

# PRISON

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### Florida's Private Prison Industry Corporation Under Siege

*by David M. Reutter*

As early as 1980, drugstore mogul Jack Eckerd was convinced a private company could provide higher profits to Florida if it ran the state's Prison Industries. After Eckerd's lobbying of the Florida Legislature, that Legislature enacted laws to create Prison Rehabilitative Industries and Diversified Enterprises (PRIDE) as a private, non-profit corporation to lease and manage the state prison industries program. A December 2003 special report by the Florida Legislature's Office of Program Policy Analysis and Government Accountability (OPPAGA) concluded PRIDE has failed to explain its corporate structure or protect state

interests while PRIDE's Directors appear intent on ensuring they personally profit.

Florida Law establishes that PRIDE's mission is to: provide education, training and post-release job placement to prisoners to help reduce recommitment; enhance security by reducing prisoner idleness and providing an incentive for good behavior in prison; reduce costs to the state by operating enterprises primarily with prisoner labor while not unreasonably competing with private enterprise; and rehabilitate prisoners by duplicating, as nearly as possible, the activities of a profit-making enterprise.

Ostensibly to help PRIDE carry out its stated mission, it was granted sovereign immunity, which shields it from liability in the same manner as the state, and it is not required to pay unemployment compensation or workers' compensation, in most cases, to prisoner workers. Moreover, PRIDE is not subject to the authority of any state agency, except the auditing and investigatory powers of the Legislature and Governor.

#### Anatomy of a Prison Industry

In fiscal year 2002-03, PRIDE operated 38 industries in 21 of Florida's 121 prisons and facilities. Those industries included, among others, raising dairy calves, building office furniture, heavy vehicle refurbishing, printing, digital information services, and citrus processing. In 1994, PRIDE provided 2,934 prisoner jobs. By 2003, PRIDE's workstations had decreased by 33% providing only 1,995 prisoner jobs to Florida's 80,000 prisoners. Still, PRIDE generated \$60.9 million in sales.

Prisoners are not placed in PRIDE jobs unless they are free of disciplinary reports

for six months prior to placement, and they are removed from that job if they receive a disciplinary report, for any offense. In return for their labor, prisoners are paid between 20 cents and 55 cents per hour, depending on their skill level and length of service. These low-paying jobs are highly coveted in Florida's bread and butter style prisons, which aims to have prisoners live no better than the state's poorest resident. The only other paying jobs are canteen operators or staff barbers.

PRIDE is also certified under the Federal Prison Industries Enhancement (P.I.E.) program, which was enacted in 1979. PRIDE reports 10 active PIE programs that employ 249 prisoners. The PIE program is a federally certified program created to encourage state and local governments to create prisoner employment opportunities that approximate private work sector opportunities. Under the certification program, deductions cannot exceed 80 percent of prisoner gross wages and permissible deductions are limited to: crime victim compensation fund, taxes required under federal law, costs of incarceration, and family support. Additional deductions may be made for a savings account for release purposes. Under PIE, private, for profit businesses are allowed to directly employ prisoner labor provided the prisoners are nominally paid the minimum wage or prevailing wage for the work they perform, whichever is higher.

While PRIDE's normal operations provided only \$249,991 to victim restitution for fiscal 2002-03, its PIE program, with only about 15% of PRIDE's prisoner workforce but much higher wages, generated \$125,043 in total deductions from prisoner wages.

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## **Under Siege (Contd)**

Those deductions amounted to \$28,785 for victim restitution, \$18,624 in taxes, \$73,353 room and board, and \$4,282 in family support. To the extent that restitution and similar deductions rely on the prisoners' meager wages it is obvious that the less the prisoners are paid, the lower the deductions. However, the low prisoner wages do not translate into lower prices for the products sold by PRIDE nor lower profit margins for the private businesses using the PIE program.

The state is entitled to a 50% share of PRIDE's profits, but that provision of state law has not been exercised in years. PRIDE has opted to use proceeds for capital improvements and expansion. If PRIDE fails, the state is the beneficiary.

### **A Declining Industry**

Over the last five years, PRIDE's sales have fallen by 25%. A number of factors have contributed to this decline, including federal limitations on the sale of interstate goods manufactured by prisoners, general economic conditions and state spending, state agency resistance to using PRIDE products and services, and private sector concerns about using products manufactured by prisoner labor. PRIDE has taken steps to increase its sales in recent years, but its effects have had limited success.

In 1934, Congress enacted the Ashurst-Summers Act, which banned the interstate transportation of prison manufactured goods. See: 18 U.S.C. § 1761. The law applies only to manufactured goods, and PRIDE has established industries such as data entry, calf-raising, and vehicle restoration that are exempt from the ban. Through industries such as these, PRIDE sidesteps federal law and generates clients such as the one in Puerto Rico that PRIDE produces eyeglasses for. Nonetheless, federal law restricts PRIDE's potential markets.

Florida law requires state agencies to buy PRIDE's products when they are of similar quality and price to those offered by outside vendors. In 1995, state agency purchases accounted for 83% of PRIDE sales. By 2002, state agencies only provided 55% of sales. Despite the low wages to prisoners, many items can be bought on the open market from non prison based vendors offering lower prices and higher quality. While state agencies have held off on purchases of office furniture because of budget cuts, privatization has also had an effect.

When the Florida Department of Corrections (FDOC) entered in a contract with Aramark effective July 1, 2001, to privatize prison food services, PRIDE took a large hit to

sales. PRIDE's contract with FDOC was cancelled because PRIDE lacked the capacity to produce, warehouse, and deliver the quantity of goods Aramark desired. The next year, PRIDE's revenue dropped \$30 million.

Although privatization has affected PRIDE, many state agencies complain about "delivery times and quality of PRIDE goods and a belief by agencies that they could obtain lower prices or higher quality products from other sources." Florida's Department of Management Services reports that the statutory preference clause to purchase from PRIDE has generated resentment and some agencies do not comply with the requirement. This is not unique to Florida. *PLN* has frequently reported on similar complaints made by federal agencies and other states.

The private sector has resisted PRIDE's efforts to do business with it. Fearing negative public reactions, private companies and industries are often reluctant to accept goods produced by prisoners. Coca-Cola and Wal-Mart, for example, prohibit using goods produced by forced or prison labor. The public relations factor is significant in that few companies want to be linked in the public mind with prison slave labor. *PLN* has in the past frequently reported on companies using prison labor to manufacture, package or market their products. Private companies often resist PRIDE's efforts to expand operations into new industries, asserting PRIDE has an unfair competitive advantage due to the low wages it pays prisoners.

When a federal prison industry won over a bid to produce missile-shipping containers, Tim Graves' 18 year-old company in Marietta, Georgia, was driven out of business. "It's hard for me to accept that the government would put the welfare and benefit of convicted felons above the interests of its taxpayers," said Graves.

Mike Harrell, Vice President of Business Development for PRIDE, says PRIDE "will not enter into a relationship with a company if there's a displacement of workers." With sales declining and its market limited, PRIDE had to take action to survive.

In order to increase its revenue, PRIDE has become a conglomerate that easily masks its industries and encroachment into the private sector.

### **Expanding PRIDE's Umbrella**

"We knew looking down the road that PRIDE couldn't continue to do business the way it always had, relying on state agencies as its primary customer," said PRIDE CEO Pamela Jo Davis, a former jail warden in



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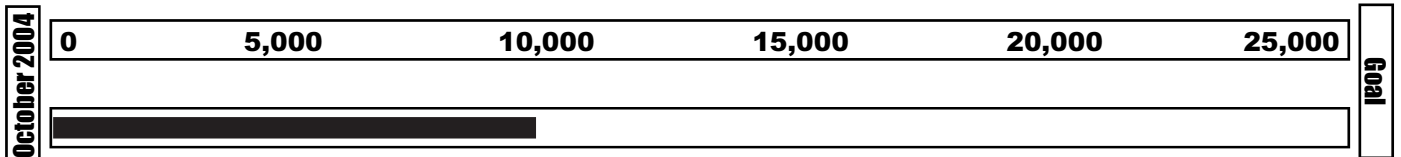
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Miami-Dade County and former deputy state corrections secretary.

PRIDE's new way of doing business was to create spin-off companies, some of which are non-profit and others that are for-profit. The purpose of the spin-off companies was to allow more aggressive business practices that are not limited by PRIDE's mission or hampered by federal wage and non profit guidelines.

From its creation in 1981 and until 1999, PRIDE provided a number of prisoner services including prison work, training, and assistance in finding post-release housing and employment. In 1999, with the assistance of a business consultant, PRIDE created Industries Training Corporation (ITC), a non-profit corporation.

ITC in turn created Labor Line Services; Labor Line, Inc.; and Global Outsourcing and formed private partnerships to create Florida Citrus Partners and Diversified Supply Management.

ITC's purpose is to manage prison work programs for PRIDE by entering into various business relationships and providing administrative and managerial support. ITC's fee is based on PRIDE's budget, and the services contracted to ITC have not been placed out

for bid on a regular basis to determine if another contractor could provide PRIDE with the same services at a lower cost. PRIDE and ITC have common managers, common board members, and use the same offices. The phones are answered "ITC/PRIDE." Corporate nepotism is readily apparent; as all of ITC's current board members are either current or former board members of PRIDE. The two companies appear to be one.

ITC wholly owns Labor Line Services (LLS), a non-profit corporation. LLS offers transitional support and job training to PRIDE prisoners upon their release from prison. PRIDE pays LLS to assist released prisoners, at no charge, with finding housing, transportation, and employment, as well as general encouragement and support.

Another company ITC owns is Labor Line, Inc., (LLI), a for-profit corporation. LLI is a temp-to-hire staffing company that provides jobs for former PRIDE prisoners and other underemployed individuals. LLI provides labor to several companies throughout Florida.

Global Outsourcing (Global) is a for-profit corporation wholly owned by ITC. It creates partnerships with private business, with the primary purpose of creating jobs for

PRIDE prisoners. In 1999, Global created a most peculiar business for Florida when it paid \$2.5 million to purchase Northern Outfitters, a for-profit corporation. Northern Outfitters produces boots tough enough for the Arctic, with matching hats and gloves, fleece pull-overs and high-country bibs, Avalanche pants, thermal socks, and hand-warmer muffs. The cost for this set: \$989.

The most peculiar fact about this Florida prison rehabilitation program is that no Florida prisoner has ever stitched one stitch of a Northern Outfitter outfit. This PRIDE subsidy uses the labor of prisoners at the Utah State Prison near Salt Lake City under a certified PIE program.

Global also does business as Global Digital Services, a company that uses PRIDE labor to provide various digital services to the private sector. Many government agencies have an excess of records in need of electronic storage and retrieval. Prisoners at Florida's Liberty Correctional digitally scan records to help alleviate this problem, and then index them.

PRIDE and/or ITC created two other entities. One, Diversified Supply Management (Diversified) was to cut PRIDE's purchasing costs by pooling orders from it

## Under Siege (Contd)

and other customers. This venture ultimately failed and was shut down.

The other, Florida Citrus Partners, is a limited liability corporation, 50% owned by ITC and 50% owned by South Florida Citrus grower, Bernard Egan. Egan said he had two inventions to revolutionize the citrus market. The first would allow easy sectioning of citrus fruit to compete with the cut melon market. The second was a way to kill bacteria in orange juice at far lower temperatures than pasteurization, keeping that fresh-juice taste longer.

To make the revolution occur, ITC used PRIDE money to build a factory at Okeechobee Correctional Institution. Egan was to market the product. The deal was a failure and is mired in litigation. ITC owes PRIDE \$3.5 million in operating costs, supposedly to be paid from future ITC revenue. For those who believe in free markets, Egan should have been able to find private capital willing to take the risk of promoting his venture.

### Corporate Nepotism at Work

To create and fund these spin-off entities, PRIDE invested more than \$10 million in loans to its fledgling companies. As of December 31, 2002, the corporation owed PRIDE \$9.7 million. According to PRIDE officials, the debt has been reduced to \$8.7 million as of December 1, 2003. At that time, PRIDE had not established the terms for repayment of these loans.

It is questionable if repayment was ever expected. PRIDE's 2002 Annual Report noted that PRIDE had advanced funds to "certain parties," but did not disclose who the recipi-

ents were, why they would not benefit from the funding, why PRIDE assumed the cost of the initiatives, and why over \$5 million was forgiven from the related parties.

When Diversified Supply Management was created, ITC did so with three partners, who contributed \$2,000 each: PRIDE's CEO Davis, former PRIDE board member and former President of Florida A & M University Fredrick Humpries, and the husband of PRIDE board member Maria Camila Leiva. Davis also serves as ITC's President.

The bylaws of ITC provided that if it closed, PRIDE would inherit its assets. A future ITC board, however, could change the bylaws and sever its relationship with PRIDE. Not only is there no contract governing the terms of repayment of loans PRIDE made to ITC, PRIDE gave a cold storage facility to ITC that was valued at \$2.5 million. If ITC decided to change its operation, PRIDE would have no recourse to regain the value of that asset.

While PRIDE's prisoners earn pennies an hour, Davis is paid \$236,000 a year to be ITC's CEO. Davis' salary has increased 35% since 2000. That salary is more than double what Florida's Secretary of Corrections earns to run the entire prison system, which houses 80,000 prisoners with a \$1.7 billion yearly budget. Thus low wages and payroll deductions for the prison slaves, high wages and lavish living for the corporate CEOs. The state of Florida has succeeded in creating a "for profit business" atmosphere to prepare prisoners for wage slavery upon release. PRIDE's prisoner workers are prohibited from unionizing or otherwise seeking better wages or work conditions.

### Investigating the PRIDE Conglomerate

To prepare its 2002 Annual Review of matters pertaining to Corrections, Florida's Corrections Commission (FCC) requested additional financial information from PRIDE after it disclosed the existence of ITC and its related corporations. PRIDE refused to provide information that was requested, challenging the authority of the FCC to review PRIDE. The FCC, as a result, reported PRIDE's unwillingness to report its activities and recommended a review by the Auditor General or OPPAGA. OPPAGA then conducted its special review of PRIDE.

The OPPAGA was highly critical of the cozy relationship it found within the conglomerate that PRIDE has become. The OPPAGA said PRIDE has failed to communicate clearly with its key stakeholders, namely, the taxpayers of Florida.

PRIDE is required under Florida Law to report annually the status of proposed profit use, amount of non-prisoner labor, work subcontracted to other vendors, use of consultants, finished goods purchased for resale, and the number of prisoners it currently employs.

The OPPAGA said PRIDE's reports provide only cursory information about its evolving structure, and refers to ITC and other corporations as "related parties" without further identification or explanation. PRIDE's reports also fail to include information about profit use, the amount of work subcontracted to ITC and Labor Line Services, Inc., and the amount of finished goods purchased for resale. The failure to provide financial and performance information prevents effective evaluation of the program.

The Auditor's report recommended that PRIDE's reports specifically detail the relationship between its corporations, "including the amount and status of loans and the nature and rationale for gifts." Its reports should also describe costs the state incurs to support PRIDE. "In 2001-02, the Division of Risk Management reported that the state paid 12 liability claims related to PRIDE for a total of \$128,888." The state pays the medical bills of prisoners injured on the job. There have been a few major accidents, including a prisoner who lost a portion of a leg and several who have lost fingers.

When PRIDE was created, the state donated property to ITC because Florida law does not speak to the state's interest in this property, or PRIDE's liabilities should it fail. The OPPAGA recommended state law be clarified to define the state's interest in PRIDE.

As for PRIDE's failure to be transparent in its operations, the OPPAGA said, "PRIDE needs to recognize that as a state created entity it has a fundamental responsibility to provide accountability information on its operations, including those conducted by closely related corporations."

After the OPPAGA's report was issued in December 2003, Governor Bush tried to shake up PRIDE. The minutes of PRIDE's April 2004 Board meeting show that Bush's senior staff wanted PRIDE's board to voluntarily resign and apply for reappointment. Bush also wanted PRIDE's bylaws changed so that the Governor, not the Board, picks the Chairman.

PRIDE's 14 member Board refused the overtures. While most of PRIDE's Board members are appointed by the Governor, each was vetted by PRIDE's CEO Davis before their name was submitted to Bush.

By June 2, 2004, Foster Narbin, governmental relations director for PRIDE, wrote Bush an e-mail voicing concerns about Davis'

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leadership. Narbin wrote that "the current Board of your appointees have fully abdicated their fiduciary responsibility to the state in what may be ultimately prove[d] to be a criminal act...I'm not sure anyone is paying attention."

Bush then called in his inspector general. His Chief Inspector, Perry Harper, wrote Davis on June 8, 2004, requesting the Board postpone a meeting scheduled for the next day, which had on the agenda a new agreement between PRIDE and ITC.

The Board held its meeting, but it suspended for 60 days Davis and President John F. Bruels. That decision did not affect Davis' position as CEO of ITC. Moreover, it had no financial impact on Davis, as her PRIDE post was unpaid and she earns her \$236,000 yearly ITC salary.

On July 22, 2004, PRIDE requested Davis and Bruels to resign. In the interim of the suspensions and resignations, a consultant hired by PRIDE found nothing amiss between PRIDE and its spin-offs. "There is no wrong doing," said Leiva. "There was just a feeling that people needed new leadership." PRIDE has launched a national search to replace Bruels and Davis. "They were not working well together and neither could take the full load," Leiva said. "We will look for one person to do both jobs. Davis, meanwhile, remains as ITC's CEO.

### Defining PRIDE's Mission

Despite its problems, PRIDE has its supporters. "In juvenile justice we have so many programs that absolutely do not work, yet we spend millions on them," says Daniel Webster, a former speaker of the Florida House and Chairman of the state's governmental oversight and productivity committee. "PRIDE is working, and we're not even paying for it. I would be willing to do it even if we had to pay for it."

"The benefit to the public is awesome because those people are not going back to the Correctional facility, or causing more havoc – whether its murder, rape, burglary, destroying property. Those things cost the private sector lots of money. If you look at the recidivism statistics – even over an extended period of time – those prisoners in PRIDE usually don't come back. They have a skill that is marketable, and their supervisors know what they can do. We have employers who are signed up to hire them," said Webster.

At first glance, PRIDE's recidivism statistics are impressive. The OPPAGA report, however, said "PRIDE's effect on recidivism

cannot be confirmed." PRIDE reports a recidivism rate of 18.1% for prisoner workers released in the fiscal year 2001, which compares favorably to FDOC's reported recidivism rate of 33.8% for all prisoners since 1993.

PRIDE's analysis does not take into account the fact that it uses prisoners who tend to be older, to have been incarcerated longer, to be more likely to be white, and to be more educated. As well as prisoners serving life or otherwise lengthy sentences that makes their release from prison unlikely. These factors make PRIDE's prisoner workers less likely to return to prison even before they enter the program, assuming they get out. Once those factors were removed, the OPPAGA found no net impact on recidivism by PRIDE.

"You've got the question of, what is the mission of PRIDE?" Governor Bush said he sees PRIDE's mission as training Florida's prisoners "to have a skill so they can live a productive life beyond when they're finished." Going beyond that "may not be appropriate," says Bush. While much has been made lately about PRIDE's structure, Davis and her cronies are still in positions to make the most money. Significantly, no one has demanded PRIDE's structure be altered, only that it be more transparent in its actions.

As a successful business man, Jack Eckerd knew where the money was. His predecessors at PRIDE have learned how to put Florida's prison industry money into their own pockets. After all, that's what private business is all about, isn't it?

Sources: OPPAGA Report No. 03-68, available on the web at: [www.oppaga.state.fl.us](http://www.oppaga.state.fl.us); *Naples Daily News*; FCC 2000 Annual Report; <http://gtalumni.org>, fall 99 magazine; *St. Petersburg Times*.

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# Is There A Winning Argument Against Excessive Rates For Collect Calls From Prisoners?

by Madeline Severin, 25 *Cardozo Law Review* 1469, March, 2004

Review by John E. Dannenberg

We all know about how prisons and jails conspire with telephone companies to bilk recipients of prisoner phone calls via exorbitant charges—swollen by kickbacks approaching 60%—but how does one legally challenge this scheme?

Yeshiva University Doctor of Jurisprudence candidate Madeline Severin has thoroughly researched existing case law, legislative histories and peer law review literature in creating her *Cardozo Law Review* treatise that insightfully discusses the history of state and federal legal challenges to prisoner telephone-call price gouging. Severin then proceeds to analyze each legal theory attempted, showing where it failed or occasionally, was held to have merit. From this analysis, she then looks forward to how the problem might have to be approached in the future. In sixty pages of text replete with 390 comprehensive footnotes informative for both proper and attorney readers, Severin first examines existing case law. She notes that federal prisoners pay lower rates, but that the legal theories protecting them have little to do with state law claims on prisoner phone rates.

One major obstacle is the “filed rate doctrine,” wherein once a phone company has “filed” its rate plan with a state regulatory utility, it is automatically jurisdictionally saved from court review. Severin makes as

much as possible from Judge Posner’s recent ruling in *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir. 2001) that rejected a summary dismissal based on such jurisdictional insulation. A discussion of the impact of the Federal Communications Commission Act of 1934 and the tariff-unraveling Federal Communications Act of 1992 next follow. This leads to a review of other defenses to outrageous tariffs, including seeking regulatory review before the tariff is approved. However, such defenses are rebuffed by simply passing off the rates as an “unfortunate incidence of incarceration”, notwithstanding that the real plaintiffs (prisoners’ families) are not incarcerated.

In another theory, the “state action doctrine,” Severin notes that the anti competitive conduct at issue, when legislated by the state, is immune from antitrust liability. Even where evidence of conspiracy is presented, private defendants (e.g., phone companies) are immune under the judicially created *Noerr-Pennington* doctrine. Parenthetically, however, she notes that the Prison Litigation Reform Act is not relevant here because it is the call recipients, not the prisoners, who are the litigants.

Next, Severin reviews ten cases where the Sherman Antitrust Act was raised. In a few key cases the issue of standing (for antitrust purposes) was raised, and was affirmed under a five-part U.S. Supreme Court test. But defendants have historically weaseled out of liability by arguing that prisons are too small to be a “relevant market” for antitrust purposes. And even so, the

question remains, is it the phone company or the prison that is truly driving the market?

Looking at constitutional arguments, Severin found First Amendment attacks of little hope, since the rates do not selectively restrain any particular protected speech, and thus do not rise to the requisite level of censorship. Fourteenth Amendment equal protection claims fail quickly because prisoner initiated collect calls and non-prisoner-initiated collect calls do not define similarly situated groups and prison security concerns clearly distinguish these. The fact that prisoner populations are racially skewed towards minorities does not ipso facto create a legally sustainable equal protection claim that phone rates discriminate against minorities.

Severin offers a small ray of hope in relying upon state constitutional takings clauses and the separation of powers. Two decisions explain these theories, *Fair v. Sprint Payphone Services, Inc.*, 148 F.Supp. 2d 622 (D.S.C. 2001) and *Valle v. New Mexico*, 54 P.3d 71 (N.M. 2002).

Notwithstanding her analysis of the strengths and weaknesses of litigation, Severin believes the most meaningful resolution of the problem lies in state legislation to reduce excessive phone rates. Vermont is the national trendsetter (the feds have already established lower rate procedures) and other states are looking into it. However, a bill passed by the California Legislature was vetoed in 2003 by then Governor Davis because he “didn’t want to give up the revenue stream” of the phone company’s 46% kickback. But legislation has its pitfalls, too. Legislators are loathe not to look “tough on crime” by having aligned themselves with prisoners’ families and friends.

Severin closes by noting the ultimate irony of phone-rate gouging. Since prisoner telephone contact with families strongly correlates with low recidivism, it would seem “penny-wise and pound-foolish” for states to brazenly extort 60% of prisoner phone revenues, only to thereby engender billions of dollars in taxpayer expense for further incarceration.

On the other hand, perhaps the prison-industrial complex knows precisely what it is doing with phone rates: “reaching out and incarcerating someone.”

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# Prison Needle Exchanges Around the World

by Julie Falk

Did you know the first prison needle exchange program was started in Switzerland in 1992? Would you guess that the five other countries maintaining needle exchange programs in their criminal justice systems are Germany, Spain, Moldova, Kyrgyzstan and Belarus? In the United States, where Los Angeles television stations recently refused to air a public service announcement on the dangers of syphilis for fear of reprisal from the Federal Communications Commission, a national harm reduction policy addressing the spread of HIV and hepatitis C in our prisons and jails sounds like a pipe dream.

This, however, is the recommendation from the Canadian HIV/AIDS Legal Network, who forcefully argue for needle exchange programs in Canada's federal and territorial prisons in their recent report *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience*. Relying on international law and standards and the overwhelmingly positive experiences of the prisons and jails that have implemented needle exchange, this report refutes common fears and prejudices which impede these programs and makes a convincing case for their implementation.

Prison needle exchanges programs in these varied countries were brought about by the common understanding that the criminal justice system incarcerates a disproportionately high number of injection drug users, who are at great risk for spreading or becoming infected by HIV or hepatitis-C during incarceration because of the availability of drugs and the lack of clean needles. Each country conducted a needs assessment and determined that, as in the United States, the rate of HIV and hepatitis C was substantially higher on the inside than in the general popu-


lation and that a significant number of cases in the community were persons who had been formerly incarcerated. (In the United States, an estimated 25% of persons infected with HIV pass through jail or prison each year.)

The report emphasizes that each institution should tailor its needle exchange program to its unique population and culture. Methods for needle distribution discussed include automatic dispensing machines, hand-to-hand distribution by prison medical staff or outside community health workers, and programs using prisoners trained as peer outreach workers. In some cases needle exchange was strictly one for one; other programs allowed for multiple needles to be given through various mechanisms. In quite a few facilities, the first needle was given in a translucent, hard plastic "hygiene kit" that also contained items such as a condom, disinfectant, and distilled water. In each country, evaluations demonstrated conclusively that the needle exchange programs resulted in a reduction in needle sharing and concomitant reduction in the spread of HIV and hepatitis C.

Other benefits were noted as well. For example, needle exchange programs do not endanger staff or prisoner safety, and in fact, make prisons safer places to live and work; they do not increase drug use, and in fact serve to link and attract people who inject drugs to other harm reduction strategies and intervention; and the number of overdose deaths in prison dramatically decreased. Furthermore, staff in these institutions came to support these programs and feel needle exchange is in their own interest.

It is important to note that drug use and drug possession remained illegal in each prison and jail discussed in this report. The authors write, "While harm-reduction policies do not condone illegal drug use, they do

recognize that reducing the transmission of bloodborne diseases and overdose deaths in society is a more urgent and achievable goal than is ending illegal drug use." A prison director in Switzerland concurs, "Given that all we can do is restrict, not suppress, the entry of drugs, we feel it is our responsibility to at least provide sterile syringes to inmates. The ambiguity of our mandates leads to a contradiction that we have to live with."

The report can be viewed on line at: [www.aidslaw.ca/Maincontent/issues/prisons.htm](http://www.aidslaw.ca/Maincontent/issues/prisons.htm). It may be ordered from the Canadian HIV/AIDS Information Center 1565 Carling Avenue Suite 400 Ottawa K1Z8R1, Canada. (phone: 1-877-999-7740). The report is free but shipping & handling (based on location) will be charged. 

*[Julie Falk is the former co-editor of Southland Prison News. She is currently the Executive Director of CorrectHELP, the Corrections HIV Education & Law Project, a national advocacy organization for prisoners with HIV based in Los Angeles]*

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# Latest Honduran Prison Massacre: “Homies Were Burning Alive”

by Tom Hayden

In first-ever interviews, representatives of the Mara Salvatrucha (MS) gang in Tegucigalpa, Honduras this May described how security forces were to blame for the May 17, 2004 prison fire that killed 105 of those they call their homeboys. In addition to starting the fire, police and prison guards allegedly kept the facility's gates locked for over an hour while trapped prisoners were burnt alive or died from smoke inhalation.

Human rights observers, children's advocates, and MS members say the tragedy is a direct consequence of Honduras' *mano dura* (strong hand) policies. These policies employ suppression tactics based on New York City's "zero tolerance" police strategies of the '90s, and were instituted on the advice of the Manhattan Institute think-tank and the Giuliani Group, which have exported the New York model to Latin America.

Mayor Rudy Giuliani's policies, while popular with many New Yorkers, resulted in notorious police shootings of innocent individuals such as Amadou Diallo. The tactics also included stop-and-frisk sweeps that led to the preventive detention of thousands of young blacks and Latinos, until lawsuits challenging racial profiling methods spelled the demise of the NYPD's Street Crime Units.

An over-the-top version of the New York City model is, however, gaining a new lease on life in countries like Honduras and El Salvador as the street gangs become a global phenomenon — fueled mainly by deportations from the U.S. [See August, 2004 *PLN* for more details on U.S. criminal deportations.]

In the past five years, over 900 kids, 18 and younger, have turned up dead in the streets, ditches, or dumpsters of Honduras — in terms of the nation's population, that is roughly equivalent to 45,000 fatalities in the U.S. Honduran officials estimate that 20 percent of the victims were killed by police or private death squads who prowl the streets in station wagons with tinted windows and no license plates. Most of the victims — usually deportees from Los Angeles — were identified as gang members because of their

tattoos, although a majority had no criminal history. [Editor's Note: In the 1980's these same U.S. trained and funded death squads murdered hundreds of leftists opposed to the U.S. intervention in Central America. That war over, these same death squads of military and police officers now preoccupied themselves with social cleansing operations.]

The prisons themselves have become the scenes of mass-scale killings. On April 5, 2003, 68 prisoners affiliated with the 18th Street gang were killed in a prison massacre near La Ceiba, in northern Honduras. [See *PLN*, October, 2003, for further details.] Initially, prison officials blamed the prisoners for causing the fatal fire, but a government-appointed commission later concluded that 51 of the dead prisoners had been summarily executed by police officials, who then set the fire to cover up the killings. No one has been charged for these murders.

The latest fire catastrophe on May 17 was in a prison near San Pedro Sula, the center of *maquiladora* employment in north-east Honduras. Police officials blamed the blaze on faulty wiring, but human rights observers are skeptical — and with good reason.

The evidence on hand justifies their suspicions. The fire broke out only in the MS cellblock even though the prison has more than 15 other blocks. Before the fire started, prisoners phoned friends on the outside to express their worries about smelling gas in the air. After the fire exploded and prisoners began screaming, police officials on the scene failed to open the compound gates for two hours. They instead fired shots in the air to discourage prisoners from escaping. Firefighters didn't arrive for at least an hour, even though a substation was less than five minutes away. And three massive containers of water, used for showers, were inexplicably empty on the day of the fire.

## Gang Members Speak Out for First Time

The harshest denunciation of the official story of May 17 comes from gang members themselves, who spoke under condition of anonymity.

They received secret warnings of an impending crisis just after midnight. "Homie, we're having trouble. I smell gas" was the message. Then an object emitting a gas-like substance was thrown into cellblock 19, and immediately ignited.

"We thought we all would die. The homies ran to the cellblock door. We started screaming for help. The police could see us. They were shooting and doing nothing. Homies were burning alive or dying from the smoke. We started trying to break the [doors] with our weights," a prisoner says.

One surviving prisoner could not explain why he was alive. As in a religious experience, he said, the fire seemed to part as he jumped for his life and rolled into a bathroom between the burning cellblock and an outer wall. He was saved by an overhead air vent that could be turned on.

The same prisoner also recognized police anti-gang units as the men standing at the gates. Locally known as "Cobras" since the Contra wars of the '80s, they were yelling "Die, you motherfuckers! Die!"

These eyewitness accounts were given by MS members, who also brought in four survivors with raw burns covering most of their bodies to be photographed. The hallway outside their cell was filled with dozens of heavily-tattooed homeboys who leaned alertly against the walls. Each fully expects to be the next victim of a "mysterious" fire or some other convenient disaster.

Exposed wires stretch across the prison over their heads and along the walls, including a crowded space with a dilapidated refrigerator, stove and hotplates. The stench from open toilets is omnipresent, no matter how much the prisoners try to clean their cells and press their clothes.

In the yard, Protestant evangelicals wave Bibles and preach repentance, as blank-faced guards shouldering automatic weapons stand a few yards away.

At an earlier interview in McDonald's in San Pedro Sula, while children skipped and jumped on indoor slides, two designated MS representatives, both armed and wary, remain defiant. They insist that the security forces' efforts to "exterminate" the gang will not succeed. Police hatred of MS, they claim, is because the *pandilla* (gang) refuses to pay "rent" to the drug-trafficking mafia who enjoy official impunity.

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MS and its rival gang, 18th Street, grew among refugees from the U.S.-sponsored Central American wars of the 1980s in Los Angeles. Fleeing violence in their homelands, the refugees started gangs for safety and solidarity in places like the Pico-Union immigrant community of downtown Los Angeles. Many thousands of their members have been convicted and deported back to Central America, triggering a globalization of the gang phenomenon.

One of those interviewed at McDonald's says that his elder brother created MS in Honduras just over a decade ago. Youngsters joined the gang in those days, he says, "to kick it, for something to do, some weed, to disco, to learn how to dance, just normal stuff." (A recent survey of 499 Honduran gang members and parents by Dr. Jose Acevedo for the Christian Youth Association revealed that 33 percent said their motive for joining their gangs was "la diversion"; 29 percent said "la amistad"; and 17.4 percent said "la baile," or dancing.) The war with 18th Street began in Los Angeles in 1991 over equally minor grievances, "like over their girls wanting to hang with us." The squabble soon escalated into a Hobbesian war for survival with rival gangs on the one hand, and police and death squads on the other.

Two weeks before the McDonald's interview, the MS representative said, he evaded police in a car chase and shootout. He constantly changes cell phones and residences. Yet he has never been convicted or imprisoned in either Honduras or the U.S. A father of two, he readily acknowledges that "we are not angels, we will kill our enemies, and we don't pay no fucking rent to the police." But he insists, "We are human beings, not animals. If we break the law, convict us fair and square. But they are picking up, violating and killing kids off the street just because they have tattoos."

Ernesto Bardales, a youth worker who originally supported the harsh anti-gang law, believes the law he once favored has only created "a climate of incitement against the pandilleros." Nothing has changed since last year's massacre, he said, "there is the same hate, the same fantastic projections" about the gang crisis.

This MS representative says he wants "this shit to end." He wants reforms of the anti-gang laws to exclude convictions solely for tattoos. His partner, who is a significant leader in the international MS network, claims that he was picked up earlier this year and tortured by police with needles and electrical wires to his genitals. (The Honduras Human Rights Commission has accused prison police of using electric shock and water immersion techniques.)

The government policy, they say, is to sweep the trash off the streets, then burn it. The gang members point to the policy of indefinite pre-trial detention, and the country's virtual lack of any rehabilitation programs.

### **Sweeping the Trash**

While gang atrocities are real, U.S. Embassy officials say that only three percent of all prisoners are gang-members. A U.S. security expert acknowledged that "you can't get much cooperation on white-collar crime, corruption and drugs, but everyone agrees on cracking down on street crime."

The government's real goal is to "sweep" the streets to make Honduras safe for sweatshops, increasingly the leading employment sector. Honduras' failed economy leaves 80 percent of the population in poverty with 40 percent subsisting on less than one U.S. dollar per day.

The social crisis is aggravated by a prison system filled to twice its intended capacity, and where almost 90 percent of prisoners are pretrial detainees — arrested

without warrants and never charged with a crime. The prison budget allocates 46 cents (U.S.) per day for food and medicine. U.S. State Department reports document severe overcrowding, malnutrition, poor sanitation, beatings and other abuses. The prison where the recent fire took place was designed for 800 prisoners, and currently holds 2,200.

Juvenile offenders are treated as harshly and arbitrarily as adult gang members. A visit to one cellblock for 12-to-17-year-old juvenile offenders outside Tegucigalpa reveals 30 youngsters packed in a room without a toilet. Half of those interviewed have no shoes. Several have chicken pox to which the rest were exposed. Open electrical wires were draped across their blankets. They have built makeshift beds out of any materials they can find. None of them have been convicted or sentenced for any crime, and most expect to be detained longer than any sentences they eventually might receive.

According to the 2001 UN report, only five percent of all crimes and misdemeanors and only 0.02 percent of murders are committed by children. The same report concluded that "in the end, every child with a tattoo and street child is stigmatized as a criminal who is creating an unfriendly climate for investment and tourism in the country."

One 12-year-old in the prison stands out because of his blue eyes and strong American accent. He admits to stealing money from a friend of his family, which includes a former U.S. Marine stepfather and a mother from Texas. Even though the victims asked the court

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## Prison Massacre (Contd)

to drop all charges, he says the judge insisted on detaining him to teach a lesson. He expects to spend two years in prison.

Honduras has a variety of determined children's rehabilitation organizations, such as Casa Alianza and Victory Outreach, which try to rescue street children and monitor disappearances, extra-judicial executions, child trafficking and prostitution. They are consulted by government agencies and cited by the media and State Department human rights reports. But they lack the capacity to rehabilitate more than a few hundred children in a sea of social and economic neglect. In visits to Casa Alianza's urban center and Victory Outreach's rural encampment, counselors said that while they could rehabilitate countless youngsters, it is almost impossible to reintegrate them safely into society. While over 400,000 Honduran youngsters are employed in the illegal underground economy, many more have no employment prospects at all.

In such conditions, the growth of gangs like MS and 18th Street appears inevitable and unstoppable.

### The U.S. Connection

The 2001 "mano duro" campaign of President Ricardo Maduro grew from daily crime crises in Honduras, specifically the 1997 killing of the president's own son in a botched kidnapping attempt. But the initiative was also "made in the U.S.A" from the very beginning. "I saw how it worked in New York, and I liked how it worked," Maduro told the *Associated Press* in 2001. He was referring to the "zero tolerance" policies of cracking down on littering, graffiti, vagrancy and traffic violations. "Instead of taking the long route of accumu-

lating proof of types of crimes committed, we opted to make it illegal to belong to gangs," he said in another interview.

Although his only previous experience was running the Honduras Central Bank, Maduro won the 2001 election against a 71-year-old candidate who stressed improving public education. A political novice, Maduro was mesmerized by the New York model. Honduran officials met with Mayor Giuliani's staff and New York police officials, and with experts at the Manhattan Institute, the ideological fountainhead of the doctrines of "zero tolerance" policing that were adopted by the Giuliani administration. Maduro, however, outdid his mentors, assigning more than half the Honduran army to joint patrols with local police, often personally going on early morning raids of neighborhoods.

Not only did Giuliani's foundation staff pay a visit to Tegucigalpa, but so did law-enforcement gang units from Los Angeles, the other epicenter of the gangs and immigration crises. These cities had one aspect in common: Street gangs were becoming the scapegoats justifying an intensified rhetoric emphasizing law-and-order.

Martha Savillon, an attorney who works with Casa Alianza in Tegucigalpa, remembers L.A. sheriffs' deputies visiting San Pedro Sula in 1997 for "training" workshops, which led to the establishment of the Salvadoran special anti-gang units. Some of their rhetoric sounded good, she says, like "crime prevention" and "community policing," but in practice, the ill-trained Honduran police would "just investigate, detain, and act as guardians of the data base" — a secret law enforcement tracking system coordinated with the F.B.I. that was created and is used without any guidelines or civilian oversight.

In his small human rights office in San Pedro, Ernesto Bardales also remembers the L.A. sheriffs' visit, and even retains their business cards. One was from an inter-agency "gang homicide task force" and another from the homicide division. Bardales willingly participated in the trainings, but noticed that it was about intelligence-gathering, identifying and targeting gang members more than building a new, law-abiding police force.

After the May 17 fire in the San Pedro de Sula prison, Savillon noted, the American FBI "came right away to investigate, so there must have been a previous relationship."

In an interview on deep background, a U.S. official in Tegucigalpa said that American policy is to "export best [police] practices" to Honduras, which includes re-

cent visits by Los Angeles and San Jose gang experts. Another U.S. security expert acknowledged "tracking and monitoring" gang activity to protect U.S. interests. He insists that the May 17 fire "could have been wiring — my take is it's credible, it started with inmates in clothing [trying] to escape."


Other American officials readily admit, also on background, that Honduras "lacks a rule of law." Nevertheless, their reports on human rights abuses notably omit criticism of the anti-gang laws. State Department reports simply note that the law was passed in 2003, and that human rights complaints against its provisions "did not have standing." The same official report cites the 2001 UN report but makes no mention of its criticism of Honduran law enforcement.

The U.S. government's silence towards the sweeping anti-gang laws and crackdowns may reflect its own complicity in the creation and continuation of these policies.

Honduras was cynically known as the "Pentagon republic" in the '80s when it served as the base of military and intelligence operations against the Nicaraguan Sandinistas in the Contra wars. That period was marked by military regimes, a security apparatus linked to Sun Myung Moon's religious anti-communist crusade, nearly 200 officially organized disappearances and assassinations, repression of popular organizations, and an economy subjected to Reaganomics. That shadowy and violent gangs should emerge in its aftermath is hardly surprising. (The architect of those destabilizing Honduran policies during the Ronald Reagan presidency, John Dmitri Negroponte, is the newly-appointed U.S. ambassador to Iraq.)

One of the MS representatives attributes his survival thus far to having been "trained to have a military mind, how to be a bad motherfucker" during training for the Honduran infantry in the 1980s at a U.S. facility in California.

Thanks to continued U.S. involvement, the future does not look any brighter for Honduras. The MS member warns, "If they don't stop, we're gonna do something crazy. If I get treated like an animal, I'm gonna treat you like an animal."

[In December 2004, gang members machine gunned a bus in Honduras, killing 28 people, mostly children.] 

[Tom Hayden is the author of *Street Wars* (New Press, 2004). He visited Honduras from May 27-30. For his photos from inside Honduran prisons, go to [www.tomhayden.com](http://www.tomhayden.com).]

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## Texas "Gang Expert" Indicted for Sex Assaults

On June 17, 2004, top Texas prison administrator Salvador "Sammy" Buentello was indicted on felony charges that he sexually assaulted three female employees of the Texas Department of Criminal Justice (TDCJ). A week earlier Buentello had been indicted on four misdemeanor charges of official oppression for alleged sexual harassment.

In his more than 25 years with TDCJ, Buentello had built a reputation for being hard, tough, and uncompromising. As director of the Department's Security Treat Group Unit, which monitors institutional gang activity, the swaggering Buentello was a nationally known expert on prison gangs and the tactics used to appear to combat them. Around the prison system he became known as a macho man. Perhaps a little too macho.

Five women, all former employees, have accused Buentello of sexual misconduct during his tenure as head of the State Classification Committee, a TDCJ division that assigns prisoners to a particular prison, including long term segregation units. Two of the victims have filed a federal lawsuit against Buentello and TDCJ.

According to Walker County District Attorney David Weeks, officials decided to investigate after several women filed complaints with TDCJ's Office of the Inspector General. After conducting numerous interviews, investigators ultimately referred the case to his office, Weeks said. The resulting felony indictment alleges that Buentello sexually assaulted 3 women on four occasions-- in May and June 1999, and in January and May 2002. The indictments accuse Buentello of, among other things, forcing the women to engage in oral sex and sexual intercourse.

As for the official oppression indictments, one charge accuses Buentello of sexually harassing an employee in August 2003 by exposing himself and "attempting to touch her." A second charge alleges that in December 2003, Buentello harassed another female employee "by touching her inappropriately, knowing said touching was not welcomed." Two other charges accuse Buentello of making "unwelcome sexual advances" to two employees on two occasions in 2003."

The federal lawsuit filed by two of the victims offers more details. One former female employee contends that when she separated from her husband Buentello started

making offensive sexual comments to her. "He asked her if she was still having sexual relations with her husband," the lawsuit alleges. "He intimated that he wanted her to provide him with sexually explicit photos of herself and requested them on a daily basis."

Another former female employee alleges that beginning in 2000 Buentello started making unwelcome and offensive sexual advances toward her while he was her supervisor. She said Buentello exposed himself to her, groped her breasts, and on more than one occasion "pinned her down in what she believed to be an attempt to rape her."

Although the women allegedly reported the sexual harassment to a supervisor and the prison's Equal Opportunity Office; TDCJ took no action against Buentello. Now that he has been charged, many TDCJ employees worry that Weeks will not aggressively pursue the charges against Buentello, who has worked closely with his office in the past.

Kathleen L. Day, a Corpus Christi attorney who is representing two of the women in their federal lawsuit, says the prison system has winked at sexual harassment for far too long. Because TDCJ is male-dominated, she said, prison administrators simply don't take sexual misconduct seriously. "There is a code of silence, and women who come forward face retaliation for breaking that code," Day said. "They get the message that if you file a complaint, you will be punished."

Soon after the allegations surfaced Buentello was placed on administrative leave. A month later, on April 30, 2004, he retired. Many who commented on prison-related websites expressed anger that Buentello was allowed to retire rather than be fired.

Still, both sides believe that Buentello will eventually be tried on the charges. Buentello faces up to 20 years in prison if convicted on the sexual assault charges, and up to one year in jail and a \$4,000 fine for each of the misdemeanor charges.

Buentello is the highest-ranking TDCJ official to face criminal charges since prison director Andy Collins was indicted on federal bribery and money laundering charges in 1998. Collins was later convicted and is still awaiting sentencing years after being convicted [see *PLN*, November 2003, p. 12].

Sources: *Houston Chronicle*, *Austin American Statesman*

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## From the Editor

by Paul Wright

Welcome to the first issue of 2005. The year is starting pretty much the way it ended in terms of political progress for prisoners' rights: not very good at all. The ongoing, simmering outrage of the abuse of Iraqi and Afghan prisoners by the US military in those countries and in Cuba has helped raise awareness about the abuses inflicted on US prisoners. Both in *PLN* and in other media we have strived to make this connection and it seems to be sinking home. As the cover story of last month's issue noted, all the high ranking commanders who either ordered the torture and abuse of foreign prisoners, or who directly oversaw it, remain employed and in most cases have been promoted since the torture and murders became public knowledge. Some of the low ranking torturers and killers have been given show trials to deflect blame from their superiors.

*PLN* has consistently pointed out that the treatment meted out to foreign prisoners is pretty much what US prisoners have been experiencing for decades. As this issue, and every issue of *PLN* reports, corruption, brutality and sadism are not restricted to the armed forces or to foreign prisons. They occur all too often right here in US. The problem is the inability to communicate this reality to too many Americans at once. The biggest obstacle *PLN* has faced over the past 15 years of publishing has been under fund-

ing. *PLN* is solely reader supported and relies almost entirely on donations from its readers and advertising income to continue publishing.

If you have not already donated, our \$25,000.00 matching grant fundraiser ends on January 31, 2005. A *PLN* supporter and donor has agreed to match all donations made to *PLN* dollar for dollar, two dollars for each dollar donated if made by a prisoner, up to a grand total of \$25,000.00. This is a significant sum for *PLN* and would greatly help us bring our staffing levels to the level we need to keep up with the work that *PLN* requires. The donation can be from any source, including foundations. As of December 31<sup>st</sup>, *PLN* has raised \$7,119.43 and our matching grant total is now: \$10,110.01. This is not enough! If we are to meet our matching grant total we need another \$14,889.99 by the 31<sup>st</sup> of January. If you have not yet donated please do so now! Every penny helps support *PLN* and the work we do: publishing the best prisoner and human rights magazine in the United States, providing the most in depth coverage of detention facility litigation and news, how to columns for pro se litigants and much more. Please don't let us have to turn down any portion of the matching grant we would otherwise qualify for due to insufficient donations from our readers. If

every *PLN* subscriber donated just \$6.00 we would get the full matching grant!

We also continue to have censorship problems around the country. If you are a prisoner subscriber and your issue of *PLN* is censored by prison or jail officials, please notify *PLN* as soon as possible and send us a copy of any censorship notices you may have received because all too often *PLN* is never notified when the magazine is censored. Prisoners should exhaust whatever administrative remedies they have available and again, send *PLN* a copy of the documents this process generates. *PLN* aggressively challenges censorship of our magazine and book mailings but we need to know if we are being censored before we can do much about it.

As this issue goes to press, on December 22, 2004, the Tenth Circuit court of appeals issued a ruling reversing the dismissal of a lawsuit filed by *PLN* against the Kansas Department of Corrections (KDOC) over their ban on gift subscriptions and dollar limit on publication purchases as well as the total lack of notice to publishers when publications are censored. The case is *Prison Legal News v. Simmons* and we will report the case in detail in next month's issue of *PLN*. This is yet another case where *PLN* has successfully vindicated the rights of both prisoners and publishers who wish to communicate with them. Your ongoing financial support makes these important first Amendment battles possible. *PLN* has no litigation budget. Our lawyers represent *PLN* on a contingency basis, but we still need the staff resources to develop the facts our lawyers need to win in court. Your donations help support us on this. Sadly, *PLN* is the only publisher in the United States that consistently fights, and wins, these free speech battles on behalf of prisoners and publishers.

Likewise, it is equally important that subscribers immediately notify us of any changes of address when they move or are transferred. The Post Office does not forward *PLN*. It is returned to us at an additional charge of 70 cents per issue. We do our part to ensure every subscriber receives their issue, subscribers need to keep us updated on their location so we can actually get the magazine to them!

We hope this coming year, and *PLN*'s upcoming 15<sup>th</sup> anniversary issue, will mark significant progress in the struggle for justice and human rights for everyone, even American prisoners. Enjoy this issue of *PLN* and encourage others to subscribe.

## Ex-Rikers Island Chief Indicted

Anthony Serra, formerly the second in command at the New York City Department of Corrections (DOC), has been indicted for felony grand larceny and 145 counts of misdemeanor violations of the Conflict of Interest Law. He faces up to 15 years in prison for the theft and a \$5,000 fine for each misdemeanor count.

As reported in the August, 2003 *PLN*, Serra is accused of misusing DOC personnel and resources for political purposes. According to Bronx District Attorney Robert Johnson, Serra, who was the supervisor of Rikers Island Jail, coerced wardens and captains to take days off and work on the campaigns of New York Mayor Michael Bloomberg and former Mayor Rudy Guiliani.

Serra also allegedly stole money from the campaign of New York Governor George Pataki. Serra allegedly first "volunteered" his jail employees to work as poll-watchers for

Pataki, then falsely told the Friends of Pataki Committee that he paid them \$100 each for the poll-watching, who then reimbursed him \$200,000 for Primary Day (9-10-02) expenses. However, Serra allegedly kept \$62,500 for himself that had been to reimburse the poll-watching payments.

Serra was arraigned on August 13, 2004. His attorney, Peter Driscoll, proclaimed his innocence.

"He is confident that at trial the real facts will come out," said Driscoll.

That may be so, but the real facts may not be so favorable to Serra. As previously reported in *PLN*, Serra also faces over 200 felony counts for allegedly forcing jail guards to work as construction workers and landscapers at his home in Mahopac, New York.

Sources: *New York Post*

# Massachusetts Court Enjoins Sheriff from Charging Jail Prisoners Assorted Fees

by Michael Rigby

The sheriff of Bristol County, Massachusetts, has been enjoined from gouging prisoners and their families on jail service fees in accordance with his Inmate Financial Responsibility Program (IFRP).

Under the program, prisoners in the Bristol County Jail and the Bristol County House of Corrections were saddled with multiple fees. These included a \$5 a day fee for the prisoners' "cost of care," \$5 for prisoner initiated medical visits, \$3 for pharmaceutical prescriptions, \$5 for eyeglass prescriptions, \$5 for a hair cut or beard trim, and \$12.95 to register and take the General Equivalency Diploma (GED) test. These fees were automatically deducted from the prisoners' Inmate Money Account (IMA). If a prisoner had no money in the IMA, the debt accrued for a period of two years and was deducted whenever a prisoner received money.

On July 9, 2002, the day after Hodgson implemented the program, attorney for the prisoners, James R. Pigeon, Litigation Director for Massachusetts Correctional Legal Services, filed a lawsuit challenging Hodgson's fee scheme as unconstitutional. Hodgson removed the case to U.S. District Court, but on July 17, 2003, after the plaintiffs voluntarily dismissed with prejudice all of their federal claims, the case was remanded to the Superior Court for resolution of the state law claims.

After examining a number of state laws, Superior Court Judge Richard T. Moses held that if the legislature had intended for the sheriff to impose fees for room and board and for medical expenses it would have explicitly authorized him to do so. Since the relevant laws gave no such authorization, the sheriff exceeded his authority when he imposed the fees, Moses ruled. Likewise, Moses held that the GED fee was illegal because the legislature had clearly intended for the prisoners to have free access to GED testing (General Laws Chapter 127, § 92A). As to the hair cut fee, Moses noted that G.L. c. 124, § 1(r) authorizes the Commissioner of Corrections to charge state prisoners a fee for haircuts, but does not specifically authorize the sheriff to do so. Nevertheless, Moses held that the sheriff could impose a haircut fee, just not in excess of the \$1.50 charged to prisoners in the Massachusetts Department of Corrections.

The July 29, 2004, ruling also requires Hodgson to return approximately \$720,000 collected since the program was implemented. Hodgson said he will appeal the decision and asked Moses for permission to hold off on returning the money in the meantime.

Ironically, Hodgson's brilliant scheme probably cost the jail—and ultimately the taxpayers—more than it collected. Prisoners at the jail earn no wages and rely on small

donations from family members for commissary purchases. Many prisoners, unable to maintain an amount in their IMA in excess of the fees (roughly \$150 a month for the COC alone) apparently chose not to have any money at all placed in their accounts. Thus, the rate of indigency rose. These now indigent prisoners were unable to make even minimal commissary purchases, forcing the jail to provide them with basic necessities such as soap, razor, toothbrush and toothpaste.

In order to justify this ill-conceived program, Hodgson claimed the IFRP was designed to instill a sense of personal responsibility in the prisoners. But as Pigeon argues, "Sheriff Hodgson's fees did not teach prisoners responsibility because the vast majority of prisoners have no money. Therefore these fees were paid by prisoners' families, most of whom are poor and have done nothing wrong." If the sheriff truly wanted to teach responsibility to prisoners, Pigeon said, "he should treat their substance abuse problems, educate them, and give them job skills."

Hodgson has been criticized in the past for removing televisions from cells, closing weight rooms, and advocating the use of chain gangs. See: *Souza v. Hodgson*, Bristol Superior Court, Case No. BRCV 2002-00870. ■

Additional source: *Boston Globe*

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# Don't Build it Here - The Hype Versus the Reality of Prisons and Local Employment

by Clayton Mosher, Gregory Hooks, and Peter Wood

Fueled by the war on drugs, Draconian sentencing policies, and more general get tough on crime policies, the United States has experienced phenomenal growth in prison populations over the last two decades. As of June 30, 2002, there were more than two million prisoners in prisons and jails in the United States; 1,355,748 prisoners were housed in state or federal facilities, with an additional 665,745 in local municipal and county jails. This represents a more than six-fold increase in the number of prisoners over a 30-year period. More than 5.6 million Americans, or one in 37 adults, are currently in prison or have previously served time in a prison. The disproportionate racial impact of this imprisonment binge exacerbates the tragedy. In 1999, over 44 percent of the prisoners in state and federal prisons and local jails were African-American, and fully 11 percent of black males in the 25-34 age group were incarcerated in that year. While not as severe as those for black males, the imprisonment rates for African-American women, Hispanics, and Native-Americans have also been increasing in recent years. In order to house this growing number of prisoners, approximately one thousand new prisons and jails have been built in the last two decades, with much of the construction occurring in rural areas. According to the Economic Research Service of the Department of Agriculture, 245 prisons opened in 212 of the nation's 2,290 rural counties between 1991 and 2001.

Over the past two decades, prison hosting has been advertised as a sure-fire catalyst for economic recovery and growth, particularly for economically depressed rural areas

that have seen a loss in primary industry jobs. A brochure published in 1989 by the California Department of Corrections designed to encourage communities to host prisons asserted that prisons brought economic benefits - "including 600 to 1,000 new jobs and an annual payroll of \$20 to \$52 million, a large share of which remains in the community." Similarly, an article discussing prison construction in the state of New York claimed that a typical 500-bed correctional facility employs 350 people with an annual payroll of \$12 million - "in rural counties of northern New York, existing correctional facilities are contributing \$75 million to the local economy."

Belief in the positive economic impact of prisons is so strong that a town in Illinois composed a rap song and purchased television advertising as part of a public relations blitz for legislators deciding where to locate a prison. In Texas, students in a Sunday school class reportedly got on their knees and prayed that a new prison would open in their area. In the same state, some towns offered free golf club memberships to prospective prison officials if the facilities were located there. In California, approximately 140 residents of a southern community traveled more than 600 miles to the state capital in Sacramento to hold a rally, chanting "we want the prison." In the mid-1990s, 19 communities in Washington State were competing for a juvenile rehabilitation center; in Florida, 15 towns offered free land for a new state prison; in Missouri, 12 communities were vying for three prisons. In a 1999 "prison derby" in the state of Illinois, 27 communities competed to secure a new prison. And communities that win the "prison prize" appear to be eternally grateful. For example, in Tamms, Illinois, which houses the state's supermaximum prison, a billboard for the local bank promised "super-max-imum savings," while a local restaurant offered the "supermax burger" on its menu. A billboard outside Tamms displays the message "Welcome to Tamms, the Home of the Supermax - Thank You Governor Edgar."

## Do Prisons Deliver? - A National Study of the Economic Impact of Prisons

While in recent years prisons have been almost universally viewed as economic panacea

for struggling communities, very little empirical analysis has been undertaken to determine whether they deliver the purported economic benefits. Most studies examining the economic impact of prisons have been based on a limited number of correctional facilities in a limited number of jurisdictions. In order to address this deficiency, our research involved the collection of data on all existing and new prisons built in the United States since 1960. In our article (Gregory Hooks, Clayton Mosher, Thomas Rotolo, and Linda Labao, *The Prison Industry: Carceral Expansion and Employment in U.S. Counties, 1969-1994*) which appeared in the journal *Social Science Quarterly* (2004 v 85:37-57) we examined the impact of prisons on employment growth in the approximately 3,100 counties in the contiguous United States for the 1969 to 1994 period. Given that the tendency to lobby for prisons has been more common in rural jurisdictions, our statistical analyses compared metropolitan with non-metropolitan counties. In the first set of analyses, we examined income per capita, total earnings, and total employment growth (without statistically controlling for other factors that could affect economic growth). Among urban counties, there was little difference in the average annual change in income per capita between counties housing a prison and those not housing a prison. We also found that urban counties without a prison had the highest annual rate of growth, while those with a newly built prison grew at the slowest pace. In rural counties, for both income per capita and total earnings, those without a prison grew at a faster pace, and employment grew more slowly in counties in which a new prison was built.

Our next set of analyses attempted to isolate the impact of prisons on employment growth by introducing a number of statistical controls for other potential influences on economic growth in counties. Controlling for a number of social, geographical, and economic factors that could affect employment growth, including population size, economic infrastructure, and the educational level of the workforce, among others, our statistical analyses examined employment growth, again comparing metropolitan and non-metropolitan counties. The analyses with statistical controls determined that prisons did not play a prominent role in

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employment growth. For non-metropolitan counties - the counties in which the majority of prisons have been built in recent years and the counties that have typically been the ones competing to attract prisons in order to boost local economic growth - there is no evidence that prisons have had a positive impact. Neither established or newly built prisons made a significant contribution to employment growth in rural counties.

Even if prison construction does not have a positive impact on employment for all non-metropolitan counties, it is possible that prisons could provide tangible benefits to the most economically-depressed rural counties. To explore this possibility, we distinguished non-metropolitan counties experiencing slow employment growth during the previous decade from those growing at a faster pace. Our analyses showed that among faster growing counties, there was no evidence that prisons made a significant contribution to a change in total employment. Among the slower-growing counties, prisons appeared to do more harm than good - new prisons in these counties actually impeded private sector and total employment growth.

Although it has largely focused on smaller geographical areas, additional research has supported our primary finding that prisons do not contribute to economic growth. For example, in New York State, a recent Sentencing Project report by Ryan King, Marc Mauer, and Tracy Huling on the impact of 38 new prisons that opened between 1982 and 2000 found no substantive or statistically significant impact of prison construction on reducing unemployment, nor were there positive effects with respect to per capita income. Similarly, a report on the impact of prison construction in Missouri found that, aside from the expected increases in population in jurisdictions with prisons (primarily as a result of the arrival of prisoners in these jurisdictions), counties with prisons evidenced no increases in personal income, and actually had larger increases in unemployment, than counties without prisons.

#### **Why Have Prisons Failed to Provide Economic Benefits?**

Our analyses did not allow us to determine why prisons did not result in the economic benefits they were purported to offer. We speculated, however, that one possible explanation is that prison construction may serve to crowd out alternative economic activity. With communities in a number of states competing to attract prisons, correc-

tions bureaucracies are shifting infrastructure costs to local governments. In order to attract prisons, communities are forced to supply the facilities with electrical services, roads, and other things necessary to operate these facilities. Under such pressures, rural counties desperate for jobs are diverting substantial portions of what in most cases are already limited infrastructure budgets to support a correctional facility. As a result, the infrastructure may be ill-suited for other potential employers, and local governments may have few remaining funds for additional investments in local infrastructure.

A second possible explanation for the lack of positive impact of prisons on economic growth, confirmed in the previously mentioned Sentencing Project study of prison construction in New York and at least two other studies, is that the jobs created by prison siting - both those related to facility construction itself and jobs within the prisons, are not taken by local residents. Most prison construction firms are from out of state and typically bring their work crews with them. Construction workers, especially on large projects, are a highly mobile and skilled workforce that moves with their employer to new construction sites. With respect to the jobs within correctional institutions, the Sentencing Project study noted that jobs in rural prisons are highly desirable, so that prisons can have seniority waiting lists of several years. This report noted that in Malone, New York, most of the 750 prison jobs went to people outside the town because of prison seniority rules. Malone's Director of Community Development commented "Did we get 750 jobs? We didn't get 100." In essence, King, Mauer, and Huling conclude that the effect of a prison in a community is largely artificial in nature and amounts to an employment transfer. Ruthie Gilmore's study of prison towns in California similarly found that less than 20 percent of the jobs on average are taken by current residents of a town with a new prison.

Prisons also fail to create jobs in rural areas because they have limited economic multiplier effects. Prison workers may not choose to live in the

community that hosts the prison - one study estimates that 60 percent of such workers move from elsewhere - but rarely end up residing in the actual prison town. These workers are more likely to live in neighboring communities (up to 50 miles away) that offer more amenities but have no prison. Thus, their consumer behaviors (shopping, banking, housing, etc.) will have more of an impact on markets outside the prison community.

Another possible reason for the lack of positive economic benefit of prisons is the existence of prison industries - as Tracy Huling notes, prisons may actually pit local residents in competition with prisoners for employment. All 50 states now operate their own prison industries, and there is a wide range of work activities engaged in by prisoners. Among the prominent companies that use, or have used, prison labor are Dell Computers, the Parke-Davis and Upjohn pharmaceutical companies, Toys 'R Us, Chevron, IBM, Motorola, Compaq, Texas Instruments, Honeywell, Microsoft, Victoria's Secret, Boeing, Nintendo, and Starbucks. Prisoners in California have served as booking agents for TransWorld Airlines, while Microsoft has used prisoners to assist in the shipping of Windows software. Honda pays \$2 an hour to prisoners in Ohio to do the same jobs that members of the United Auto Workers Union were once paid \$20 an hour to do. Correctional officials in some states such as Washington even advertised their prisoners by asking "Are you experiencing high employee turnover? Wor-

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## The Hype (Contd)

ried about the cost of employee benefits? Getting hit by overseas competition? Having trouble motivating your workforce? Thinking about expansion space? Then the Washington State Department of Corrections Private Sector Partnerships is for You.” [Editor’s Note: A Washington State Supreme Court decision in May of 2004 held that the state’s free venture prison labor program was unconstitutional.]

Oregon is a state which perhaps best exemplifies the prominence of prison industries and the negative impact of prisoner labor on public and private sector jobs. In 1994, Oregon voters approved Ballot Measure 17, requiring that all prisoners in the state work 40 hours per week, and that the state’s prisoner work programs be conducted such that they would realize a net profit. Gordon Lafer notes that in Oregon State, thousands of previous public sector jobs are being filled by prisoners, who are now responsible for all data entry and record keeping in the Secretary of State’s corporate division. Prisoners also answer the phones when members of the public inquire about corporate records, and state

agencies employ prisoners for desktop publishing, digital mapping, and computer-aided design work. In the same state, companies can hire prisoner work crews. At least partially as a result of the fact that a prominent company in Linn County, Oregon was relying on prisoner labor, the county lost approximately 1,000 jobs in the four-year period spanning 1997-2001. In this particular case, given that a crew of prisoner workers costs \$400 per day, Linn County Mills saved \$466,000 off the cost of minimum wage, plus 30 percent payroll taxes over a one-year period. If the costs of using prisoners were compared with normal wages, the company saved between \$600,000 and \$900,000. Money that enhanced its profitability and its bottom line.

There are also several examples of companies that locate within prisons and subsequently close down their outside operations. For example, the Texas based company American Microelectronics employed approximately 150 workers at its headquarters in Austin as well as their branch operation in Lockhart prison. After shutting down their operations for 45 days, the company permanently closed their Austin headquarters and moved the entire operation to Lockhart prison. In Washington State, Omega Pacific, a carabiner manufacturing company, laid off 30 workers from its Redmond plant near Seattle and moved to the Airway Heights Corrections Center near Spokane. Interestingly, the company’s catalog indicated that its products came from “Our new home located on an arid plateau above the Spokane Valley” - but neglected to mention that this new home was inside a prison. In Wisconsin, the Fabry company employed 205 workers at three plants in the Green Bay area in 1996. By April of 1997, less than one year after the company began hiring prisoners, it had reduced its labor force at these plants to 120 employees. The company also reduced the wages of its remaining employees by up to \$5.50 per hour. In Georgia, a recycling plant fired workers who were originally hired as part of a welfare-to-work program and replaced them with prison labor.

Additional evidence that the presence of prisons may lead to lower levels of employment in communities in which prisons are located was provided (inadvertently, we believe) by the mayor of Connell, Washington (where the Coyote Ridge Correctional Center is located). In an interview with an *Associated Press* reporter who had documented our findings that prisons did not provide economic benefits, the mayor noted that prison work crews were paid \$1.10 an

hour to help maintain the city’s public works and commented “If it wasn’t for them, we wouldn’t be able to keep our parks up.”

## The Future

Our analyses and a growing body of research have served to dispel the myth that prisons are associated with economic benefits, and communities considering prison siting need to be aware of that the rhetoric does not match the reality. We are encouraged by the fact that the previously mentioned *Associated Press* report on our research generated a considerable amount of interest on the part of numerous groups across the United States who were actively engaged in opposing prison construction in their communities, several of whom contacted us requesting copies of our article. We are also encouraged by the fact that a number of states have recently altered their sentencing policies (especially with respect to drug offenses) to reduce the number of individuals subject to incarceration. While it appears that these changes have been motivated primarily by fiscal considerations, it is possible that at least some public officials have realized that any economy based on human punishment is an inherently perverse one. ■

*Clayton Mosher is an Associate Professor in the Department of Sociology at the Washington State University Vancouver. His research interests include the interactions between race, crime, and criminal justice outcomes, inequality in the criminal justice system, and the sociology of drugs and drug policies. His book THE MISMEASURE OF CRIME (with Terance D. Miethe and Dretha Phillips) was recently published by Sage.*

*Gregory Hooks is Professor and Chair of the Sociology Department at the Washington State University. This research into prisons is part of his larger focus on the strategies and consequences of regional growth with an emphasis on the impact of military facilities.*

*Peter Wood is Associate Professor of Sociology and Director of the Program in Criminal Justice and Corrections at Mississippi State University. His research includes the study of issues related to correctional policy and practice, and the impact of criminal justice sanctions on the behaviors and decision-making processes of adjudicated offenders. His work has appeared in Justice Quarterly, Criminology, Crime and Delinquency, and the Prison Journal.*

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# Washington Jail Settles Wrongful Death Suit For \$1.6 Million

by Michael Rigby

On October 12, 2004, Jefferson County, Washington, agreed to pay \$1.6 million to settle a lawsuit arising from the wrongful death of Kevin Bledsoe in the Jefferson County Jail. The settlement is one of the largest ever for excessive use of force by a county in the Pacific Northwest, according to the family's attorneys.

On the morning of March 24, 2001, the lawsuit alleged, Kevin Bledsoe, 23, was forcefully restrained by four Jefferson County sheriff's deputies in a Port Hadlock parking lot. The deputies were Andy Pernsteiner, Michael Stringer, Benjamin Stamper and John Saum. In the course of restraining Bledsoe, the deputies threw him to the ground, sprayed him in the face with pepper spray, and placed a hood over his head. Bledsoe was then hog-tied and placed on his stomach in the back of a police car while the deputies continued to interview witnesses.

Although Bledsoe was in obvious need of medical attention, the lawsuit contended, he was taken to the Jefferson County Jail rather than to a hospital. At the jail Bledsoe was stripped of his clothes and held face down on the floor of an unlit "crisis cell" until he lost consciousness. There he was left—naked, bleeding, unmoving. When the deputies returned, Kevin Bledsoe was dead.

Seeking justice, Kevin's parents, Sandra Morgan and Jerry Bledsoe, filed a civil rights lawsuit in federal district court alleging excessive use of force and failure to obtain medical assistance. Shortly before the scheduled October 25, 2004, jury trial began, the county agreed to settle by paying Kevin's parents \$1.6 million.

It was probably the wise thing to do. In the course of preparing for trial, the family's attorneys, Ed Budge and Erik Heipt of the Seattle civil rights firm Budge & Heipt, documented widespread abuses in the Jefferson County Jail and inadequate training of county law enforcement and jail personnel. Earlier in 2004 Jefferson County settled a major class action lawsuit filed by the Washington ACLU over, among other things, barbaric conditions of confinement, inadequate medical care, and insufficient staffing levels [see *PLN*, Sep. 2004].


Budge and Heipt believe the case will force other police agencies to reevaluate how they handle similar situations. "This settle-

ment sends a message that police departments cannot ignore," said Budge. "There is no excuse for what happened to Kevin Bledsoe and no excuse for a police department's failure to properly train its officers."

The attorneys also hope the settlement will help end the controversial and dangerous practice of hog-tying suspects who are behaving erratically because of intoxication or mental illness. Hog-tying—which consists of placing the detainee on his stomach, knees bent and wrists behind the back, and tying the wrists to the ankles—has resulted in dozens of deaths around the country due to positional asphyxia. Consequently, most police departments have replaced its use with safer, equally effective methods.

Heipt says that "the dangers relating to the hog-tying of citizens have been well known for over a decade, and it is unacceptable for police departments to continue this practice."

Heipt and Budge worked on the Bledsoe case exclusively for over a year, interviewing more than a hundred witnesses and hiring a number of consultants. Heipt told *PLN*: "We retained multiple experts, including one of the top (if not the top) forensic pathologists in the world, a former chief of police, a former director of corrections, a professor of emergency medicine, and an economist," See: *Morgan v. Jefferson County*, USDC WD WA, Case No. CV 03-5002 RJB.

Budge and Heipt have recently met with success in other cases involving excessive force and restraint-related death. In May 2004, they obtained a high profile ruling against the Portland Police Department. The federal judge in that case held that excessive force was used against a man who died after being pepper sprayed and hog-tied. In 2001 their firm secured an \$8 million excessive force verdict against an Oregon State Trooper. See: *Conroy v. Henry*, USDC D OR, Case No. 99-3074-AA. 

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# California Initiative To Soften “3-Strikes” Law Defeated; DNA Collection From Arrestees Approved

Proposition 66 (Prop. 66), a voter Initiative Act placed on the ballot by prisoners’ families to soften California’s unforgiving “3-Strikes” law by qualifying an offense as a third strike only if it is an enumerated “serious” or “violent” felony (rather than the current “any felony”) was crushed by an intense eleventh hour media fear-campaign. Only one week before the election, polls showed that Prop 66 enjoyed a 65% “sure win” sentiment, with \$2.8 million donated to support its passage and only \$133,000 to oppose it. But that evaporated to a losing 46% vote by November 4, 2004, the big money, special interest, contributions of \$6.2 million poured in and changed 1.5 million voters’ minds. The media-blitz of misinformation was paid for with over \$2 million donated by Governor Arnold Schwarzenegger’s initiative campaign fund, \$3.5 million from southern California billionaire Henry Nicholas III and at least \$700,000 from the powerful California prison guards union (CCPOA). Separately, the voters approved Proposition 69 (Prop. 69) which provides for collection of DNA samples from *all* current prisoners as well as from sex offender and felony *arrestees*.

Prop. 66 had three major features. First, as a “hook” to appear “tough on crime,” it increased punishment for many sex crimes, the crown jewel of which was 25 years-life for first-offense child molestation of a victim under the age of ten. Second, it lifted the “any felony” qualification for the third strike to instead require the third strike to be like the first two statutorily specified recidivist “serious” or “violent” felonies. This change was intended to permit retroactive resentencing of about 4,500 current 25-lifers whose third

strikes were as benign as drug possession, petty theft with a prior, or failure to timely reregister as a sex offender. The avoided long-term incarceration cost of \$1 million each would have totaled \$4.5 billion.

But it was the third feature that may have doomed Prop. 66 decriminalizing the status of six felonies by removing them from the “serious” or “violent” recidivist list. The most significant of these was 1st degree (daylight/residential) burglary where no one was at home. While this was intended to apply to *third* strike sentencing, the media-blitz propounded that those convicted of only a *second* strike [whose recidivist enhancement invokes doubling of the normal term plus doing 80% of that time, rather than 50% otherwise] might also apply for retroactive resentencing. Proponents of Prop. 66 said they did not intend to include such second-strikers in the sweep of the Initiative, but California’s Attorney General Bill Lockyer and every district attorney in the state averred that the proposed language would likely include them - estimating that another 26,000 existing prisoners might thereby gain an earlier release.

No organized opposition appeared against Prop. 66 until four days before the election, when Nicholas added \$2.0 million to his initial \$1.5 million ante that had been given upon prodding from former Governor Pete Wilson. The purpose was to buy every second of available radio air time in the southern California market, as well as sizeable chunks elsewhere in the state. Suddenly the airwaves were saturated with fifteen-second radio and TV spot commercials featuring Governor Schwarzenegger announcing that if Prop. 66 passed, “26,000 murderers, rapists and child molesters would be released to your neighborhood.” Yet, just weeks earlier, the Sacramento Superior Court had ordered similar language stricken from the ballot arguments mailed to all voters because it was “patently false.” The commercials ended with a sliding cell-door slamming shut in front of three prisoners. Another commercial featured a woman who lost two loved ones in a manslaughter case, arguing that Prop. 66 would release the perpetrator. It depicted a montage of 26 prisoners’ photos, followed by murder-victim parent-turned-activist Mark Klass incanting the mantra, “Murderers, rapists, and some very dangerous child molesters.” Nicholas even flew former Governor Jerry Brown down to Southern California to pro-

duce an FM radio ad with guitarist Ryan Shuck and drummer Dave Silvera of heavy metal bands Orgy and Korn.

Not amused by seeing his own picture in the photo montage was 3-strikes life prisoner David T. Chubbuck (convicted of soliciting a beating of his wife) who was implicitly portrayed as a child molester in the ad. California Department of Corrections’ spokesperson Margot Bach acknowledged that Chubbuck is not a molested, but that didn’t stop fellow prisoners at the California Medical Facility from sending him 20 death threatening notes. No-on-66 campaign manager Mark Temple said the ad did not depict Chubbuck as a molester, but the public’s perception was clearly otherwise -- possibly adding impetus to a threatened taxpayer’s lawsuit.

Notwithstanding billionaire Nicholas’ \$3.5 million juggernaut and his own \$2 million donation to the negative campaign, Governor Schwarzenegger told Californians in a televised post-election statement crowing over the many state propositions whose fate he had championed, that the election result was clearly the “voice of the people - not big money, special-interest groups in Sacramento.” CCPOA Vice-President Lance Corcoran explained their \$700,000 contribution: “We’re just a small labor union trying to fight for the safety of Californians.” For this “safety” California taxpayers will pay his 31,000 union members the lion’s share of the \$1 billion/year it will cost to keep 26,000 potentially eligible “strike” prisoner incarcerated.

And if sealing the doom of recidivist petty thieves wasn’t enough, 62% of the voters also passed Prop. 69, which provides for blanket DNA sample collection. Effective immediately, DNA must be collected from all adults and juveniles convicted of any felony offense; from all adults and juveniles convicted of any sex offense or arson offense (or an attempt thereof) *not* amounting to a felony; and from all adults *arrested* for or charged with felony sex offenses, murder, of voluntary manslaughter (or attempts). Finally, beginning in 2009, DNA samples must be collected from all adults *arrested* for or charged with *any* felony offense. California *PLN* readers should be aware that under Prop. 69, the DNA of all current state prisoners will be collected. Parolees leaving state prisons and county jails are the top priority of those to be sampled. Prop. 69 is expected to supplement the existing 1.5 million DNA profiles in the FBI’s Combined DNA Index

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System (CaDIS) with 1 million profiles from California. California currently has 125,000 samples - a number it expects to double within one year.

Proponents of DNA data bases point to their success, measured by 2,000 "cold hits" in Virginia and 1,100 over ten years in California (with its heretofore more limited DNA testing program sampling only violent offenders). Virginia reports that over 80% of their "cold hits" would not have been made if they had limited their DNA sampling to just violent offenders. And Great Britain, where *all* arrestees are DNA profiled, reports 3,000 cold hits *per month*.

To pay for the enlarged DNA data base program -- on top of the October, 2004 supplemental infusion of \$10 million of federal money - Prop. 69 also enacted a 10% surcharge on every criminal penalty assessed. Additionally, it created a new felony punishable by 2, 3 or 4 years for tampering, or attempting to tamper, with a DNA sample, a thumb print or a palm print impression. The ACLU has filed suit challenging the new law. ■

Sources: *Sacramento Bee*; *Los Angeles Times*; San Diego County Public Defender's memorandum, 10/29/04; *California Official Voter Information Guide*, Nov. 2004.

## Washington Prison's Water System and Meat Contaminated With Feces

by Roger Smith

On August 20, 2004, fecal coliform and *E. coli* were found in the water system at the McNeil Island Correction Center (MICC) near Steilacoom, Washington. *E. coli* was also found in about 6,000 pounds of ground beef produced at a meat processing plant on the Island prison. Both types of bacteria are caused by fecal contamination and can cause serious illness and death in humans.

Bottled water was provided for MICC prisoners for about a week while the bacteria were flushed from the water system. All subsequent tests have shown the water to be contaminant-free.

The meat in question was supposed to go to other Washington prisons and meal programs for the elderly, said Howard Yarbrough, head of the correctional industries work program in Washington prisons. Yarbrough said that the contaminated meat had been isolated for more tests and eventual destruction.

Yarbrough said that water used for meat processing on the island tested positive for

the bacteria, without commenting on its source. Additionally, MICC administrators claim they do not know the bacteria's origin.

However, minimal investigation reveals the likely source of the fecal coliform. Between 1999 and 2002, the MICC wastewater plant operator submitted 36 falsified water reports in an attempt to conceal the fact that the water had fecal coliform levels far above those allowed by law. That water collects in a reservoir on McNeil Island. See: *PLN* July 2004 issue p. 7 (Washington DOC Fined \$60,000 for Bogus Water Pollution Reports). It appears likely that the fecal coliform's origin is the reservoir of polluted wastewater.

Unidentified MICC officials claimed they will continue to test the water for contamination. They also said they have plans to improve water distribution at MICC in the near future. ■

Source: *The Tacoma News Tribune*

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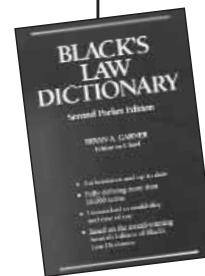
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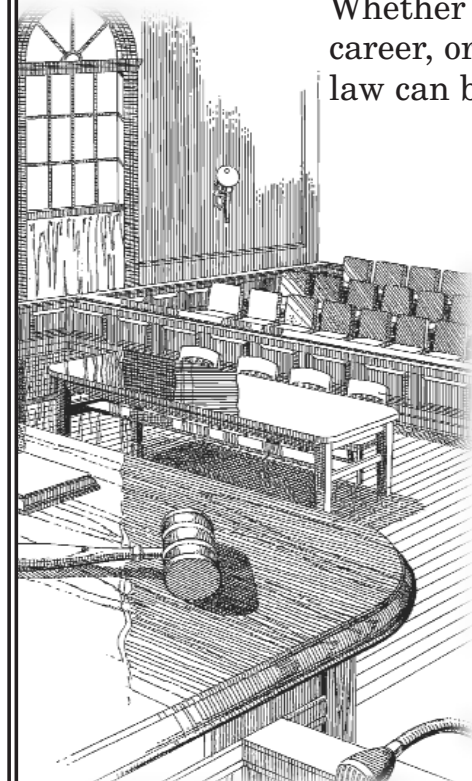


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# Qualified Immunity Denied to Supervising Driver's License Examiner in Oklahoma Prisoner's Rape

by David M. Reutter

The Tenth Circuit Court of Appeals has held that a state driver's license examiner who exercised supervisory control over a prisoner acted as a state actor and can be held liable for raping her. Pamela Smith, a former prisoner of Oklahoma's Tulsa Community Correction Center (TCCC), brought this action. TCCC prisoners are required to participate in the prisoners' works program. Smith was assigned to perform janitorial services at the Oklahoma Department of Public Safety (DPS) at the Tulsa Northside Center.

TCCC trained two DPS employees, Ed Spencer and defendant Don Cochran, in the supervision of prisoners. Spencer would pick Smith up at TCCC each work day and return her to TCCC. While Spencer was the supervisor of two DPS Centers, Cochran normally supervised Northside. So, supervision of Smith was Cochran's responsibility.

DPS was allowed to use TCCC prisoners to perform DPS work, but TCCC retained "full jurisdiction and authority over discipline and control of prisoners." Prisoners were prohibited from using alcohol or drugs, engaging in sex, receiving visitors, using the telephone, or leaving the DPS facility except to return to TCCC. Any violation was to be reported by the supervisor to TCCC.

During her first week working for DPS, Cochran told Smith that he would tell prison officials that her brother visited her at work if she would expose herself to him. Fearing transfer to a higher security prison, Smith exposed herself. During the next two weeks, Cochran forced Smith to have sexual intercourse with him. Between November 1997 and May 1998, Smith says Cochran forced her to continue having sexual intercourse and perform oral sex with him. Cochran says he never had sexual relations with her.

Cochran, however, admits that during that period he took Smith off DPS grounds to visit her family and friends. According to Smith, Cochran permitted her to leave DPS for other purposes and to receive gifts from family and friends. Cochran regularly reminded Smith that he would report her misconduct if she did not have sex with him. On one occasion, Cochran raped Smith with a salt shaker. After Smith was transferred to another prison, she reported Cochran. Before an internal affairs investigation was completed, Cochran resigned. After Smith filed her complaint, Cochran moved for summary judgment on qualified immunity grounds, which the district court denied. Cochran appealed.

The Tenth Circuit found Smith alleged violation of her right to be free from cruel and unusual punishment by using excessive force against her in the form of rape and sexual abuse. The Court held that at the times alleged it was clearly established in law that a prisoner has a constitutional right to be secure in her bodily integrity and free from attack by prison guards, and this includes the right to be free from sexual abuse.

Cochran argued the Eighth Amendment acts as a restraint only on the acts of prison guards or prison officials. He characterized his relationship with Smith as only a co-worker. The Court held that under Oklahoma law Smith was effectively in prison even as she worked at DPS. Moreover, pursuant to the terms of the contract governing the prisoner works program, DPS personnel effectively acted as agents of the Department of Corrections in monitoring Smith while she worked at DPS. Thus, Smith had responsibility for administering the conditions of Smith's custody while she worked at DPS, which placed Cochran in the position of acting under the state's authority and laws. Accordingly, Cochran was not entitled to qualified immunity and the matter was affirmed and remanded for trial. See: *Smith v. Cochran*, 339 F.3d 1205 (10<sup>th</sup> Cir. 2003). ■

## New York Prisoner's Retaliation Suit Remanded for Trial

The Second Circuit Court of Appeals has reversed a district court's grant of summary judgment to guards in a prisoner's retaliation suit. This action was filed by New York prisoner Anthony Bennett, alleging he was retaliated against for successfully prosecuting a previous lawsuit and filing grievances.

In 1995, Bennett filed an action alleging that guards retaliated against him for filing grievances, and they instituted false misbehavior reports against him and punitively transferred him to a different prison. In September 1997, settlement negotiations ensued, and the defendants agreed to pay Bennett \$3,000 and transfer him to another facility. In the spring of 1997, Bennett had been transferred from Attica Correctional Facility, a maximum security prison, to Collins Correctional Facility, a medium security prison. Before the settlement was

finalized, Collins officials tried to transfer Bennett back to Attica. That attempt was administratively denied because of "insufficient reason for placement."

Three days after that denial, Bennett received two disciplinary reports: one for defacing library books, the other for "working to consolidate unauthorized groups to a common purpose to the detriment of the safety and security of the facility." Both charges were sustained and Bennett was transferred to Attica. Bennett administratively appealed the disciplinary findings, and both charges were reversed as lacking merit. The disciplinary findings remained in Bennett's prison file, and those references caused the parole board to require him to serve additional time. Additionally, Bennett was improperly denied the opportunity to be transferred out of the Attica hub before he was sent to Gowanda Correctional Facility after the reversal.

Finally, while Bennett was receiving HIV counseling, guard Rutski entered the exam room. Bennett then filed a grievance alleging his confidentiality had been violated. Three days later, guards searched Bennett's cell allegedly looking for an unauthorized employee's manual, but instead found a weapon. Bennett alleged the weapon was planted. The resulting disciplinary action caused yet another transfer. The defendants admit the search was conducted due to the grievance.

In finding the district court erred in granting summary judgment to the guards, the Second Circuit held Bennett presented sufficient evidence to raise a question of material fact about whether retaliation was a substantial factor in the transfers and discipline. Therefore, the matter was remanded for further proceedings. See: *Bennett v. Goord*, 345 F. 3d 1133 (2<sup>nd</sup> Cir. 2003). ■



## HIV is Occupational Disease for Connecticut Prison Guards

The Connecticut Supreme Court held that the human immunodeficiency virus (HIV) is an occupational disease for prison guards who are members of prison emergency response units. The court also held that the estate of a deceased guard filed a timely claim for death benefits under Conn. Gen. Stat. § 31-294c, by filing the claim within three years.

A Connecticut Department of Corrections (DOC) guard who worked at the Bridgeport Correctional Facility from 1986 to 1991 was diagnosed in April, 1992, with HIV. In March, 1993, he died from Acquired Immune Deficiency Syndrome (AIDS), and his estate filed a notice of claim with the workers' compensation commission, alleging that he contracted HIV through his contact with prisoners.

The "claim was filed more than one year after the decedent's last date of employment, and was, therefore, untimely under the one year limitation period set forth in § 31-294c for accidental and repetitive trauma injuries." The estate argued "that the claim was timely under the three year limitation period set forth in § 31-294c for occupational disease claims. The defendant [DOC] disagreed, and filed a motion to dismiss. . . for lack of jurisdiction."

Ultimately, "the Commissioner found that HIV was not an occupational disease for [guards] and, therefore, the three years limitation period for occupational diseases set forth in § 31-924c was inapplicable. . . . The plaintiff appealed from the commissioner's decision to the board, which affirmed that decision." The estate appealed to the Appellate Court and the Supreme Court transferred the appeal to itself.

The Court agreed with the guard's estate that "HIV is an occupational disease for [guards] who, like the decedent, are members of the emergency response team." This conclusion was based, in part, on a finding that as "a member of the emergency response unit, one of his specific 'duties of employment' was to break up altercations, riots, and other emergencies in which, through splash or other similar incidents, he could have come into contact with the blood and bodily secretions" of prisoners. The court indicated that it "need not, and [did] not, decide whether HIV is an occupational disease for [guards] who are not members of the emergency response unit."

Relying upon the expert testimony offered in the case, the court found that "[b]reaking up altercations and riots in an

inmate population with an HIV infection level of 1 in 20, more than seventy times greater than the infection rate of the non-incarcerated population, is 'peculiar to' the decedent's occupation as a [guard] in the emergency response unit." Therefore, the court concluded, "the commissioner improperly determined that HIV was not an

occupational disease for [guards] who are members of the emergency response unit." Hence, "the estate's notice of claim was timely filed under. . § 31-294c, as it was filed within three years[]" of the last date of employment. See: *Estate of John Doe v. Department of Corrections*, 268 Conn. 753 (Conn. 2004).

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# DNA Profiling Of Conditionally Released Federal Offenders Upheld

by John E. Dannenberg

A sharply divided en banc Ninth Circuit U.S. Court of Appeals held that the United States does not violate the Fourth Amendment when it requires "DNA profiling", a practice compelling the submission of DNA samples from certain conditionally released federal prisoners in the absence of individualized suspicion that they have committed new crimes.

In enacting the DNA Analysis Backlog Elimination Act of 2000 [DNA Act] (see 42 U.S.C. § 14135a(a)(1)(2) and a(c)(1)(2)), Congress ordered that individuals convicted of "qualifying federal offenses" [e.g., homicide; aggravated and sexual assaults, robbery, burglary, arson (or attempts)] must provide blood samples for DNA "genetic fingerprinting" for use in a national law enforcement data base. The DNA coding authorized may use only nongenic "junk DNA" code not associated with any known physical or medical characteristics. The practice is intended to aid forensic crime-scene identification while avoiding invasion of privacy as to personal DNA genetic characteristics. The constitutional question raised here is whether such "fingerprinting" in the absence of individualized suspicion of one's having committed a new crime violates the Fourth Amendment's protection against unreasonable search and seizure.

In 1993, Thomas Kincade was convicted of armed bank robbery and sentenced to 97 months followed by three years of supervised release. For the two years following his release, he had dirty urine tests indicating continuing cocaine addiction. By June 7, 2001, Kincade was released from a successfully completed residential drug treatment program.

On March 25, 2002, Kincade's probation officer requested him to submit a blood sample pursuant to the DNA Act. Kincade refused, citing only a personal preference

and not any religious conviction. Threatened with imprisonment for failure to submit blood samples, Kincade objected on Ex Post Facto grounds, Fourth Amendment search and seizure grounds, the Due Process Clause and separation of powers principles under Article III of the U.S. Constitution. He was sentenced to four months by a district court in California, which was stayed pending appeal. However, while free, Kincade again tested positive for cocaine and was re-incarcerated. During that period, he was forced to submit blood samples.

The court reviewed three exceptions to Fourth Amendment protections against unreasonable search and seizure. The first is "exempted areas," which includes searches at borders, airports, government building entrances and in prisons. The second category is "administrative searches," involving the inspection of closely regulated businesses. Finally, the court identified "special needs" as a category permitting suspicionless searches such as highway checkpoints to question citizens about a recent crime, random drug testing at universities, compulsory testing of railroad employees following an accident, and warrantless search of a probationer's residence. The concept is that where warrant and probable cause determination would be impracticable, the preservation of order may justify a "special need."

In deciding just how far one might "push" the amorphous "special needs" category, the court phrased the question as whether "special needs analysis [must] be triggered not by a complete absence of suspicion, but by a departure from the Fourth Amendment's warrant and probable cause requirements?" First, it was decided that it is an "open question" as to whether suspicionless searches pass constitutional muster when they are conducted for law enforcement purposes. Noting a split in the circuits on this question, the court followed its own precedent in *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995) by applying a "pure totality of the circumstances analysis." The court "balance[d] the degree to which DNA profiling interferes with the privacy interest of the included federal offenders against the significance of the public interests served by such profiling." Applying this standard, and avoiding the question of whether a "special

needs" analysis would produce the same result, the court concluded that DNA profiling was consistent with the Fourth Amendment.

The court observed that the DNA profile derived by the "junk DNA" analysis establishes only the defendant's identity. "Once a person is convicted of one of the felonies included as predicate offenses under [the DNA Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling" (citing *Rise*, 59 F.3d at 1560). Answering Kincade's impassioned complaint that the blood samples could nonetheless be "mined" for data beyond the needs of law enforcement identification purposes, the court noted that the DNA Act provides protections against such misuse, and the court's review would be limited to the constitutional question presented.

Accordingly, the court found that the DNA Act "both provides a means to monitor [conditionally released federal offenders'] compliance with the terms of their release and helps minimize the pain and suffering recidivist offenders sow in our communities" a reference to the recognized extraordinary rate of recidivism among previous offenders. "In light of conditional releasees' substantially diminished expectations of privacy, the minimal intrusion occasioned by blood sampling, and the overwhelming societal interest so clearly furthered by the collection of DNA information from convicted offenders, we must conclude that compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances ... [and] hold that the DNA Act satisfies the requirements of the Fourth Amendment."

The dissent decried the majority's ruling as authorizing "a programmatic search designed to produce and maintain evidence relating to ordinary criminal wrongdoing, yet conducted without any level of individualized suspicion. Never has the [U.S. Supreme] Court approved of the government's construction of a permanent governmental database built from general suspicionless searches and designed for use in the investigation and prosecution of criminal offenses." "The plurality simply asks us to trust those in power." See: *United States v. Kincade*, 379 F.3d 813(9th Cir. 2004)(en banc). ■

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# Los Angeles Voters Reject 5,000 More Cops; Invest In Clear Ocean Instead

by John E. Dannenberg

Los Angeles, California voters, in a November 2004 campaign marred by scare tactics, rejected a 1/2 cent sales tax measure (Measure A) that would have raised \$560 million per year to pay for 5,000 added cops. At the same time, the voters *approved* a \$500 million bond measure for improvements to the city's storm drainage system to prevent polluted runoff from entering the Pacific Ocean.

With a current staff of 9,099 city police sheriff deputies to serve 3.8 million residents, Los Angeles County Sheriff Lee Baca and L.A.P.D. Chief William Bratton tried to sell the public on the idea that they were understaffed compared to cities like Chicago, which has 13,500 cops for 2.9 million people. Indeed, they were so understaffed that in the past 2 1/2 years, 119,577 prisoners had been let out of L.A. County jails early - often doing only 10% of their sentence - because the jails were full. Further analysis showed that 62,090 of those left jail within just a day or two, notwithstanding sentences of many months for burglary, drunk driving and minor assaults. Baca lamented that the jail population had to be reduced from 22,000 to 17,500 over the past few years due to \$160 million in budget cuts.

Post election analysis identified three factors that seemed to doom the tax measure. First, the city's major crime rate - as reported by the FBI - *dropped* from 652,939 in 1993 to 395,963 in 2003.

Second, a tally by precinct revealed that while Measure A passed by the 2/3 margin necessary in most of L.A., it's failure was tied to an ambivalent showing by African-American voters in south L.A. -- including some backlash from the Rodney King police beating -- sufficient to drag the countywide tally down to a failing 64%. Many African-Americans interviewed stated their distrust of police and racial profiling. Even African-American Congresswoman Maxine Waters and Senator Tom Hayden urged a no-vote in pre-election mailers. In contrast, heavily Latino neighborhoods voted overwhelmingly in support, where post-election opinions related concern over "gangs on every corner" that needed cleaning up.

Third, the proponents used knowingly false data in their media campaign in a crude attempt to scare the voters - which appar-

ently backfired. The website for Measure A used headline fragments and an article from an Arkansas newspaper to synthesize false headlines. "Crime rates are at an all-time high. More police needed on the streets," was followed by "L.A. Streets no longer safe for children."

Not only were the purported facts outright false, the language was literally stitched together from pieces of a year-old story in the *Leader* newspaper of Jacksonville, Arkansas—much like a stereotype ransom note made of pasted newspaper clippings. And that article, as run in whole, was about transportation planning in the Little Rock suburb not police understaffing.

Rick Taylor, advertising consultant running Measure A, initially defended this ploy, calling it merely "a graphic" to illustrate the crime problem, and not meant to represent actual news. "It's not a big deal," he said. Nonetheless, he pulled the material from the

website and later apologized for use of misleading headlines and stories. But before being removed, it was used in an image on the website that faded into pictures of Baca and Bratton urging a "yes" vote on Measure A.

Nancy Snow, an assistant professor of communications at Cal State Fullerton, said of the false headlines that misrepresenting facts to voters, while not uncommon in campaigns, often boomerangs with critical thinkers. Here, voters obviously were aware that fecal matter runs downhill, when they rejected Measure A but overwhelmingly approved an equal monetary investment to sanitize storm drainage off, contaminated by cat and dog litter that frequently renders famed L.A. beaches unusable due to the resulting oceanic bacteria blooms. ■

Source: *Los Angeles Times*.

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## Washington ISRB Departure from Standard Sentencing Range Upheld

The Washington Supreme Court has affirmed the State Indeterminate Sentence Review Board's (ISRB) extension of a sex offender's sentence beyond the standard range under the state's Sentencing Reform Act (SRA). Chapter 9.94A RCW.

In 2002 Lincoln Addleman had served 23 years of a life sentence for a 1979 First Degree Statutory Rape conviction. Even so, the ISRB extended his sentence by 14 years. Addleman then sought relief in a Personal Restraint Petition (PRP), arguing that the ISRB abused its discretion by extending his sentence.

Until 1981, Washington trial courts sentenced felons to the statutory maximum for the crime they committed. The parole board (now the ISRB) then set the prisoner's minimum term. RCW 9.95.100 required the parole board not to grant parole to a prisoner it had not found to be rehabilitated.

In 1981, the legislature enacted the SRA, which required trial courts to set felons' minimum and maximum terms, without ISRB involvement, based on a grid that es-


tablishes standard range sentences. Trial courts are required to impose a standard range sentence under the grid unless aggravating factors exist.

The legislature tried to achieve consistency between pre and post-SRA sentences by requiring the parole board to "attempt to make decisions consistent" with the SRA when adjusting pre-SRA sentences. RCW 9.95.009(2).

Addleman's standard range sentence under the SRA would have been 108 to 144 months in prison. He contended that since the ISRB had kept him incarcerated for 23 years and just extended his sentence by 14 years, the ISRB did not act consistently with the SRA as required by RCW 9.95A.009(2). On that basis, Addleman concluded that the ISRB had abused its discretion by extending his sentence.

The ISRB argued that it had only done what the law required of it because Addleman was not rehabilitated. The ISRB considered Addleman's past, lengthy record of violent sex

offenses, his poor psychological reports, and some of his writings to decide that he was not rehabilitated. On that basis, the ISRB argued that it properly extended Addleman's sentence because he had not been found to be rehabilitated, citing RCW 9.05.009(2).

The Supreme Court agreed with the ISRB and dismissed Addleman's PRP. The court held the ISRB had "reasonably attempted" to harmonize Addleman's sentence with the dictates of the SRA. No more was required. The court held the ISRB had properly exercised its discretion in extending Addleman's parole review date. This case illustrates the ongoing injustice of maintaining multiple sentencing systems whereby defendants with the misfortune of committing a crime prior to the enactment of one sentencing system find themselves serving sentences far in excess of those served by prisoners committing similar or more serious offenses afterwards. See: *PRP of Addleman*, 151 Wn.2d 769; 92 P.3d 221 (Wash. 2004). 

## Misidentification Requires Washington Jail Officials Take Reasonable Steps to Confirm Identity

The Washington State Supreme Court has held jail personnel have a duty to take steps to promptly release a detainee once they know or should know, based on information provided to them that the person they are holding is not the person named in an arrest warrant.

This matter was before the Court in consolidated appeals resulting from lawsuits filed by two persons arrested by warrant and held in the Pierce County Jail in Tacoma, Washington. The Pierce County Superior Court granted jail officials summary judgment. The Division Two Court of Appeals reversed the orders granting summary judgment on the negligence and false imprisonment claims, but affirmed dismissal of the 42 U.S.C. § 1983 claim. See: *Statler v. State*, 113 Wa.App. 1, 51 P.3d 837 (2002).

The Supreme Court found that Kevin Lee Statler was arrested by a Washington State Patrol trooper under a Pierce County warrant issued for Robert John Statler, which listed, "Kevin Lee Statler" as an alias. Kevin adamantly asserted he was not the person named in the warrant. His physical


appearance differed from the individual described in the warrant by 27 pounds, four inches in height, three years in birth date and eye color. Confronted with his claim of misidentification, a booking officer was advised to book Statler under the name of Kevin Lee Statler. Two days after being booked into the jail, Kevin was released after Robert John Statler's probation officer advised the court at arraignment the wrong man was in custody.

David W. Brooks, Jr., was stopped for a traffic violation, and a Fife police officer was advised by the dispatcher that there was a North Carolina warrant for David W. Brooks, Jr. The warrant described an individual remarkably similar in appearance to the person before the officer in terms of name, race, and date of birth. Despite Brooks' assertions he had never been to North Carolina, the officer was not deterred from arresting him.

At arraignment, Brooks did not inform the Court there was a misidentification. Brooks was ordered held without bond pending an extradition hearing. Almost a month later, Pierce County received a photo-

graph and finger prints of the person named in the warrant. That same day, a technician concluded the fingerprints were not Brooks', and he was released from custody.

The Supreme Court held jail officials have a duty to take steps to promptly release a detainee once they know or should know, based on information presented to them, that there is no justification for holding the individual. The Court said Statler provided sufficient evidence to warrant a trial. Evidence that the jail had a file that contained a photograph of Robert John Statler, the discrepancies in names, weight, height, eye color and date of birth would allow the jury to conclude the jail violated their duty.

The Court, however, held Brooks' facts do not justify a trial because he matched the description in the warrant completely. Because a due process violation cannot be based on an unreasonable or negligent refusal to investigate claims of misidentification, the constitutional claim had to fail. The matter was reversed in part and affirmed in part. See: *Statler v. Washington*, 151 Wn.2d 148; 86 P.3d 1159 (Wash. 2004). 

# Texas Supreme Court Clarifies Procedures For Civil Court Prisoner Appearances

by Matthew T. Clarke

The Supreme Court of Texas recently clarified the procedures a prisoner must follow to secure the right to personally appear in a civil court proceeding. In doing so, it partially overruled most of the case law on the issue.

The Texas Attorney General filed suit to establish the parent-child relationship between Zeb Lee Thompson, a Texas state prisoner, and three minor children. Thompson filed a pro se motion for a bench warrant (also referred to as an application for a writ of habeas corpus ad testificandum). The motion wasn't ruled on. Trial was held in Thompson's absence. The trial court entered an order establishing the parent-child relationship, requiring child support of Thompson and setting visitation. Thompson appealed.

The en banc court of appeals reversed the case, holding that the trial court abused its discretion by failing to rule on the motion before trial. *In re Z.L.T.*, 82 S.W.3d 100 (Tex.App. San Antonio 2002) [PLN, Nov. 2003, p. 24]. The state appealed to the Supreme Court of Texas.

The Supreme Court of Texas held that, although prisoners have a limited right to appear in civil cases, prisoners seeking a bench warrant to make such an appearance must show in the body of the motion the justification that is to be weighed against the protection of the integrity of the correctional system. Factors to be weighed include: (1) cost and inconvenience of transporting the prisoner to the courtroom; (2) how great a security risk the prisoner presents to the court and public; (3) whether the prisoner's claims are substantial; (5) whether the prisoner can and will offer admissible, non-cumulative testimony that cannot be effectively presented by deposition, telephone, or some other means; (6) whether the prisoner's presence is important in judging his demeanor and credibility; (7) whether the matter can be reasonably delayed until the prisoner's release; (8) whether the trial is to the court or a jury; and (9) the prisoner's probability of success on the merits. The court of appeal's holding that the trial court did not abuse its discretion in implicitly denying Thompson's motion by holding the trial without first ruling on the motion. To the extent they indicate otherwise, the following cases—many of which do not reveal

the content or quality of the bench warrant material—are disapproved of: *In the interest of C.W.*, 65 S.W.3d 353 (Tex.App. Beaumont, 2001); *Jones v. Jones*, 64 S.W.3d 206 (Tex.App. El Paso, 2001); *In re Taylor*, 28 S.W.3d 240 (Tex.App. Waco, 2000); *Dodd v. Dodd*, 17 S.W.3d 714 (Tex.App. Houston [1<sup>st</sup> Dist.] 2000); *Zuniga v. Zuniga*, 13 S.W.3d 798 (Tex.App. San Antonio,

1999); and *Nichols v. Martin*, 776 S.W.2d 621 (Tex.App. Tyler, 1999). The judgment of the court of appeals was reversed and the case returned to the court of appeals for consideration for Thompson's other grounds for appeal not previously considered by the court of appeals. See: *In re Z.L.T.*, 124 S.W.3d 163 (Tex. 2003). ■

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- 3) The sentencing court did not impose a condition requiring an approved address on the judgment and sentence before early release; and
- 4) DOC did impose a condition requiring an approved release address before early release; and
- 5) The submitted release address was not approved and as a result, there was no release at the early release date.

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# Uprisings at CCA Prisons Reveal Weaknesses in Out-of-State Imprisonment Policies

by Matthew T. Clarke

States strapped by tight budgets and pressed by a swell of prisoners are faced with the Hobson's choice of releasing prisoners early to ease overcrowding or building prisons they can ill afford to construct and staff. Private prison corporations seem to offer a third choice. They claim to be able to house the state's excess prisoners without the substantial outlay of capital required to build prisons and at a lower cost of incarceration than the government can manage.

How do private prison corporations achieve this miracle of modern capitalism? By running a much more efficient operation than is possible with moribund state bureaucracies say private prison proponents. Opponents of private prisons reply that the savings are achieved by locating prisons in distant states with distressed labor markets and cutting the number of employees, union busting, slashing employee salaries and benefits, and the quality and/or quantity of food, medical care, and programs offered prisoners, as well as by plain, old-fashioned cooking the books. Regardless of the quality of programs and services offered, relocating prisoners to prisons in distant states traumatizes them and their families, making communication and visitation difficult and expensive, if not impossible, and reducing one of the most valuable aids to rehabilitation—strong family ties

## CCA, The 800-Pound Private Prison Gorilla

Corrections Corporation of America (CCA) is the largest private prison operator in the United States and the world. It runs 65 prisons and jails, owning 38 of them, and is responsible for 66,000 prisoners located in 20 states and the District of Columbia. This makes CCA the sixth largest prison system in the United States behind the federal government and four states. CCA alone is responsible for contracts with eleven states to ship over 8,000 prisoners to out-of-state CCA prisons

Despite its formidable market position, CCA has a history of scandal. In 2001 its stock dropped to less than a dollar a share after stockholders who had discovered that CCA had cooked the books on a grand scale filed state and federal stockholders' lawsuits. CCA settled those suits by distributing over

3 million shares of common stock and \$30 million in cash to stockholders, issuing \$30 million in promissory notes (that guaranteed a minimum stock price) and paying \$17 million in cash and 1.6 million shares to the stockholders' attorneys for attorney fees. CCA stock rebounded following the announcement of the final settlement on May 20, 2003.

Currently, CCA is facing another crisis. This one was caused by the downgrading of CCA stock due to multiple riots at CCA prisons in July 2004. Stock analysts seemed unwilling to take the word of CCA CFO John Ferguson that neither the riots, recent escapes from CCA prisons nor lawsuits filed against CCA alleging abuse and murder of prisoners would affect the company's bottom line. He claimed that most of the costs of the riots would be covered by insurance.

CCA profits were down \$4.8 million to \$15.4 million in the second quarter of 2004 compared to the second quarter of 2003. On August 11, 2004, James A. Seaton resigned as Chief Operating Officer of CCA. Currently the COO's responsibilities are being handled by J. Michael Quinlan, CCA senior vice president, former COO, and former Director of the Federal Bureau of Prisons in the first Bush Administration. As *PLN* has reported in the past, Mr. Quinlan also has a history of sexually assaulting his male underlings. See: *PLN*, June, 2000. *Former BOP Director Fingering in Sex Scandal*.

CCA gave no reason for the resignation. Richard Crane, former CCA general counsel, said that the resignation might indicate that Seaton's background in management of the Marriott hotel chain was inadequate for running a prison system.

"It's just so hard to understand that environment," said Crane. "It's not like running a hotel. I'm sorry. Your hotel guests rarely riot."

## Specific Contracts for Out-of-State Imprisonment

Eleven states and the District of Columbia use prisons outside their boundaries. Alabama imprisoned 1,423 men at a CCA prison in Mississippi and 285 women at a Louisiana private prison. Alaska sent 706

men to an Arizona CCA prison while Arizona sent 625 men to a Texas private prison. Connecticut imprisoned 500 of its men in a Virginia state prison and plans to send up to 2,000 more prisoners out-of-state, Hawaii has 843 men and 63 women at CCA prisons in Oklahoma and 532 men in Arizona, Indiana sent 655 men to a CCA prison in Kentucky while 1,800 beds sit empty in the Indiana state prison system. Kansas has 48 prisoners in a CiviGenics Texas prison. Vermont shifted 450 prisoners previously housed in a Virginia state prison to a CCA prison in Kentucky and may send another 250. Washington had 240 prisoners in a Nevada state prison and 198 in a CCA prison in Colorado before the riot in July 2004. Wisconsin sent 1,388 prisoners to Minnesota CCA prisons and 502 to CCA prisons in Oklahoma. Wyoming imprisoned 398 men in two Colorado CCA prisons before the July riot and 131 at a state prison in Nevada. The District of Columbia, which has no prisons of its own spreads its 5,800 prisoners across the country in federally-supervised prisons. The total is about 14,500 prisoners being imprisoned out-of-state, some of whom are thousands of miles from their home states.

## Long Distance Suffering

Not taken into account by the prison profiteers is the misery long-distance incarceration causes the prisoners and their families. Vera Leblond, the mother of a Connecticut prisoner imprisoned in Virginia knows this all too well. Her son's transfer virtually eliminated the possibility of family visits.

"It's horrifying — driving that distance would exhaust me," noted Ms. Leblond.

State officials turn a deaf ear to the protests of prisoners and their families.

"The public doesn't have a lot of sympathy for prisoners," said Robert Farr, ranking Republican on the Connecticut House Judiciary Committee. "Someone committed a murder and says, 'Gee, I want to be closer to home.' What about the family of the person they murdered?"

Of course, most of the transferred prisoners were not convicted of murder and the public hasn't been given an opportunity to voice their opinions as there has been no referendum or other opportunity to do so.

Farr also noted that the out-of-state transfers saved up to \$10,000 per prisoner and



relieved severe overcrowding. This, he claimed, is more important than inconveniencing prisoners' families.

Stacy Smith, spokesperson for the Connecticut Department of Corrections, claimed that the transfers were not punitive and a cross-section of prisoners were transferred.

"The attitude of the families — initially, there is a shock, and then they acclimate," said Smith.

Whereas prisoners and families may be able to adjust to fewer visits when the prisoner is moved a few hundred miles away to a nearby state, it is difficult to imagine how Alaskan prisoners imprisoned in Arizona or Hawaiian prisoners incarcerated in Oklahoma can adjust to their new circumstances.

"Kids are great motivators for parents in prison to get their act together," said Kat Brady, coordinator of the Community Alliance on Prisons which is based in Honolulu. "You take away the possibility of kids' visits, and it's a self-fulfilling prophecy: 'See, these people can't be rehabilitated.'"

Brady noted that virtually none of the families of Hawaiian prisoners in Oklahoma could afford to visit them. Furthermore, outlandish telephone rates prevented even that diluted contact with families and helped explain why the recidivism rate for Hawaiian prisoners incarcerated on the mainland is higher than the rate for those who remain on the islands.

Indeed Vermont, in its recent contract to incarcerate a minimum of 236 prisoners primarily at the CCA Marion Adjustment Center in Kentucky, but also at CCA prisons in Tennessee and Arizona, took into account the distance from Vermont when rejecting bids from Emerald Correction Management to use a Texas prison and CiviGenics to use a prison in Louisiana. However, the consideration was not to reduce the burden on prisoners and their families.

"The cost for transport to Kentucky, when it was on our nickel, is a lot less than when it's to Texas and Louisiana," said Vermont Department of Corrections Commissioner Steve Gold.

Although CCA's provision of medical care to Vermont's prisoners was one of the most extensively negotiated portions of the contract, CCA will not be accepting any Vermont prisoners with AIDS, Hepatitis C, renal dialysis, and certain mental health disorders. Therefore, one has to wonder whether CCA's winning bid of \$42.00 per prisoner per day for housing Vermont's healthiest prisoners is really such a good deal.

The prisoner transfer began with 390 Vermont prisoners moved from state prisons

in Virginia to the Kentucky CCA prison in February 2004. The number of Vermont prisoners imprisoned by CCA is expected to grow at a rate of 20 prisoners per month thereafter. Vermont prisoners recently rebelled as well. *PLN* will report the details in an upcoming issue.

In Indiana, the 2003 decision to increase by several hundred the 650 Indiana prisoners imprisoned in Kentucky CCA prisons met with controversy in light of the fact that the Indiana prison system has over 1,800 new, unused beds,

"It's incomprehensible," said Indiana Representative Dennis Avery, D-Evansville. "To open up those prisons so the prisoners can stay in the state of Indiana — to me it makes sense. Otherwise, it is a waste of tax dollars for construction."

Furthermore, Avery questions the claims by private prison proponents that it is cheaper to incarcerate Indiana prisoners in the Kentucky prisons than to open and operate the already-built prison in Indiana. He claims that the prisoners selected for the Kentucky transfer are the "cream of the crop" whose costs of incarceration is less than the prison system average used in the calculations.

Indiana Governor Frank O'Bannon claims that the state budget left the prison system with no choice by providing no money to open and operate the Miami and New Castle prisons. However, State Budget Agency Deputy Director Mike Landwer says that internal transfer of prison funds is a common practice and could be done. However, the General Assembly made its intentions clear when it explicitly stated that the budget did not include money to increase bed capacity beyond what it was on June 30, 2003.

"They do not want to increase the number of beds being used," said Landwer. "If that means double-bunking, so be it, if that means continuing to use contract beds, that's the preferable approach."

"We wanted to make the Department of Corrections very much aware of the fact that we want a focus on community corrections and alternative sentences," said State Senator Vi Simpson, D-Ellettsville. "We learned a lesson from other states: You can't build yourself out of a corrections problem. For a while we took the advice of the DOC and built many more beds. But at this point in time, we're saying: 'We want to put pressure on you — the department — to do as much as you can to build community resources and alternative sentences and rehabilitate people so we don't have this continuous growth in prison population and continuous recidivism.'"

In many cases, voters refuse to approve bond issue to build more state prisons. Rather than release prisoners or change their sentencing policies when state prison capacity is reached, state officials have contracted the warehousing of their prisoners to the private for profit prison industry. Thus ensuring continued imprisonment growth.

### **Washington State Prisoners Rebel at Colorado CCA Prison**

Washington State legislators were faced with a dilemma in late 2003 — a huge budget deficit caused in part by a growing prison population. Apparently, they expected reductions in prisoner counts when they approved a so-called "half-time" law that actually had the effect of releasing 180 prisoners a few months early while lengthening sentences for thousands more. Instead, they were faced with hundreds of new prisoners being shoved into an already overcrowded state prison system and a "community corrections" program growing by thousands. They ignored the findings of the Legislature's nonpartisan research unit that, noting the low recidivism rate among most categories of sex offenders, recommended early release for the 70% of sex offenders in the low-recidivism categories. Instead they came up with the not-so-novel idea of contracting with CCA to incarcerate prisoners out-of-state.

The initial one-year contract, announced on July 1, 2004, called for 300 Washington prisoners to be sent to CCA's 1,222-bed. Crowley County Correctional Facility (CCCF) located 35 miles east of Pueblo in Olney Springs, Colorado, at a charge of \$56.85 per prisoner per day for up to 250 prisoners and a \$2.00 discount per prisoner per day for levels between 250 and 400 prisoners. Housing at CCCF consisted of 944 two-men cells; 144 four-man cells, 22 single-man cells in segregation, and 92 two-man cells in close custody. It is a medium-security prison.

Washington prisoners were not unfamiliar with CCCF. It had been built in 1998 for Dominion Management, Inc. and run by Correctional Services Corporation (CSC). On March 3, 1999, Washington State prisoners were sent to CCCF. Two days later they rioted. The cause of the riot, according to Colorado State prison officials, was poorly trained guards. *PLN* reported abuse of prisoners as the core cause of the riot. [*PLN*, June; 1999, p. 10].

The current riot had several causes. Washington prisoners were angered at having been shipped about 1,400 miles from

## Uprisings at CCA (Contd)

their homes only to find that the quality had been squeezed out of the food by penny pinching prison profiteers. Colorado prisoners were upset that the Washington contract called for prisoners who worked to be paid \$3.00 per day when Colorado prisoners received only 60 cents for a day's work. Prisoners were also perturbed by a lack of access to prison officials and the guards beating of a prisoner who refused to go to work earlier in the day.

Descriptions of the food are indeed abysmal. Prisoner Fredrick Morris, 47, said that he quit his job after three years as a cook due to the prison's poor food preparation. According to him, they were ordered to grind hot dogs for spaghetti sauces, use muffin mix in meatloaf, mix instant potatoes with pinto beans for burritos and spike the Jewish prisoners' soup with pork, Morris complained to CCA supervisors over three months before the riot, but nothing happened except that the food got worse.

CCA claims that it received no formal grievance from prisoners about food quality.

CCCF prisoner Robert Horn also witnessed the beating of the prisoner that sparked the protest. According to Horn, the prisoner was jerked to the ground after a struggle with guards taking him to a disciplinary cell for refusing to go to work. After he was subdued: "These other guards started pummeling him and kicking him," said Horn. "We'd just had enough, you know? To treat someone like an animal is not going to fly anymore."

The incident which led to the riot began as a peaceful protest when Washington prisoners refused to return to their cells from the recreation yard at about 7:30 p.m. on July 20, 2004. Guards ignored prisoners' requests to speak with the warden and apparently did little to quell the demonstration initially. Colorado prisoners then joined the demonstration, which swelled to include about 400 prisoners. The demonstration became an uprising within an hour when prisoners began to destroy property -by smashing furniture and setting fire to cellblocks and the greenhouse. They also used steel weights and dumbbells from the exercise yard to smash doors, windows and walls. Much water damage was caused by the fire suppression sprinkler system.

After 5½ hours, order was restored to the prison by over 150 Colorado state prison guards using tear gas and rubber bullets. Two of the prison's five housing unit were unin-

habitable, two others were damaged and the greenhouse was totally destroyed. Damage is expected to exceed \$1 million. Thirteen prisoners were injured — one of them seriously enough to require medical helicopter evacuation due to multiple stab wounds, another prisoner was shot in the foot with a rubber-coated bullet.

Prisoners reported that the guards ran at the first sign of trouble. "They ran," said Horn.

"They just abandoned the place."

"They just took off running, and they left the female employees behind," according to CCCF prisoner William Morris.

Of course, the CCCF guards didn't just abandon the female employees, they also abandoned the prisoners they were charged to protect -- with predictable results. As many as 15 prisoners are reported to have used the riot as cover to attack sex offenders and real or suspected snitches.

Prisoner Rudy Lujan, 32, who was beaten, stabbed, thrown off the second tier run, and assaulted with a microwave oven as he lay limp on the floor during the riot, called his sister after the first fires were set. He told her he feared for his life and asked her to call police.

"He said a riot was going on, and all the guards were so scared they went on the roof," said Lujan's sister. "The prisoners had already taken control. He was scared. He told me, 'If anything happens to me, tell everybody that I love them,'"

According to the Lujan family, Rudy was attacked because he refused gang members' attempts to recruit him. He is expected to survive.

Slow decision making and a lack of communication hampered the CCA response according to a Colorado Department of Corrections review of the incident. One senior official said that CCA failed to respond promptly and with sufficient force, ignored an attempt to negotiate, and failed to account for missing staff.

According to Colorado Director of Prisons, Nolin Renfrow, CCA officials were told to use chemical agents as soon as the demonstration became unruly to keep prisoners away from housing units and break up the riot. The CCA officials replied that they needed approval from their Nashville headquarters to deploy chemical agents. CCA denies any requirement for approval from headquarters and claims that "chemical agents had already been disbursed by facility staff at approximately 8:20 p.m.," That is earlier than Renfrow said he asked for the use of chemical agents.

During the ordeal, prison librarian Linda Lyons remained in the library along with 37 prisoners in her charge, forgotten by her CCA colleagues even though she had radioed them her location. At one point she ordered the prisoners to return to their cells, but they begged her not to force them out into the nascent riot. The riot came within one building of the library. However, Lyons maintained a calm atmosphere within the library throughout the ordeal.

Equally shocking is that CCCF officials knew that prisoner unrest was imminent.

"I was told about it," said one guard who asked not to be named. "They said it wasn't going to be more than two months. It wasn't even that long. I was told this by several different inmates." [Editor's Note: In 1999 Washington prisoners rebelled within four days of arriving at CCCF.]

According to Frank Smith, a Kansas criminal justice reform advocate, prisoners warned CCCF employees about a possible uprising a week before the riot. Smith says that the information was passed on to Colorado DOC officials, but "nothing was done." Smith began receiving information from CCCF staffers after he spoke on a Pueblo radio station and gave out his e-mail address. Smith's reports were later borne out by the official Colorado DOC report on the uprising, see sidebar for details.

"In fact, one gave me information [in May, 2004] that the situation was getting very tense in Olney Springs, that the staff was concerned that the Washington prisoners would get there, and that there were things like rebar lying around the place from construction that nobody bothered to pick up, nobody recognized as weapons."

According to Smith's CCCF sources, rioting prisoners freed prisoners in administrative segregation while prison employees "locked themselves in." However, it was never a prisoner-against-guard or attempted escape type of situation.

"It wasn't a thing of, 'We're going to capture all these guards and blow our way out of there.' But, they almost got out; they were two doors away from getting out," said Smith.

Smith further explained the riot as resulting from CCA's "terrible wages, terrible training, fraudulent record keeping, manufacturing of records (to meet standards), hiring people that were clearly inappropriate, gang-connected people, stuff like that." Smith opposes private prisons "because they treat prisoners and employees poorly, and use their profits to corrupt municipalities and state governments with campaign contributions or 'outright bribery.'"

"They lobby at arm's length for longer sentences. It's more market share and more market (for them)," said Smith. Smith isn't the only one questioning the wisdom of allowing private prisons. Colorado Representative Buffie McFayden., D-Pueblo West, has repeatedly requested information on the true costs for housing state prisoners in private prisons only to be rebuffed by CCA.

"It is consistently argued that these facilities are cheaper for the taxpayer, but safety should be the utmost concern when evaluating incarceration. This is the second riot at this prison since 1999, although there were different owners then. The question is - are we risking the safety of the public and is it really cheaper?" McFayden asked.

McFayden, whose district includes eight state-run prisons, called for a fiscal analysis of housing prisoners in private prisons and the cost of using Colorado state resources to quell private prison riots. She noted that the private prisons are located in rural areas where there is little local law enforcement to help out and that private prison employees may be poorly trained and equipped.

Colorado State Senator Abel D. Tapia, D-Pueblo was also concerned that the state not foot the bill for riot control at CCA prisons. However, officials of the Colorado Department of Corrections said that they would probably not send CCA a bill, explaining that this is never done when outside law enforcement is asked to help out in a prison riot and that they expect CCA to reciprocate in the event of a riot in a state prison.

Brian Dawe, Executive Director of Corrections USA, a nonprofit prison guard association, argued strongly against private prisons. He noted that they have a widespread climate of substandard training and wages that caused a huge turnover rate which in turn resulted in a lack of staff mentoring. He also said that they put shareholder profits ahead of prisoner and public safety.

"They say they're better. Yet, they won't open their books. If I was better, I wouldn't be afraid to open my books," said Dawe.

Dawe quoted statistics showing that private prisons are much more violent and have more escapes than state-run prisons. Furthermore, they have a negative effect on nearby land value and industries. The private prison industry's claim that land values increase when a private prison opens he says is laughable.

"When you're looking for a house, is one of the questions you ask, 'Is there a private prison nearby?'" asked Dawe.

Following the riot, 300 prisoners were moved to a newly-constructed housing unit at CCCF; 300 more were transferred to Colorado state prisons. Some Colorado prisoners believed to have taken part in the riot were immediately transferred to a CCA prison in Tutwiler, Mississippi. There they broke out of recreation cages and started a riot the next day.

### **Tutwiler Uprising aka CCCF Uprising - Part Two**

Colorado prisoners suspected of participation in the July 20th CCCF rebellion were transferred to the 1,400-man CCA-run Tallahatchie County Correctional Facility (TCCF) in Tutwiler, Mississippi. Other Colorado prisoners were sent to TCCF in May 2004 after they allegedly participated in six riots within three months in Colorado prisons. When a guard left them unsupervised on July 21, 2004, at 6:20 p.m., they broke the low-quality locks and chains on their recreational cages and rioted, setting fire to their mattresses, clothing and a portable toilet and using the cages' temporary locks to break 124 cell windows.

"They started with the mattresses, and then they started taking off their shirts and burning those, too," according to Terry Tyler, a Tutwiler fireman who arrived at the prison at 7:00 p.m. "Finally they got a hold of a Port-a-Potty, and burned that. They will burn good too, with all that plastic it's made out of."

The prison's in-house S.W.A.T. team put down the riot about thirty minutes after it started. They fired tear gas into the recreation area from a nearby rooftop. The Coahoma County sheriff's departments, Mississippi Highway Patrol, Tutwiler fire department, Tallahatchie County sheriff's and fire departments, and Mississippi State Penitentiary in Parchman sent assistance to the CCA prison. Thirteen prisoners were injured sufficiently to be sent to the hospital. Most of them suffered smoke inhalation and other minor injuries. At the time of the riot, the prison held 850 prisoners: 120 from Colorado, 690 from Hawaii and 40 from Tallahatchie County. Local governments will be paying for their own expenses in responding to the TCCF riot.

The only known indication of why the prisoners rioted is a letter by a Colorado prisoner to the *Clarksdale Press Register* mailed the week of the riot. In the letter, prisoner Harrell King alleged that more than 100 prisoners had been participating in a hunger strike for over five days to call attention to

the abuse of prisoners. He accused guards of beating prisoners, denying them access to toilets, and keeping them in 24-hour-a-day lockdown, claiming it had driven some prisoners to attempt suicide. TCCF officials declined comment on the letter or whether King was involved in the riot.

Local residents complained about a lack of notification that there was a problem in the prison. Relatives of prison workers complained that the prison, the largest employer in the county, refused to tell them about the fate of their loved ones who were not allowed to leave the prison or call out for hours after the riot had been quashed.

During the riot and ensuing lockdown/communications blackout, local residents had spread rumors about hostages, escapes, and fatalities.

TCCF Warden Jim Cooke promised to improve notification of residents in the event of future prison disturbances. The prison is also hiring 37 additional staff, 25 of them guards, and adding additional security cameras according to Cooke who said this was not a reaction to the riot, but rather to keep up with a growing prison population. Total staff with the increases will be 302, about 65% of them guards.

The prison is the most important "industry" in the town of 1,364 residents. CCA built the 1,400-bed prison at a cost of \$25 million and pays \$562,000 in annual property taxes. It also pays a local utility bill of \$484,000 annually, state and local taxes of \$225,000 each year, and \$3,000 per month (\$5,000 starting in 2005) to the Tallahatchie County Correctional Authority. The Mississippi Legislature passed a bill in the 2004 session which allowed the CCA prison to accept other out-of-state prisoners in an effort to save the TCCF jobs after Alabama withdrew its state prisoners in mid-March, 2004.

### **Arizona Prisoners Rebel At Oklahoma CCA Prison**

On May 14, 2004, more than 500 Arizona prisoners imprisoned at the 2,000-bed CCA Diamondback Correctional Facility (DCF) in Watonga, Oklahoma rioted. Arizona Department of Corrections Director Dora Schriro attributed the riot to "poor management of the population by the facility." She noted that there had been a conflict between two racial groups the day before the riot. This and other warning signs were ignored by the DCF administration. Furthermore, when the riot began, they failed to activate their emergency response or no-



## Uprisings at CCA (Contd)

tify the Arizona DOC's monitors. This made containment of the disturbance difficult. DCF was also understaffed, with CCA double-counting some of the staff to come up with sufficient numbers on paper.

Arizona has removed about 400 medium-security prisoners who did not take part in the riot back to Arizona. Schriro said that they would not move Arizona prisoners who rioted back to Arizona, but might move them to other out-of-state prisons in Texas.

"We don't want to reward inmates who have had bad behavior by letting them come back to Arizona because they didn't want to be there," said Arizona DOC spokesperson Cam Hunter.

A signal of the impending trouble came the day before the riot when Mexican nationals attacked a group of Mexican-Americans who were on their way to the infirmary. The riot began at 8:00 p.m. with fighting between groups of Mexican nationals and Mexican-Americans, but blacks and whites soon joined in. Prisoners used construction material left on the recreation yard, baseball bats, canned goods and boards both as weapons and tools to damage the prison by smashing windows and walls. Some prisoners broke out of their housing using metal shower rods as battering rams to defeat fire escape door locks and join the melee. Higher-security prisoners recreating on a different yard broke down a fence to join the fray. The section of the prison in which the riot took place housed 360 Arizona prisoners and 783 Hawaiians. 91 prisoners were injured in the riot. Two were evacuated by helicopter to Oklahoma University Medical Center in extremely critical condition. No staff was reported injured.

The Arizona Department of Corrections (DOC) criticized CCA for failing to notice warning signs such as the fight the day before the riot and the fact that prisoners had turned out on the recreation yard in greater-than-usual numbers, then segregated themselves by race and ethnic group. The signs were duly noted by guards who pointed them out to supervisors. The supervisors did nothing.

The Arizona DOC report on the incident further criticizes CCA officials for ignoring DOC advice at two critical junctures. The first was the day of the fight, when Arizona DOC monitors, noting longstanding volatility between Mexican nationals and Mexican-Americans, advised CCA to lock down the Mexican national unit. The recommendation was ignored. On the morning

of the riot, Arizona DOC officials again advised the partial lockdown and were again ignored. Once the rioting started, the report states that CCA never got its Incident Management Team operational and the Arizona monitoring team had to give the CCA staff directions. Despite the mismanagement at the prison, Arizona renewed its contract with CCA, expanding it to incarcerate up to 2,000 Arizona prisoners at CCA prisons out-of-state.

Other Arizona prisoners being held at a CCA prison in Texas have also rebelled. They went on a hunger strike to protest bad conditions and had several fights hoping that the misconduct would get them returned to Arizona.

### Other Private Prison SNAFUs

In addition to the riots, private prisons have had to contend with multiple escapes, lesser disturbances and allegations of abuse of prisoners recently. Three prisoners were injured in a jailhouse melee at the CCA-run Bay County Jail in Panama City, Florida in July, 2004. The fight was reportedly motivated by "racial prejudice" and involved six men attacking two men using fists and a padlock in a sock. One of the six also attacked a man who tried to stop the fight. Six prisoners were charged with felonies relating to the fight.

On June 7, 2004, a prisoner escaped from the CCA-run 960-bed Marion County Jail in Indianapolis, Indiana two days after being sentenced to 14 years in prison. The 26-year-old man was recaptured 15 hours later after having been turned in by an anonymous tip. He escaped by breaking into a manager's office on the jail's second floor and prying off a second-floor metal gate over a window then lowering himself to the ground.

A 26-year-old man serving a life sentence without parole for murder escaped from the CCA-run Hardeman County Correctional Facility in Whiteville, Tennessee on August 7, 2004. He was recaptured about nine miles from the prison a day and a half later.

A prisoner awaiting sentencing on drug charges escaped from the CCA prison in Florence, Arizona, on July 30, 2004, with the assistance of the U.S. Immigrations and Customs Enforcement Service. Sacramento Irbie Flores, 20, a Mexican citizen who pleaded guilty to possession of 37 pounds of cocaine and 10 pounds of methamphetamine, was scheduled to be sentenced on October 15th. Instead, he swapped identification cards with

Juan Carlos Damian-Burrola, a prisoner awaiting deportation for illegal entry into the United States, and was driven to the border in a government van.

Five federal prisoners escaped from a CSC-run prison near San Antonio, Texas, on August 6, 2004, after using wires cutters to make holes in two fences surrounding the exercise yard. The jailbreak was discovered by a private citizen who reported seeing the five men in jail garb crawling under the fences. Four of the men are Mexican citizens. The fifth is a high-ranking member of the Mexican Mafia gang. There have been four other jailbreaks involving 15 prisoners at the Frio County Jail during the last eight years. Only one of the 15 prisoners was recaptured.

Dustin Holley, a 22-year-old CCA guard at the CCA-run Tulsa Jail in Oklahoma was charged with possession of marijuana. The dope was found after a visual inspection of his car when he arrived at work on August 6, 2004, revealed a gun under the front seat. A subsequent voluntary search of the automobile turned up a small bag of pot.

On September 17, 2003, CCA guard Constance Edwards, 33, was arrested as she attempted to smuggle two balloons of heroin stuffed into her bra into the CCA-run Southern Nevada Women's Prison in North Las Vegas. According to CCA,

Edwards was paid between \$50 and \$200 per trip to smuggle drugs and other items given to her by a former prisoner to the prisoner's former cellmate. A few months earlier, a scandal had broken out at the prison after a prisoner became pregnant and named a guard as the father.

### The Lowdown: Private Prison Profiteers Care Only About Making Money

Clearly critics have a point when they note that private prison corporations seem willing to compromise prisoner and public safety to enhance their bottom lines.

Former Davidson County, Tennessee, Sheriff Hank Hillin said it well. "With me it's a moral issue. I don't think people should make money off the discomfort of others and locking them up." He also noted that "private prisons are inefficient, politically connected and bottom-line driven—often at the expense of good management." Hillin lost his reelection bid in 1995 to a private prison advocate.

A 2003 report by the Open Society Institute notes that CCA faces "numerous lawsuits and scandals" due to alleged systematic failure to provide adequate medical care, control violence, and prevent criminal

activity by employees in its prisons. It cites “self-defeating labor practices” such as low pay, understaffing, insufficient pension plans, and poor training that lead to a high turnover rate at CCA prisons. It also questions academic studies that have favorable conclusions about CCA’s record of safety and efficiency because they were funded by CCA.

Ken Kopczynski of Private Corrections Institute, Inc., a group opposing private prisons, notes that “almost half of the employees in the facility” where the murder of a female prisoner in Tennessee took place “had no experience whatsoever.” Two of the guards were working double shifts due to staff shortages.

Let’s review: private companies take a selection of very healthy and usually well-behaved prisoners, incarcerate them in prisons far from their home states, and understaffed the prisons with poorly-paid, ill-trained, inexperienced guards then tout

how much more efficient they are than state prisons that have to deal with prisoners in all custody class and levels of health. The private prisons often cut additional corners on food, medical services, and programs. They become violent places where ill-treated prisoners react with foreseeable violence to the abusive and stressful environment. The result is debilitations, not rehabilitation. After all, the prisoners who survive their private prison ordeals will eventually be returned to the general public—complete with physical and psychological scars. Hopefully the public will soon understand that prisons privatization is an idea whose time has gone. Until the 1920’s many prisons and jails were privately operated. The practice ceased after widespread abuse and corruption became public knowledge and reform ensued. That remained the situation until 1984 when CCA was founded. How often must history repeat itself before its lessons are clear? ■

Sources: *Nashville Tennessean*, [www.correctionscorp.com](http://www.correctionscorp.com), *Greenly Tribune*, *Jackson Sun*, *San Antonio Express-News*, *Houston Chronicle*, *Indianapolis Star*, [www.tulsaworld.com](http://www.tulsaworld.com), *Denver Post*, [www.claironledger.com](http://www.claironledger.com), [www.zwire.com](http://www.zwire.com), [www.prup.com](http://www.prup.com), *Arizona Daily Star*, *Arizona Republic*, *Arizona DOC Corrective Action Plan-Diamondback Correctional Facility (6-22-Oh)*, [www.newsok.com](http://www.newsok.com), [www.dallasnews.com](http://www.dallasnews.com), *Panama City News Herald*, *The Oklahoman*, *Seattle Times*, *Pueblo Chieftain*, *Rock Mountain News*, [www.kxly.com](http://www.kxly.com), *Colorado DOC Press Release*, AP, *New York Times*, *Indianapolis Courier-Journal*, *Burlington Free Press*, *Washington Post*, *CCA Press Releases*, *Chattanooga Times/Chattanooga Free Press*, *Puget Sound Business Journal*, [www.csindy.com](http://www.csindy.com), *Seattle Post-Intelligencer*, *Dallas Morning News*, *Washington DOC Confidential Documents on CCCF Transfers*.

## Colorado DOC Report: CCA At Fault for Crowley Uprising

by Matthew T. Clarke

On October 12, 2004, the Colorado Department of Corrections (DOC) issued an extensive, 179-page After Action Report on the July 20, 2004, riot at the Crowley County Correctional Facility (CCCF) which is run by Corrections Corporation of America (CCA). The report places most of the blame on CCA, citing understaffing, inexperienced staff, lack of staff training, and a delayed response to the initial prisoner disturbance as the main reasons the relatively minor disturbance grew into a major riot.

The most important recommendations in the report for CCCF are improved emergency plans and increased emergency procedures training, clarification of lines of authority and command structure, additional authority for local administrators, improving relationships with local law enforcement, renovating cells using more resilient construction materials, improving staffing, and reporting staff shortages to the DOC. Also recommended was more private prison monitors and giving the DOC the ability to make private prisons comply with Colorado DOC standards.

There were only 33 guards at the prison the day of the riot. This represents only one guard for every 33 of the prison’s 1,122 prisoners and contrasts strongly with the DOC’s ratio of one guard for every five prisoners. But it is also key to profit maximization for private, for profit companies like CCA, and thus unlikely to change.

The staff that was at the prison had no emergency procedures to follow as no emergency response plan had been developed. CCCF suffered from high turnover rates and several of the guards there had only been on the job a couple of days. Emergency drills were rare and very few staff members were part of an emergency response team.

The report depicts a riot that need not have been. Guards were aware of prisoners’ grievances and had reported them and the growing unrest to the prison’s administration. Nothing was done. The DOC’s Private Prison Monitors (PPM) had informed CCA of the problems that led to the prisoner’s grievances and lack of emergency preparedness at CCCF. Nothing was done. Prisoners had also reported their grievances to the administration using the prison’s grievance system. Nothing was done. At 7:30 p.m. on July 20, 2004, prisoners, angered by a perceived excessive use of force, assembled on the recreation yard and refused to return to their cells, demanding to speak to the warden about their grievances. Nothing was done. When the disturbance progressed to violence, DOC monitors told CCA staff to deploy tear gas to drive the prisoners from the yard. Nothing was done. Within an hour, a full-scale riot was in progress.

The prisoners’ grievances included excessive use of force by staff, food that was lacking in quantity and quality and did not follow DOC’s mandatory menu, a lack of

religious or medical meals, problems with the pricing and availability of items at the prison’s canteen, problems getting money into prisoner’s canteen accounts, excessive telephone charges, problems receiving medical treatment and medication, a lack of response to prisoner’s written grievances, and a disparity in the treatment of prisoners from Colorado and those from Washington (who were paid much more for the same work and allowed more property). The PPM had reported all of these problems independently during the six months prior to the riot. The PPM also reported problems in tracking prison gang members, lack of emergency plans, poor Emergency Response Team and Escape Team staffing and training, and paperwork deficiencies. CCCF failed to address or correct those deficiencies. [Editor’s Note: In a sense of déjà vu all over again, Washington prisoners had rioted at the same prison, for the same reasons in 1999 when it was run by the Correctional Services Corporation, another for profit prison company. See *PLN*, Jun. 1999. Apparently little has changed in the interim.]

On May 15, 2004, CCCF supervisory staff received a written report from a guard who reported a Wyoming prisoner stating that a riot was planned for July 5, 2004, when the second group of prisoners from Washington were scheduled to arrive. A second guard’s report dated July 5, 2004, revealed an informant’s communication that a group

## CCA At Fault (Contd)

of Washington prisoners planned to take a guard hostage. An undated third report indicated a guard overhearing prisoners taking about "getting even" and "fighting it out" in Unit C.

When the disturbance began, with prisoners demanding to talk to the warden, a Captain denied their request. As the prisoners became unruly, guards retreated from the recreation yard, allowing the cycle of violence to expand unchecked. As the unsupervised prisoners became bolder, guards abandoned their cellblock control pickets. When told by the PPM to use gas to disperse the prisoners, CCCF Warden Brent Crouse, who has since been reassigned by CCA, said he had to wait for permission from CCA corporate headquarters. This delayed the beginning of riot countermeasures until around 9:00 p.m., 90 minutes after the riot started.

The expansion of the riot from the recreation yard began when prisoners decided to free from administrative segregation the prisoner who had earlier been the perceived victim of a guard's excessive use of force. The prisoners used easily-available weight bars to smash walls and doors in the cinderblock cellblocks. Wooden door cells were set on fire. The ease of destruction of the flimsily-built private prison fueled the prisoners to greater vandalistic urges. They broke through to control pickets and destroyed the electronic control panels. They gained access to the rooftops through the guard's emergency exit hatches that had not been secured after the guards fled to the rooftops. On the rooftops, they destroyed air

handling equipment. In the cellblocks, they destroyed furnishings and flooded the areas. On the yard, they made bonfires of combustible items.


Prisoners broke into case managers' files which were located in the cell blocks. They sought to identify snitches and sex offenders to target them for beatings. One prisoner was beat and stabbed nearly to death.

The response to the nascent riot was abysmal. As soon as the prisoners on the recreation yard became the least bit unruly, the guards were ordered to retreat, leaving the prisoners to their own devices. Their own devices soon included breaking into cellblocks where the guards were again ordered to retreat, abandoning their posts and control pickets. According to the report, CCA personnel never took the initiative at quelling the disturbance. Instead, the CCCF Special Operations Response Team (SORT) were ordered to wait hours for the arrival of Colorado DOC SORT teams. Even when DOC SORT arrived, they were delayed by indecision among CCCF administrators. Finally, Colorado DOC officials went from advising to de facto operational control, beginning the nightlong process of restoring government control to a prison in full riot.

After control was restored, for several hours CCCF medical personnel failed to assist DOC medical personnel in examining and treating prisoners. And medical treatment was needed. According to the report, those seeking to quell the riot expended 120 rounds of 00 buckshot, 143 rounds of 7½ gauge birdshot, 50 shotgun slugs, 336 rounds of 12 gauge high-velocity rubber pellets, six 12 gauge bean bag rounds, ten 37 mm bean bag rounds, twenty-two 60 caliber stinger rounds,

4 CS [military grade tear gas] Triple Chasers, 2 CS grenades, 2 CN [military weapons-grade gas] grenades, 2 smoke grenades, 2 liters of OC [pepper gas concentrate] for Spray Jet, 11 MK-4 10% pepper spray canisters, 12 MK-4 5.5% pepper foggers, and 3,100 flex cuffs. Many prisoners complained of injuries caused by the riot-suppression weapons.

The prison was still locked down when the report was presented to Colorado Governor Bill Owens. The State of Colorado had presented CCA with a \$385,624.95 bill for riot-suppression-related reimbursable expenses. Even if that is paid, Colorado taxpayers will end up footing a bill for the four CCA private prisons in that state. In addition to paying the current private prison monitor \$3,650 a month, Governor Owens asked that the DOC's budget be increased by about \$2.1 million, largely to hire five new Inspector General's Office private prison inspectors and two more private prison monitors. The CCCF riot is being cited as the reason these additional employees are needed.

CCCF's sordid history shows an additional cost of private prisons as a former head of security at CCCF was terminated by Dominion Correctional Services for alleged sexual misconduct when Dominion ran CCCF. Another former Dominion CCCF security chief, Ronald McCall, has been accused of sexual misconduct with employees in court. This shows that poorly trained personnel with little oversight, as is common in the private prison industry, can cause other harm as well as prison riots. The Colorado DOC report is available at [www.doc.state.co.us](http://www.doc.state.co.us). 

Sources: *DOC After Action Report*, *Denver Chieftan*, *Chyenne Star-Tribune*.

## City Settles In Death of Prisoner at CCA-Operated Tulsa Jail

The City of Tulsa, Oklahoma, has agreed to settle its part in a federal lawsuit over the death of a Native American prisoner in the Tulsa Jail. According to the November 7, 2003 settlement, the city


will pay the man's family \$200,000 and improve its police training program.

Shane Spencer, 27, was arrested by Tulsa police on the evening of October 24, 2001. Sometime after midnight a surveillance camera recorded police as they dragged the inebriated man into the jail and deposited his limp body face-down on the lobby floor. Left unattended by jail staff, he soon died. The troubled jail is operated on contract by the for profit Corrections Corporation of America.

As part of the settlement, police will be trained in how to recognize alcohol poisoning, and how to restrain intoxicated prisoners

without suffocating them, said attorney Chris Davis, who represented the family.

"This is the result that we wanted," he said. "This case was never about the money. It was about making sure that what happened to Shane Spencer will never happen to anybody else."

Corrections Corporation of America, which operates the jail, was not part the settlement and is still a defendant in the lawsuit of. See: *Burrage v. Corrections Corporation of America*, USDC ND OK, Case No.03-CV-126. 

Source: *Tulsa World*

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# Kansas Supreme Court Upholds Gift Subscription Ban

The Kansas Supreme Court ruled that the Kansas Department of Corrections' (KDOC) rule IMPP 11-101, which prohibits prisoners from receiving gift subscriptions to magazines and newspapers, does not violate the prisoners' constitutional rights under the First Amendment.

Reversing the Kansas Court of Appeals' decision *contra* in *Rice v. Kansas*, 76 P.3d 1048 (Kan. App. 2003) [which had reversed the District Court's ruling below that upheld the ban], the Supreme Court applied the familiar four-part test of *Turner v. Safley*, 482 U.S. 78 (1987) to determine that KDOC had a legitimate penological interest in banning gift subscriptions and that the complaining prisoners, while inconvenienced and constrained in this regard, were not being denied access to the media.

But as reported extensively earlier (see: *PLN*, April 2004, p.6), at the same time the Kansas state appellate court disapproved the ban, the United States District Court in an independent action (*Zimmerman v. Simmons*, 260 F.Supp.2d 1077 (D. Kans. 2003)) upheld the ban. Since the latter case focused on a ban of *Prison Legal News*, *PLN* took an appeal (sub. nom. *PLN v. Simmons*) to the Tenth Circuit U.S. Court of Appeals. That court heard oral arguments on October 6, 2004. On December 22, 2004, the Tenth Circuit reversed *Zimmerman* and remanded that case for trial finding the Kansas supreme court's decision in this case was not dispositive. *PLN* will report the Tenth circuit decision in next month's issue in detail.

KDOC's premise is that it wants to reward good behavior. To that end, IMPP 11-101 permits the best-behaved prisoners to order subscriptions from their prison trust accounts in an amount not to exceed \$30 per month (some exceptions may be applied for on a quarterly basis). If prisoners may instead have unlimited subscriptions gifted to them from the outside, i.e., regardless of their behavior record, KDOC argues that their behavioral modification efforts will be thwarted.

Importantly, the ban on gift subscriptions does not limit media content it only invokes a monetary cap. The two biggest concerns of KDOC were (1) that one prisoner could "pressure" another to have gift subscriptions sent in [one such example is on the record] and (2) that prisoners who owe fines, child support, legal mail costs, etc. could avoid having incoming funds diverted to those lawful obligations. Even an indigent prisoner may still sign up for the prison li-

brary to read magazines, KDOC argued, and thus have media access consistent with the First Amendment.

In evaluating *Turner's* "rational relationship to a legitimate and content neutral governmental interest," the court was persuaded that KDOC's mission to modify prisoners' behavior was such a legitimate interest flatly disagreeing with the Court of Appeals holding that "it is not rational to eliminate all access to all gift periodicals for all inmates, be they model prisoners or habitual disciplinary rules violators."

The Kansas Supreme Court approved KDOC's graduated system of behavioral rewards, giving deference to prison administrators' "expertise" in managing their task. It was not persuaded by *Crofton v. Roe*, 170 F.3d 957 (9th Cir. 1999) [Washington state ban on gift subscriptions of *PLN* violated First Amendment, under *Turner* analysis] because in that case, the state failed to establish a sufficient factual record to buttress its position. Instead, the Kansas Supreme Court followed the then recently decided *Zimmerman* federal ruling that

IMPP 11-101 was constitutionally content-neutral and therefore acceptable.

Finally, the Kansas Supreme Court held that KDOC's policy had reasonable built-in alternatives to gifted subscriptions, with adequate provisions to petition the warden for exceptions.

The bottom line was that obedient KDOC prisoners may order a limited dollar amount of subscriptions and publications of their own choice consistent with First Amendment protections and that KDOC's behavior-incentive program was rationally related to a legitimate governmental interest. See: *Rice v. Kansas*, 278 Kan. 309; 95 P.3d 994 (Kansas 2004). [Editor's Note: As this issue of *PLN* goes to press, the Tenth circuit has held publishers are entitled to due process notice when their publications are censored and the Kansas DOC's security claims for the ban on gift subscriptions requires a trial to resolve. That case was brought by *PLN* and is reported as *Jaclovich v. Simmons*, Tenth Circuit case Nos. 03-3227, 03-3229, 03-3230. We will report the details in next month's *PLN*.]



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## Non-Contact Visits for Pennsylvania Sex Offenders Upheld

The Pennsylvania Court of Appeals held that a convicted sex offender confined at the State Correctional Institution at Waymart (SCI-Waymart) did not have a right to contact visits with minor children.

Jeffrey Garber, a prisoner of the Pennsylvania Department of Corrections (PDOC) filed a Petition for Review, challenging the constitutionality of PDOC Policy DC-ADM-812, which prohibits contact visits between convicted sex offenders and minor children. Under the Policy, Garber is permitted only non-contact visits with minors, including family members.

The court agreed with the PDOC that Garber's petition should be treated as a man-


damus action, thereby imposing upon him the "threshold burden" of establishing a clear legal right to relief.

The court ultimately concluded that "[b]ecause Garber cannot show a clear legal right to the relief requested, we agree with the Department that Garber has failed to state a cause of action." In doing so, the court explained that the relevant "question . . . is whether the Department is obligated to provide sex offenders contact visitation with minor children."

The court rejected Garber's argument that the Court should follow the reasonable relationship test of *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987), concluding that Garber failed "to establish the threshold issue of whether contact visitation with minors is a constitutional right." The court relied upon the recent Supreme Court decision in *Overton v. Bazetta*, 539 U.S. 126, 123 S.Ct. 2162 (2003) in support of its conclusion "that promoting internal security and protecting children were legitimate goals that justified limiting the visitation rights of high-security risk

inmates[.]" and the prisoner has the burden of proving that a prison regulation is unconstitutional.

"[I]t is Garber's burden to show that the regulation is unconstitutional, and he has failed to meet this burden," the court concluded. "The Department's regulations limiting the visitation rights of sex offenders are rationally related to legitimate, and obvious, penological interests under *Overton* and *Turner*." See: *Garber v. Pennsylvania Department of Corrections Secretary*, 851 A.2d 222 (Pa. App. Ct. 2004).

It should be noted that both *Overton* and *Garber* involved non-contact visitation rather than an outright denial of visitation. A complete ban on visitation, especially for prisoners serving long sentences which would prohibit visitation of any kind with minor family members for an extended period of time would probably create a legitimate First Amendment claim that is distinguishable from *Overton* and *Garber*. Under *Turner*, a reasonable alternative to a complete ban on visitation would be non-contact visitation as in the cases of *Overton* and *Garber*. 

The U.S. Supreme Court's June 2004 decision in *Blakely v. Washington* affecting federal and state sentencing enhancements has been described as "the most significant criminal case of our time." To receive a copy of *Blakely* (32 pgs.), send \$3 (stamps OK) to: PLN, 2400 NW 80th St. #148, Seattle, WA 98117.

# Total Confinement: Madness and Reason in the Maximum Security Prison

by Lorna A. Rhodes, University of California Press, 2004 (329 pages, \$19.95).

*Reviewed by David C. Fathi*

Like chain gangs and boot camps before them, “supermax” prisons were a raging fad in the 1990s—yet another round in the perpetual “tough on crime” political bidding war. By one count, more than thirty states were operating a “supermax” facility or unit by 1999. Some were freestanding prisons; the state of Washington, however, built a number of smaller “intensive management units” (IMUs) within larger facilities.

Lorna Rhodes, a professor of anthropology at the University of Washington, conducted a three-year study of Washington’s IMUs as part of the University of Washington/Department of Corrections Correctional Mental Health Collaboration. She attended meetings, classes, hearings, and other prison events, and conducted extensive interviews with prisoners and staff.

Rhodes’ description of these units will not be news to those who follow prison issues. Through the work of psychiatrists like Terry Kupers and Stuart Grassian, reports from human rights organizations, and accounts that have emerged from litigation, the extreme sensory deprivation and social isolation that characterize supermax confinement have become depressingly familiar. But for a more general readership, Rhodes’ account of the shattering effects of supermax confinement is jarring:

“Standing next to the control booth with the two prison workers who were escorting me, at first I barely noticed the man exercising in a small indoor yard in front of the tiers. The prisoner . . . was facing the wall and swinging his arms out in gradually widening circles, an exercise that made sense given the lack of any exercise equipment in the little space. But gradually we became aware that he was calmly and rhythmically swinging one arm closer and closer to the wall, a bloodstain spreading as his hand hit the concrete.”

But Rhodes is less interested in describing day-to-day conditions than in analyzing the ideology that underlies supermax confinement. This ideology, which Rhodes calls “punitive individualism,” posits that prisoners are rational actors who decide whether to violate the criminal law or prison rules based on the expected consequences of their actions. Under this theory, the environmen-

tal causes of lawbreaking are irrelevant and rehabilitation a waste of time; the only sensible policy is to increase the certainty and severity of the sanctions for misbehavior. This ideology supports the existence of the supermax as an ever-present threat for prisoners at other facilities who violate the rules.

Rhodes also describes the near-impossible position of the prisoner trying to “earn” his way out of supermax confinement. In theory, sustained good behavior can earn more privileges, and ultimately transfer from the supermax to a less-restrictive setting. But it is unclear how a prisoner can demonstrate “good behavior” when locked in a windowless concrete box virtually 24 hours a day. Indeed, a supermax prisoner’s compliant behavior is often seen less as a sign of his progress than as validation for the extremely restrictive regime under which he is confined. Finally, for prisoners who are unlucky enough to be labeled “psychopathic” or “manipulative,” even the most positive behavior is interpreted as just more evidence of their devious and dangerous nature.

Rhodes’ final chapter describes recent efforts to reform one of the IMUs. After a period of upheaval characterized by frequent assaults and uses of force, a new administrator took charge of the unit and instituted a number of changes. These included improving physical conditions (including a vigorous effort to remove racist graffiti), weekly “tier walks” in which

top administrators meet with prisoners and attempt to address problems, and limited opportunities for prisoners to take classes together. Staff received additional training; some were asked to leave. After these changes were implemented, violence and uses of force declined, and many prisoners had “graduated” from the IMU and were living in general population. Rhodes is cautiously positive about these changes, while recognizing their limits, as well as the paradox inherent in creating a kinder, gentler supermax.

There are unmistakable signs that the bloom is off the supermax experiment. Virginia and Michigan have converted supermaxes to regular maximum-security prisons; Maryland has announced plans to demolish its supermax less than fifteen years after its construction. As states face record budget deficits, supermax facilities, which are far more expensive to build and operate than conventional prisons, seem to have lost much of their appeal. Nevertheless, thousands of prisoners remain confined in supermax facilities throughout the United States. Rhodes’ book is a useful theoretical analysis of these places where, in the words of historian Michael Ignatieff, “needs are met, but souls are dishonored.”

*[David C. Fathi is Senior Staff Counsel at the ACLU National Prison Project in Washington, DC. He has successfully represented PLN in censorship litigation against the Nevada Department of Corrections.]*

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# Gang Validation in Retaliation for Filing Grievances Is Actionable

by Marvin Mentor

The Ninth Circuit U.S. Court of Appeals held that a state prisoner stated a valid claim under the First Amendment when he claimed that in retaliation for his having filed several grievances, prison officials revisited previously rejected gang affiliation insinuations and now branded him a gang member.

California prisoner Vincent Bruce had been investigated by the prison Institutional Gang Investigator (IGI) in 1995 and again in 1996 for alleged association with the Black Guerilla Family (BGF), but the IGI found insufficient evidence to validate this. However, in 1998, after coming out of administrative segregation for battery, he was told he was now being gang validated upon orders from "higher-ups," expressly because he had filed numerous grievances. But the "new" validation was based only upon the old evidence that had been repeatedly found insufficient. As a validated BGF associate, he was given an indeterminate term at the Pelican Bay State Prison (supermax) Security Housing Unit.

Bruce's 42 U.S.C. § 1983 suit against prison officials was decided against him in U.S. District Court (N.D. Cal.) on summary judgment. On appeal, he claimed denial of due process because of lack of evidence, and denial of equal protection on grounds of being treated disparately. He also claimed his "new" gang determination was motivated by animus for his having filed grievances.

The Ninth Circuit rejected his due process claim, noting there was "some" evidence to support the IGI finding, and that under *Superintendent v. Hill*, 472 U.S. 445 (1985), reweighing of that evidence was beyond the province of a reviewing court. The court also found he had received all procedural process due him under *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986). His equal protection claim was rejected because similarly situated persons are not entitled to absolute equality, and he could demonstrate no substantial difference from the process afforded others.

However, the court applied its precedent in *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985) and *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995) as to retaliatory motives, and *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997) as to the "chilling effect" against filing grievances, to determine that the district court should have permitted the case to go forward because "there were genuine issues of material fact relating to prison officials' intent in investigating and ultimately validating him as a [BGF] member." Importantly, the court rejected defendants' qualified immunity claim (relying on *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995)) because such retaliatory abuse transgresses "clearly established law" in the Ninth Circuit under *Hines*. Stating that "there must be avenues for prisoners to redress the wrongs or inadequacies of their state jailors," the court reversed and remanded for consideration of Bruce's retaliation claim. See: *Bruce v. Ylst*, 351 F.3d 1283 (Cir. 2003). ■

## Section 1983 May Be Used To Challenge Disciplinary Hearings Not Affecting Total Length of Confinement

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals joined four other circuits in holding that when challenging the procedure or result of a prison disciplinary hearing, one may utilize 42 U.S.C. § 1983 if the relief sought would not necessarily affect the total length of one's confinement. It is not necessary in such a case to first obtain a "favorable termination" of the hear-

ing result by winning a writ of habeas corpus.

Luis Ramirez, a California prisoner at Corcoran State Prison, was found guilty in a September, 1997 prison disciplinary hearing of battery on his cellmate with a weapon, resulting in serious bodily injury — for which he was sentenced to 24 months in administrative segregation. At his hearing, he was denied his request to call his cellmate and attending medical staff as witnesses. His two administrative appeals were denied.

Ramirez sued Warden George Galaza, Appeals Chief Linda Melching and other prison officials in U.S. District Court (E.D. CA) under § 1983 for damages, declaratory relief and injunctive relief, alleging that the procedures used violated his constitutional rights of due process and equal protection. The magistrate judge dismissed the complaint because the procedural defects complained of would, if proven, necessarily imply the invalidity of his disciplinary sentence — a remedy available only in habeas corpus [citing *Heck v. Humphrey*, 512 U.S. 477 (1994) and *Edwards v. Balisok*,

520 U.S. 641 (1997)]. Separately, the magistrate held that as to Ramirez' administrative appeals of the hearing, actions of prison officials in reviewing administrative appeals could not serve as a basis for liability under § 1983. In May, 2000 the district court agreed and dismissed the complaint.

On appeal, the Ninth Circuit conducted a comprehensive analysis of the legal history on this question, reviewing *Preiser v. Rodriguez*, 411 U.S. 475 (1973) [sole remedy for earlier release lies in habeas corpus], *Heck v. Humphrey*, supra [to win damages for unconstitutional confinement resulting from a conviction, one must first gain "favorable termination" of the question in habeas corpus], and *Edwards v. Balisok*, supra [*Heck* principles expanded to include a disciplinary sanction that affected one's total length of confinement]. The court joined the Third Circuit (*Leamer v. Fauver*, 288 F.3d 532 (3rd Cir. 2002); *Torres v. Fauver*, 292 F.3d 141 (3rd Cir. 2002)), the D.C. Circuit (*Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997)), the Second Circuit (*Jenkins v. Haubert*, 179 F.3d 19 (2nd Cir. 1999)), and

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the Seventh Circuit (*DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000)) in holding “[w]here the prison’s alleged constitutional error does not increase the prisoner’s total period of confinement, a successful § 1983 action would not necessarily result in an earlier release from incarceration, and hence, does not intrude upon the “heart” of habeas jurisdiction. In such cases, the favorable termination rule of *Heck* and *Edwards* does not apply.”

The court next clarified its earlier decisions addressing the availability of habeas corpus to challenge the conditions of confinement. It distinguished *Bostic v. Carlson*, 884 F.2d 1267 (9th Cir. 1989) [habeas forum required because of the likelihood of accelerating prisoner’s release if disciplinary record were expunged] and *Butterfield v. Bail*, 120 F.3d 1023 (9th Cir. 1997) [successful challenge to parole denial procedures would necessarily implicate the invalidity of the denial], while it reaffirmed *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997) [§ 1983 ruling invalidating the delay of a parole hearing caused by administrative reclassification as a sex offender only accelerated the prisoner’s “ticket to get in the door of the parole board” — it did not shorten the sentence or guarantee parole].

Turning to Ramirez’ constitutional complaints, the court found that although prisoners have no constitutional right to a prison grievance committee, their rights to due process might be protected under *Sandin v. Connor*, 515 U.S. 472 (1995). Ramirez alleged that the segregation unit was violent and overcrowded, that the isolation severed ties to his family and that he was made a patient of psychiatric programs. The court was particularly concerned with the two year administrative segregation term as running afoul of *Sandin*’s “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,” citing *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996). For these reasons, the court reversed and remanded for a determination of whether Ramirez’ treatment violated *Sandin*’s due process factors.

Finally, the Ninth Circuit observed that the district court’s dismissal with prejudice of Ramirez’ equal protection claim had been grounded in the now overturned requirement to first invalidate his disciplinary determination in a habeas corpus action. Accordingly, it reversed the dismissal and permitted Ramirez to cure any factual allegation omissions by amending his complaint. See: *Ramirez v. Galaza*, 334 F.3d 850 (9th Cir. 2003).



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# Illinois ETS Injury Claim Allowed To Proceed; Out-of-State Legal Materials Ordered Provided

by John K Dannenberg

Resolving two distinct complaints of an Illinois state prisoner, the Seventh Circuit U.S. Court of Appeals ruled that (1) where injury from ETS [second-hand cigarette smoke] was alleged at one prison, transfer to another prison with the same problem did not provide the state with a mootness defense, and (2) for so long as an Illinois prisoner's classification status and privilege restrictions remained elevated due to an old, un-prosecuted Maryland indictment, Illinois was constitutionally obligated to provide the prisoner with Maryland legal materials to accommodate his access to Maryland courts to attack that indictment.

Illinois state prisoner Donald Lehn is an unusually qualified prisoner to bring a 42 U.S.C. § 1983 action claiming Eighth Amendment injury from exposure to second-hand smoke. Holding a Ph.D. in biochemistry,

Lehn did research in carcinogenic materials at the National Cancer Institute, affiliated with the National Institutes of Health in Bethesda, MD.

In his four years at the Big Muddy River Correctional Center (BMR), he was repeatedly denied his requests for a non-smoking cellmate. Alleging ETS injury of headaches and nausea, and after filing unsuccessful grievances, he finally sued in U.S. District Court (S.D. Ill.). As a defensive response, Illinois transferred him to Graham Correctional Center then claimed his suit was moot. The court agreed and dismissed the claim.

Concurrently, Lehn raised an unrelated claim of denial of access to the courts. He claimed a need for access to a Maryland law library to attack a now eight-year-old unprosecuted Maryland state indictment. The district court dismissed this claim as well, opining that

he had no denial-of-access-to-the-courts claim in any event, unless and until he could show "injury" sufficient to meet the test of *Lewis v. Casey*, 518 U.S. 343 (1996).

On appeal, a divided Seventh Circuit U.S. Court of Appeals held first that Lehn was conditionally entitled to Maryland legal materials while in Illinois. First, the court resolved whether Illinois or Maryland was the proper defendant here. While the court opined that his complaint would be with Maryland if he were attacking a conviction or pending a Maryland trial, in the case at bar, Lehn presented a novel question. Since his *Lewis* "injury" was the act of Illinois to elevate his classification score and hence limit his privileges and prison job opportunities solely because of the open Maryland indictment, he could properly demand that Illinois give him the where-withal to attack the Maryland indictment for the purpose of mitigating his aggravated "conditions of confinement."

Alternatively, the court ruled, Illinois could moot this

problem by simply abating all the extra classification restrictions. In so ruling, the Seventh Circuit rejected Illinois's claims that the case was not ripe because Maryland was not actively pursuing prosecution. It also rejected Illinois' argument that because Lehn's claims had been screened out in a PLRA 28 U.S.C. § 1915(a) preliminary screening, an access-to-the-courts claim could not survive because Lehn had had enough access to file his claim. The court held that this circular argument was "go[ing] too far."

As to the ETS claim, the Seventh Circuit rejected Illinois' ripeness argument that was grounded in Lehn's transfer. The court observed that Lehn was prescient enough to have named both the BMR warden and the Director of the Illinois Department of Corrections; hence, his claims had statewide reach.

Illinois' attack on Lehn's standing failed as well, finding Lehn met (U.S. Const.) Article III's requirements of alleging injury-in-fact, traceability to actions of the defendant and likelihood that a favorable decision would provide redress to the injury. The court found Lehn's reliance on *Helling v. McKinney*, 509 U.S. 25 (1993) [future injuries form possible Eighth Amendment basis for continued ETS exposure] persuasive.

Dissenting only as to the access-to-the-courts issue, Circuit Judge Evans disagreed that restrictions on "conditions of confinement" in Illinois could rest on Illinois' failure to provide Lehn with Maryland legal material. Evans opined that court access rights attach only when he is required to appear in a Maryland courtroom. Evans also questioned why Lehn had not simply filed a demand for speedy trial under the Interstate Agreement on Detainers, wherein Maryland would have to extradite and try Lehn within 180 days, and provide him with an attorney. See: *Lehn v. Holmes*, 364 F.3d 862 (7th Cir. 2004).

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# Public and Press Have First Amendment Right to Access Court Docket Sheets

by David M. Reutter

The Second Circuit Court of Appeals has held that the public and press enjoy a qualified First Amendment right of access to court docket sheets. This case was filed by the *Hartford Courant* and *The Connecticut Law Tribune*, challenging the Connecticut state court system's practice of sealing cases and hiding their existence from the public and press. *PLN* previously reported the filing of this action. [*PLN*, December 2003, pg. 1].

Between 2002 and 2003, the newspapers learned that, over the prior 38 years, the Connecticut state court system had adjudicated what appeared to be thousands of cases where sealing procedures prohibited court personnel from allowing the public to access the files in those proceedings and, in certain comparatively rare instances, from acknowledging the existence of these case altogether.

Some of the cases were sealed pursuant to a variety of statutory authorizations, including those directed at protecting juvenile offenders or involving bar grievance procedures. On February 9, 2003, *The Hartford Courant* published an account that insinuated that judges selectively sealed divorce, paternity, and other cases involving fellow judges, celebrities and wealthy CEOs at the behest of these prominent individuals.

The Connecticut General Assembly began an investigation, which revealed the practice began in the 1970's as an unwritten rule when there were 16 or 20 very powerful Superior Court Judges. By the end of 2003 Assembly session, the Connecticut Senate had failed to pass legislation that would have required that "the names of the parties and the docket number in any civil or criminal matter in Supreme Court ... not be kept confidential in any future or pending cases."

The Connecticut judiciary itself promulgated new "Practice Book" rules that put the failed legislation into effect and provided notice to the public of potential closure. That rule did not, however, apply retroactively. This case concerned the system previously in place. The district court issued an order dismissing the case, holding the defendants lacked the power to provide the relief sought because the prior cases were sealed by court order. See: *Hartford Cou-*

*rant Co. v. Pellegrino*, 290 F. Supp. 2d 265 (D. Conn. 2003).

Connecticut practice allowed Trial Court Administrators and Judicial District Chief Clerks to seal cases and dockets administratively without court order. The Second Circuit found that it had previously held the public and press should receive First Amendment protection in their attempts to access certain judicial documents and attend proceedings. The ability to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible.

Docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment, the Court said. The docketing of a hearing on sealing provides effective notice to the public that it may occur. Sealed docket sheets would also frustrate the ability to inspect documents, such as transcripts, which the Court has previously held presumptively open. Finally, the inaccessibility of docket sheets may thwart appellate or collateral review of the underlying sealing decisions.

The Second Circuit held the record was speculative as to whether the sealed cases and dockets at issue were closed to the public pursuant to court order or administratively. To pass constitutional muster, they could only be sealed pursuant to judiciary or statutory authority. On remand, the district court is to make this determination. The judgment of dismissal was reversed. See: *The Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2<sup>nd</sup> Cir. 2004).

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# Verdict for Other Defendants Cannot Negate Jury Question of Warden's Liability in Transsexual's Assault

The Sixth Circuit Court of Appeals held a warden may be found to be deliberately indifferent to a male-to-female transsexual prisoner's safety where the prisoner was housed in the Protective Custody Unit (PCU) with a predatory prisoner. Traci Greene, a prisoner at Ohio's Warren Correctional Institution, was preoperative, but still displayed female characteristics, including developed breasts and a female demeanor, and was undergoing hormone therapy.

Because of the female appearance, Greene was placed in the PCU. In July 1996, a second prisoner in the PCAU, Hiawatha Fezzel, assaulted Greene on several occasions, culminating a severe attack on July 12 in which Fezzel beat Greene with a mop handle and then struck her with a fifty-pound fire extinguisher.

Warden Anthony J. Brigano moved for summary judgment, which the Ohio federal district court granted. At the same time that Court denied summary judgment to three other defendants. Those defendants appealed, resulting in affirmance of the denial for two defendants and reversal for one. A jury trial ensued, rendering a verdict in favor of the remaining defendants. See: *DOC*

*v. Bowles*, 254 F.3d 617 (6<sup>th</sup> Cir. 2001) [*PLN* Sep. 2002]. After entry of final judgment, Greene appealed the summary judgment granted to Brigano.


The Sixth Circuit said that to establish liability under the Eighth Amendment for failure to protect, a prisoner must demonstrate the official was deliberately indifferent "to a substantial risk of harm" to the prisoner. To make such a demonstration, a prisoner must present evidence from which a trier of fact could conclude "that the official was subjectively aware of the risk" and "disregarded that risk by failing to take reasonable measure to abate it."

Greene need only point to evidence from which a fact finder could conclude her vulnerability made her placement in the PCU with high-security prisoners a substantial risk to her safety, of which Brigano was aware, or alternately, evidence from which the jury could conclude Fezzel's placement in PCU without segregation or other protective measures posed a substantial risk to other prisoners in the PCU, of which Brigano knew.

The Court found Brigano signed numerous Protective Control Review forms that noted Greene's physical appearance as

the reason for Greene's placement in the PCU. In a deposition, Brigano admitted a universe of harm befalling prisoners such as Greene, including attempted assault, assault, attempted murder, and murder. Moreover, Brigano said Greene was placed in the PCU to protect her from serious harm and that serious harm could come from a predatory prisoner.

Brigano further admitted Fezzel was predatory. He has "a long institutional history of being a disruptive, violent inmate," and he had two recent convictions for felonious assault in a riot. Paradoxically, Fezzel was placed in PCU "to protect him from repercussions of his testimony against his fellow prisoners in the Lucasville riot" [*PLN* July 1997].

Brigano then argued that because the jury found his subordinates not liable he is precluded from being liable. The Court said that verdict does not affect the question of whether Brigano was aware of a substantial risk to Greene's safety and failed to take steps to guard against that risk. Accordingly, the matter was reversed for a trial upon Brigano's mental state. See: *Greene v. Bowles*, 361 F.3d 290 (6<sup>th</sup> Cir. 2004). 

## Prisoner Stated Deliberate Indifference Claim, but Summary Judgment Denial Reversed

In a case with a long, unusual procedural history, the U.S. Sixth Circuit Court of Appeals affirmed a federal district court's denial of prison officials' motion to dismiss for failure to state a claim in a prisoner's civil rights complaint of deliberate indifference to his serious medical needs. The appeals court held, however, that the district court incorrectly deferred its decision on officials' summary judgment motion.

Robert N. Wallin was incarcerated at the Southern Michigan Prison from March 4, 1986, to February 18, 1988. He sued various prison officials in 1990 under 42 U.S.C.


§ 1983, claiming that they were deliberately indifferent to his serious medical needs. The case was inactive for eight years, then was reopened in September 2000. Wallin filed four amended complaints, and several defendants were dismissed.

The remaining defendants filed a motion to dismiss for failure to state a claim, Fed.R.Civ.Proc. 12(b) (6), and a motion for summary judgment on grounds of qualified immunity, Fed.R.Civ. Proc. 56. The district court ruled that Wallin stated a claim for relief. The court deferred ruling on the defendants' summary Judgment motion, holding that discovery must first be completed. Defendant prison officials appealed.

The appeals court held that Wallin stated a claim for relief. Wallin's claims met the "heightened pleading" standard, wrongly used by the district court, when all they had to meet was the lower "notice pleading" standard.

The appeals court held, though, that deferral of the summary judgment ruling was

wrong. Qualified immunity is meant to shield state officials from suit, not just from liability. Therefore, a motion for summary judgment on qualified immunity grounds should be decided as soon as possible. Moreover, the district court gave no explanation why it believed the summary judgment motion should be deferred until after close of discovery. Finally, Wallin failed to file an affidavit, as required by Fed.R.Civ.Proc. 56(f), presenting essential facts justifying his opposition to summary judgment on grounds that more discovery was needed. The Sixth Circuit rejected Wallin's claim that, since the district court never reached the merits of the summary judgment motion, the appeals court had no jurisdiction to hear the interlocutory appeal.

The district court was affirmed on denial of the motion to dismiss, but reversed on its deferral of deciding the summary judgment motion. The case was remanded for further proceedings. See: *Wallin v. Norman*, 317 F.3d 558 (6<sup>th</sup> Cir. 2003). 

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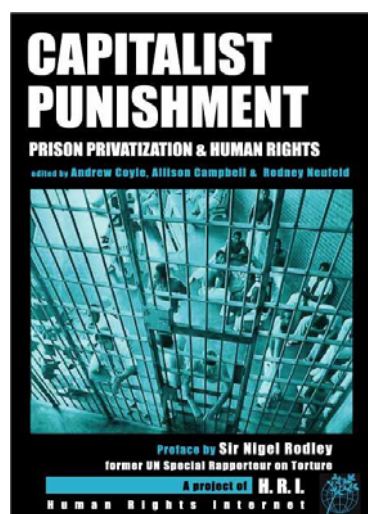
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of facilities and allocation of personnel. Special attention is paid to the effect on vulnerable groups such as women, children, and disproportionately incarcerated minority and indigenous communities.

Even as serious questions emerge in the West as to whether privatized prisons offer a more effective and efficient prison system for either inmates or the public at large, the trend to privatization is spreading. Revealing important links between neo-liberal policies locally and their global effects, *Capitalist Punishment* offers a disturbing glimpse into the transnational spread of privatized incarceration, as developing nations bound by IMF restrictions are forced into the hands of transnational corporations to the detriment of local incarceration alternatives.

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**Senior Editor: Andrew Coyle** is the Director of the International Centre for Prison Studies at the University of London, UK, Managing Editor of *Punishment and Society*, and author of *The Prisons We Deserve*. He is a former governor of several prisons in the UK, and has visited prisons in numerous countries as an expert consultant for the UN and the Council of Europe.

This book is a project of H.R.I. [Human Rights Internet] Ottawa, Canada

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## News in Brief:

**Afghanistan:** On December 17, 2004, troops of the American puppet regime stormed the Pul-e Charkhi jail in Kabul where four prisoners, three Pakistanis and an Iraqi, had attempted to escape by killing and disarming a jail guard and using his automatic rifle to escape the prison. The four prisoners and four guards were killed in the escape attempt and an additional three soldiers, three policemen and two prisoners were wounded in the ensuing ten hour gun battle. The prisoners had originally been captured by U.S. forces and accused of fighting on behalf of the Taliban. They were eventually released and later arrested on unspecified criminal charges before the current escape attempt.

**Brazil:** On December 15, 2004, six guards at Rio de Janeiro's Ary Franco prison were convicted of torturing Chinese businessman Chan Kim Chan, 46, to death. Chan had been arrested and was in the jail for attempting to leave Brazil with \$30,000 in undeclared cash. The guards apparently wanted to know if he had more money. The guards were each sentenced to 18 years in prison. Three prisoners who assisted in the torture were sentenced to 13 years in prison. Chan was beaten into a coma and died in a hospital several days later. Prison officials had initially claimed Chan's injuries were self-inflicted.

**California:** On December 14, 2004, a Los Angeles federal jury convicted Christian Ehlers, 29, of stealing more than \$1.4 million from various credit card companies in a stolen credit card scam. Ehlers used the proceeds of his crimes to buy luxury cars and pay his way through law school. He graduated from Loyola Law School in 2001 and was admitted to the California Bar in the same year. Apparently Ehlers represents the truism that no one can take away a good education.

**California:** On December 15, 2004, a former Folsom prison guard June Lucena, 41, was arrested and booked into the Sacramento county jail on one count of attempted perjury and one count of issuing a false statement to fraudulently obtain compensation. Lucena had sought worker's compensation claiming she had suffered permanent injury when she fell down while working in a prison tower in 1999. She claimed constant pain, an inability to work and in 2003 took an untaxed disability pension of \$2,307 a month, and she received a total of \$170,309.00 before the scam was discov-

ered. The California Insurance Department and prison investigators scrutinized Lucena's claim after receiving a tip she was not, in fact, disabled. She was arrested after investigators videotaped her doing back flip dives off her personal jet ski and on water slides.

**California:** On December 9, 2004, Roger Nyles, 35, a prisoner in the Twin Towers Correctional Facility in Los Angeles, escaped from the jail while working on a jail loading dock. When a gate opened to allow a bus to enter, Nyles ran through the gate and took a cab to South Los Angeles. He turned himself in to police on December 12, 2004.

**Connecticut:** On November 12, 2004, Gloria Bellacicco, 41, a guard at the Webster Correctional Institution in Cheshire was arrested and charged with second degree larceny for stealing a neighbor's baseball card collection valued at \$10,000. Bellacicco was turned in by Patrick McCue, a Hamden police officer she was dating and to whom she revealed details of the theft. The cards may have been stolen to finance Bellacicco's drug habit.

**Florida:** In August, 2004, Joe Hatem, 56, a Department of Corrections probation supervisor was fired from his \$95,000 a year job when probationer Troy Victorino, 27, was charged with stabbing and beating six people to death. Victorino and three others allegedly committed the murders to avenge the theft of his X-Box game player. A few days before the murders, on July 29, 2004, Victorino was arrested on felony battery charges and released on bail even though he was on parole for a prior felony conviction. His parole was not revoked either. In addition to Hatem, three other DOC employees were fired, Richard Burrow, the parole officer who did not revoke Victorino's parole; his supervisor Paul Hayes; Robert Gordon a circuit administrator and Hatem, the regional probation supervisor. Hatem expressed amazement at his firing, noting he had a spotless 30 year career with the DOC and claimed the situation was one he had no control over. DOC secretary James Crosby claimed the men were fired because they were not familiar with DOC policy on parole revocations. Several recent murders in Florida have been committed by parolees and probationers who should have been in jail on parole violation charges but were not.

**Illinois:** On December 5, 2004, George Washington Sr., 27, a prisoner in the Stephenson County jail in Freeport, took another pris-

oner hostage using a sharpened toothbrush and threatened to kill him if he remained in the jail. Washington is a federal pre trial detainee awaiting trial on federal drug trafficking charges along with 45 other alleged members of the Black Gangster Disciples. Washington released his hostage after another prisoner talked to him about the incident. He was charged with misdemeanor assault for the incident and got his wish of being taken into federal custody and he was removed from the jail.

**Kentucky:** On June 28, 2004, four Louisville metro jail guards were among 25 guards sprayed in the face during training with pepper spray made by Pepperball Technologies. The spray was so potent the four guards injured with three requiring hospitalization. One developed blisters on his eyes, one had problems with his esophagus and two had lung problems. The jail decided not to use the new spray as a result of the training incident. The company's spokesman, Chris Andrews, said he was unaware of any problems with the company's products.

**Louisiana:** On December 13, 2004, the Louisiana Supreme Court suspended state court judge Timothy Ellender for one year without pay for dishonoring his position as a judge. The court deferred half the penalty. Ellender, who is white, attended a Halloween party dressed in blackface, handcuffs and a jail jumpsuit. The party's host, Ellender's brother in law, was dressed as Buckwheat. The court held: "The negative shroud cast upon the state's judiciary by judge Ellender's actions will only be lifted by time."

**Maine:** On July 21, 2004, Bethany Bodenheimer, 30, a drug and alcohol counselor at the Maine Correctional Center was arrested and charged with one count of gross sexual assault for having sex with a male prisoner at the facility. She was employed by Spectrum Behavioral Services, a private, for profit company. On the same day, April Archer, 37, a medical technician at the same prison who was employed by Correctional Medical Services was also arrested on five counts of gross sexual assault for having sex with a male prisoner. Like most states, Maine criminalizes sexual contact between prisoners and prison employees.

**Maryland:** On December 10, 2004, Lilvon Johnson, a visitor to the Federal Correctional Institution in Cumberland was arrested by police in a sting operation on charges she was smuggling marijuana and heroin into the prison in her body cavities.

Alvin Simmons, the driver of the car that brought Johnson to the prison was arrested after running into a nearby swamp to elude police.

**Massachusetts:** On November 2, 2004, Jeffrey Holliday, 41, a Bureau of Prisons maintenance foreman at the Devens Federal Medical Center prison, was charged in federal court with three counts of embezzling \$90,000 in federal funds. Holliday allegedly used his government credit card to bill vendors for items that were never provided.

**New Hampshire:** On October 7, 2004, Ronald Turgeon, 59, a prisoner at the New Hampshire State Prison killed himself by jumping from a balcony and falling forty feet. Turgeon was apparently concerned he would be transferred to a prison in the Northern part of the state and would be unable to see his wife as often. Prison officials stated Turgeon was being transferred to a halfway house as soon as space became available. A year prior to the successful suicide attempt, Turgeon had attempted to kill himself by drinking windshield washer fluid. His widow Luisa was upset the prison had neither treated nor monitored her husband's mental illness. Turgeon had served 15 years of a 10-30 year sentence for sexually assaulting a young girl.

**New York:** Manhattan housing court judge Jerald Klein, was indignant after learning he had been listed on eBay, the internet auction site, as being "for sale." The listing showed a smiling picture of Klein seated in his courtroom. Before being removed by eBay after four days the listing drew 21 bidders (out of 6,400 viewers) and a top bid of \$127.50. Klein was indignant after learning of the incident from a reporter who called and asked him for comment. The ad was posted by Janet Schoenburg, a renter unhappy that Klein had ruled against her in a housing dispute. She stated the ad was meant as a parody and a satire.

**Oregon:** On September 15, 2004, Oregon State Penitentiary prisoner Mark Taylor, 22, allegedly stabbed Lt. Gary Russell and guard Mark Taylor, 45. The attack was supposedly unprovoked and occurred in the prison's control room floor. The prison was placed on lockdown after the incident. Prison officials acknowledged that attacks on staff are very rare in Oregon and could not recall when the last one had occurred.

**Pennsylvania:** On September 14, 2004, Fernando Real, 21, repeatedly stabbed co-defendant Andy Torres, 21, when the two pretrial detainees were briefly placed together in the same holding cell at the Criminal Justice Center in Philadelphia. Torres sustained seven stab wounds to the

back, arm and shoulder. Real was charged with aggravated assault. Torres had given police statements implicating Real in an attempted murder case the two men are accused of committing. Real is also awaiting trial for the 2002 murder of a man over a disputed game of craps. Both men are charged in the crime. The two men were supposed to be held apart. In April, 2004, jail guards found a home made knife concealed in the rectum of a jail prisoner. That same month another prisoner was shot in the back by a deputy sheriff after going over a table, screaming and lunging at a judge in court.


**South Carolina:** In early December, 2004, Kenneth Tager, 37, a prisoner at the Federal Correctional Institution in Edgefield, pleaded guilty in federal court to conspiracy to possess and intent to distribute for smuggling marijuana into the prison. His co-defendant, Pamela Forsyth, would bring the marijuana to him and he would sell it. Forsyth also pleaded guilty and was sentenced to probation.

**Texas:** On December 15, 2004, Adrian Barrientos, 29, an employee with Treatment Associates, a company that contracts with the U.S. Probation Office to provide drug testing to federal probationers, was arrested and charged with obstruction of justice for trading sex with a female probationer in exchange for falsifying her drug test results to indicate she had not used illegal drugs when in fact she had. Barrientos falsified the test results after the woman told him her urine would test positive for drug use.

**Venezuela:** This nation continues to have the deadliest prisons in the Western hemisphere. As of November 12, 2004, at least 247 prisoners had been murdered and 536 seriously injured in the country's 32 overcrowded, understaffed and crumbling prisons. This is in a prisoner population of 15,000, half of whom are awaiting trial. Most of the deaths occurred during riots, with 120 being killed by gunshots and 59 being stabbed to death. Between October, 2001 and September, 2002, over 244 prisoners were killed and over 1,200 seriously injured according to the U.S. State Department.

**Washington:** On August 25, 2004, Crystal Benson, 41, a Department of Corrections parole officer, was sentenced to three years in prison and ordered to pay \$14,951 to the Crime Victims Fund after pleading guilty in Spokane County Superior Court to stabbing a drug dealer while attempting to rob him in her home. John Burton, 37, sold Benson crack cocaine and had sex with her. Apparently when he would no longer give Benson cocaine she tried to rob him and

wound up stabbing him several times in the back. The crime came to light when Benson claimed she had been raped. Burton had been found stabbed near Benson's home but claimed not to know the attacker before telling police Benson attacked him while trying to steal his drugs and money. Originally charged with attempted second degree murder and also with lying to police that her car had been stolen in order to defraud her insurance company, prosecutors allowed her to plead guilty to the lying charge and dropped the more serious charge. Benson had a history of drug abuse before being hired by the DOC. *PLN* frequently reports on the Washington DOC's parole liability problems, which mostly revolve around the negligent supervision of parolees.

**Washington:** On November 3, 2004, Everett police arrested attorney Bill Joice, 50, and charged him with attempted murder for ambushing and shooting fellow lawyer Kevin Jung, 44, in the head as Jung parked his car near his office. The two lawyers represented parties in a dispute over franchise rights of a Korean grocery in Lynnwood. The shooting occurred the day before a hearing was scheduled in which Jung was asking a Snohomish county superior court to impose sanctions on Joice and his clients for failing to comply with numerous court orders in the case. Joice was employed as Snohomish county deputy prosecutor handling criminal cases from 1991 until 2000 when he entered private practice. Joice had already been repeatedly sanctioned in the case and paid at least \$4,382.36 in the case for missing deadlines and failing to appear in court. Jung is a well respected member of the local Korean American community and remains in serious condition as this issue of *PLN* goes to press. Joice is in jail awaiting trial on \$5 million bail. 

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# Arizona Adopts Favorable Termination Rule in Attorney Malpractice Suits

The Arizona Supreme Court has ruled that a cause of action accrues for attorney malpractice on the date the case is finalized in favor of the defendant because of the attorney's ineffective assistance. This rule is called the favorable termination rule, and is employed by many states.

James R. Glaze, an Arizona man, was convicted by a jury of sexual abuse and sentenced to one year of probation. His conviction was affirmed on appeal in 1997. Glaze was represented at trial and on appeal by an attorney named Eric A. Larson.

Glaze later filed a petition for post conviction relief, contending that Larson provided him ineffective assistance at trial by not requesting a jury instruction for lack of sexual motivation. The superior court dismissed the petition, but the

court of appeals reversed on September 30, 1998. On remand, the superior court found Larson to have been ineffective during Glaze's trial and dismissed the charges against Glaze with prejudice on July 6, 1999.

On December 14, 2000 Glaze filed a civil legal malpractice suit against Larson. The superior court dismissed the suit as barred by the 2 year statute of limitations. The court took that position believing that Glaze's cause of action against Larson had accrued on September 30, 1998, when the appellate court found that Glaze had a colorable claim of ineffective assistance in the criminal case. If so, the statute of limitations clock would have begun on that date, rendering the civil suit time-barred.

Glaze appealed, and the appellate court reversed. It held that an action for legal malpractice cannot accrue until the underlying litigation, including all appeals, are con-

cluded. Larson appealed to the state supreme court. The Supreme Court affirmed the appellate court applying the "favorable termination" rule used in many states. Under that rule, a cause of action for legal malpractice does not accrue in a criminal case until the case is finalized favorably to the defendant, because of the attorney's ineffectiveness during the criminal proceedings. This is so because the criminal defendant cannot be sure there is a cause of action for legal malpractice until a court finds the lawyer to have been ineffective in the criminal case. That date in this case was July 6, 1999, when the superior court dismissed the charges against Glaze with prejudice because of Larson's ineffectiveness, according to the Supreme Court. On that basis, the Supreme Court ruled that the statute of limitations began to run on that same date and did not bar Glaze's lawsuit. See: *Glaze v. Larson*, 83 P.3d 26 (Ariz. 2004).

## PLN Classifieds

See page 38 for details

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**Are Your Medical/Dental Needs Receiving Proper Attention?** "The Inmates Guide To Prison Health Care" is a 106 page book that teaches you how to get legally entitled healthcare. \$11.95. For info send SASE or stamp to: Two Rainbow Publishing, PO Box 175, Davis, CA 95617. Reviewed in June 2004 PLN. [www.inmatehealthbook.com](http://www.inmatehealthbook.com)

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## Other Resources

### *ACLU National Prison Project*

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

### *Amnesty International*

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

### *CorrectHELP*

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### *Children of Incarcerated Parents*

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

### *FAMM-gram*

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

### *Florida Prison Legal Perspectives*

Bi-monthly newsletter that includes court rulings, administrative developments and news about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

### *Justice Denied*

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 881, Coquille, OR 97423.

### *Hepatitis C Awareness News*

Hepatitis C and HIV/HCV newsletter free on request. Write: National Hepatitis C Prison Coalition, PO Box 41803, Eugene, OR 97404.

### *November Coalition*

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 795 South Cedar, Colville, WA 99114.

### *Stop Prisoner Rape*

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

### *Western Prison Project*

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.



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**The Celling of America: An Inside Look at the U.S. Prison Industry**, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 Pages. \$19.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

**Everyday Letters For Busy People**, by Debra Hart May, 287 pages. \$15.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Lots of tips for writing effective letters 1048

**The Criminal Law Handbook: Know Your Rights, Survive the System**, Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$34.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

**Represent Yourself in Court: How to Prepare & Try a Winning Case**, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

**Law Dictionary**, Random House, 525 pages. \$17.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

**The Blue Book of Grammar and Punctuation**, Jane Straus, 68 pages, 8-1/2 x 11. \$11.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

**Legal Research: How to Find and Understand the Law**, 7th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 392 pages. \$19.95. Comprehensive and easy to understand guide on researching the law. Explains case law, statutes, digest and & more. Includes review questions, library exercises and practice research problems. Especially valuable for novice pro se litigants. 1005

**Spanish-English/English-Spanish Dictionary**, 60,000+ entries, Random House, \$5.99. Two sections, Spanish-English and English-Spanish. All entries listed from A to Z. Hundreds of new words. Includes Western Hemisphere usage. 1034

**Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. & Canada**, by Jon Marc Taylor, 341 pages. \$24.95. Includes contact info & outlines courses offered by over 250 education providers. Info on high school, vocational, paralegal, law, college and graduate courses. One of a kind prisoner resource. 1047

**The Citebook**, 21st ed., by Tony Darwin, Starlite, 306 pages, \$41.95. This plain language legal manual lists positive cases (cases that give you a right, not take one away) and gives a short synopsis detailing each. 1057

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**Lockdown America: Police and Prisons in the Age of Crisis**, by Christian Parenti, Verso, 290 pages. \$17.00. Documented and has first hand reporting on law enforcement's war on the poor. Covers paramilitary policing and SWAT teams, the INS and prisons. 1002

**The Perpetual Prisoner Machine: How America Profits from Crime**, by Joel Dyer, 318 pages. \$19.00. Exposes how private prisons, banks, investors and small companies profit from the prison industrial complex, and prison growth adds to revenue & profits. 1025

**Crime and Punishment In America**, by Elliott Currie, 230 pages. \$12.95. Refutes arguments in favor of prison building as a crime solution. Demonstrates crime is driven by poverty and discusses proven, effective means of crime prevention. 1019

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**States of Confinement: Policing, Detention and Prison, revised and updated edition**, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

**Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World**, by Danny Cox & John Hoover, 256 pages, \$14.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

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**Criminal Injustice: Confronting the Prison Crisis**, by Elihu Rosenblatt; South End Press, 374 pages. \$18.00. A radical critique of the prison industrial complex 1009

**Finding the Right Lawyer**, by Jay Foonberg; American Bar Assoc., 256 pages. \$19.95. Provides guidance for hiring a lawyer, including how to determine your legal needs, fee payments, how to evaluate a lawyer's qualifications, and much more. 1015

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**Prison Writing in 20th Century America**, by H. Bruce Franklin, Penguin, 1998, 368 Pages. **\$13.95**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022 ☐

**Soledad Brother: The Prison Letters of George Jackson**, by George Jackson; Lawrence Hill Books, 368 pages. **\$16.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 30 years ago. 1016 ☐

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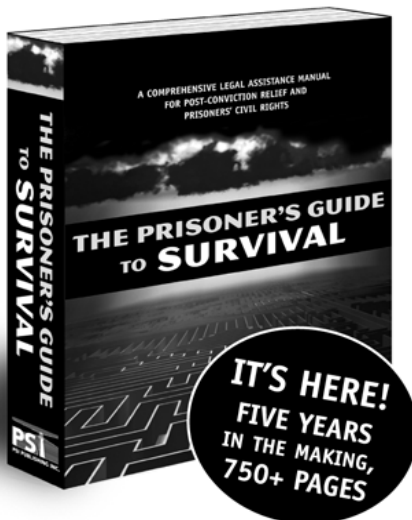
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# PRISON

## Legal News

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*Dedicated to Protecting Human Rights*

February 2005

### A National Disgrace: Indian Prisons In The U.S.

*by Michael Rigby*

Overcrowded, rundown, dangerous, and dirty, conditions at Indian prisons in the U.S. rival those found in “third-world countries,” according to a blistering 57-page report released by the Interior Department’s Office of Inspector General (OIG) in September 2004. Suicide attempts are common at these little-known prisons. Chronic short-staffing allows prisoners to escape by simply walking away. Facility maintenance, prisoner health care, and guard training are haphazard at best. Accounting procedures are outdated and inconsistent, making funds impossible to track and greatly increasing the likelihood of fraud. Overall, the Bureau of Indian Affairs (BIA) detention program is so poorly managed and so “riddled with prob-

lems,” that it constitutes “a national disgrace,” concludes the report.

As part of their assessment, which began in September 2003, investigators with the OIG visited 27 Indian Country jails, scrutinized budget records, and conducted more than 150 interviews. The results were damning. “At the very outset, it became abundantly clear that some of the facilities were egregiously unsafe, unsanitary, and a hazard to both inmates and staff alike,” Inspector General Earl E. Devaney told a Senate Finance Committee on September 21, 2004. “Our final report...found clear evidence of a continuing crisis of inaction, indifference, and mismanagement throughout the entire BIA detention program.” Senate Finance Chairman Charles E. Grassley (R-Iowa) called the report one of the most condemning he’s seen in more than 20 years of oversight work. “It finds very little worthwhile in Indian detention centers...and lots of horror stories,” he said.

#### Oversight and Coordination

Senior BIA-LES officials readily admit that overcrowding and understaffing are endemic at Indian Country jails. Inadequate funding, officials contend, makes it impossible to properly address both law enforcement and detention programs. While this may be true, a woefully deficient command structure exacerbates the problem.

Investigators discovered, for example, that the Detention Program Manager—who was already “provided with limited training, virtually no staff and minimal authority to accomplish his duties”—had been reassigned within the BIA-LES, “effectively leaving the detention program without a functioning manager.” Subordinate to the project manager are six District Commanders responsible for managing law enforcement services—including jail operations—within their respective districts. Investigators found oversight by these commanders, who rely on BIA police chiefs to oversee these functions on reservations, to be “virtually non-existent.” These district commanders conceded that detention issues were not a priority. Oversight by the Department of Interior’s Office of Law Enforcement and Security (DOI-OLEs), which has been in charge of the BIA’s detention program since 2001, is similarly lacking. This is troubling, notes the report, because “BIA-LES has proven incapable of providing coordination and oversight of Indian Country jails without assistance.”

A further hindrance to effective administration is the “frustration, cynicism, and apathy that infect Indian Country detention personnel,” according to the report. “The overall mismanagement and neglect of the program has left many personnel with the

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#### Background

BIA is tasked with providing governmental services—including law enforcement services—to 562 federally recognized tribes in 35 states. This responsibility encompasses 1.5 million Indian Americans and Alaska Natives on roughly 56 million acres of Indian Country. As of August 2004, BIA’s detention program consisted of 72 jails (27 adult, 11 juvenile, 34 mixed). Seventeen were operated by BIA Law Enforcement Services (BIA-LES), 9 were operated by tribes, and 46 were funded by the BIA under Public Law 93-638 contracts. These jails house from 2 to 120 prisoners, usually misdemeanor offenders—but sometimes felons as well—for up to a year.

**PUBLISHER**  
**Rollin Wright**

**EDITOR**  
**Paul Wright**

**EXECUTIVE DIRECTOR**  
**Donald W. Miniken Jr.**

**CIRCULATION MANAGER**  
**Jennifer Umbehocker**

**COLUMNISTS**  
**Mumia Abu Jamal, Denise Johnston, Daniel E. Manville, Kent Russell**

**CONTRIBUTING WRITERS**  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Rabih Aboul Hosn, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams, Mark Wilson & Robert Woodman**

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## **National Disgrace (Cont)**

attitude that management is not interested in the detention program and that nobody cares about the jails, the staff, or the inmates."

### **Safety and Security**

Deaths, suicide attempts, and escapes are common at Indian Country jails. During their 27 site visits, investigators discovered that 11 deaths, 236 suicide attempts, and 631 escapes had occurred in the past three years. These are conservative numbers, notes the report, because local jail records were poorly maintained and 98% of the incidents had not been reported to the BIA. One jail administrator confirmed investigators' suspicions that serious incidents were under-reported when he stated, "What happens on the reservation stays on the reservation."

**Deaths.** Proper medical care would have likely prevented seven of these deaths, including that of 16-year-old Cindy Gilbert (aka Cindy Lou Bright Star Gilbert Sohapp). Alone and unsupervised, Gilbert died in a cell at the Chemwa Indian School in Oregon on December 6, 2003. An autopsy determined she died of acute ethanol poisoning. The school had no policy for medically screening inebriated prisoners placed in the jail. A subsequent OIG investigation uncovered "a history of inaction to correct a myriad of policy and safety issues at the school's detention facility." Three other deaths similarly involved intoxicated prisoners.

Three of the 11 deaths were suicides. A typical example is that of Ricky Sampson, 39, who hung himself from a broken light fixture at the Yakama jail in Washington. He was not discovered for nearly eight hours. A single person—a dispatcher—was on duty. BIA-LES had not visited the jail in 5 years and failed to show up for a scheduled inspection 3 days prior to the suicide. The other two suicides also involved unsupervised prisoners, one a 16-year-old girl.

**Suicide attempts.** Indian Country jails have an appalling number of suicide attempts—282 in 2001-2002 alone, according to the Bureau of Justice Statistics. Yet countermeasures at many jails are a farce and many prisoners make multiple suicide attempts. At the Shiprock jail in 2001, a prisoner tried to hang himself seven times using clothing and towels left in his cell. Preventative measures consisted of removing the offending articles one at a time—if he tried to hang himself with his socks, for instance, guards took away his socks, if he used his

towel, they removed his towel, until he was finally left naked, despairing, and towel-less. The report further noted that the jails they visited had "no consistent method of screening inmates for suicide or medical purposes" or "medical staff on duty at any time."

**Escapes.** Escapes from Indian Country jails are so commonplace that jail personnel view them with an air of "causal inevitability" and "collective acceptance." Because most of the jails employ a single guard per shift, jailers admitted that it is impossible to watch everyone. Unconscionably, some jails do not even report escapes to local police, investigators found.

Opportunities to escape abound since most Indian jails are decrepit and rundown, the result of deplorable maintenance. At one jail investigators noted that a gate on the outside recreation yard was secured with a pair of handcuffs because prisoners had learned the combination to the cipher lock.

Prisoners escaped from the Medicine Root jail in South Dakota by climbing electrical conduit on the outside of the building. Rather than remove the conduit or put effective barriers in place, jail officials simply did away with outside recreation. Another prisoner escaped from the jail when cops brought in a prisoner and left the door open. At Pine Ridge a jailer told investigators that a prisoner had escaped the night before their visit by kicking open a cell door and running out another door that had been propped open because the jail gets "stuffy." Unbelievably, the same door was propped open during the investigators' visit.

Many aspiring escapees, however, need not go through such hassle. Instead, they simply walk away while being treated at medical clinics or hospitals, where they are regularly left unguarded. Of the 631 escapes documented by investigators, 144 occurred this way. A large number of the 37 escapes from Rosebud were the result of prisoners walking away from the hospital. A Pine Ridge jailer said, "We simply don't have enough people to escort them to the hospitals." At Yakama sick prisoners are released with the hope they'll return when they're well because the jail can't afford medical care. Needless to say, many prisoners have learned to feign illness in order gain release.

### **Staffing**

Most BIA and 638-contract jails are chronically understaffed, creating a danger to prisoners, jailers, and the public. In fact, 79% of the jails investigated "fell below minimum staffing levels on a regular basis,"



said the report. The majority of jails investigators visited employed only one jailer per shift. This lone guard usually had collateral duties as well. One of the most disturbing discoveries, investigators reported, was that a number of jails had shifts with no detention officers. "In these instances, dispatchers, cooks, or police officers fill in while continuing to do their primary jobs."

At the Crow Creek jail, for example, the dispatcher regularly watches prisoners while also performing his other duties, which includes preparing meals. At the Northern Cheyenne jail, the cook fills in for the lone jailer two or three times a week. At the 55-bed Blackfeet Adult Detention Center, the single guard regularly fills in for other personnel, "and must physically leave the jail to prepare meals," leaving prisoners unguarded.

Guards working alone are also more likely to be assaulted, injured, or even killed, notes the report. At the Mescalero jail in New Mexico a lone female jailer was confronted by a knife-wielding former prisoner who came in through an unlocked door. Tragedy was averted when other prisoners intervened, convincing the assailant to leave her alone. At the Blackfeet Adult Detention Center attacks on lone guards are so common that the BIA district commander told investigators that, "Every officer here has been assaulted."

### Maintenance

Many jails throughout Indian Country are "dilapidated to the point of condemnation," investigators found. Years of neglect and failure to timely perform even routine maintenance has left the majority of them in "abysmal" condition. These poor maintenance practices were noted in a 1994 audit by the OIG, yet a decade later conditions remain unchanged.

Maintenance responsibilities are tasked to BIA's Office of Facilities Management and Construction (OFMC), which operates independently from BIA-LES. Consequently, jail managers have no control over repair work or maintenance personnel. "This diminishes any sense of ownership that jail administrators and detention officers have for the maintenance and upkeep of their facility," comments the report. Moreover, few jail administrators conduct required weekly or monthly inspections, and the OFMC gives little thought to the specific needs of individual jails. As a result, inspectors found that even newer jails were "already showing signs of accelerated aging and wear due to delay of necessary repairs."

The Kiyuska O'Tipi Reintegration Center, a juvenile jail built in 1995, is an "egregious" example of a deteriorating newer jail, notes the report. Door lock indicator lights don't work, broken hot water heaters haven't been replaced, a storm-damaged roof has gone unrepaired for several years, the jail's entry gate doesn't function, a main water pump leaks, outside security lights are broken, and fire sprinkler heads and showers are in disrepair.

Even maintenance shortcomings affecting staff and prisoner safety go unrepaired by the OFMC, says the report. For instance, the plexiglass at a number of jails has not been replaced even though it has been scratched, burned, and otherwise damaged to the point of making it extremely difficult for jailers to see into cells. Fire sprinkler heads at some jails were inoperable. At Yakama the entire fire suppression system was broken and some fire extinguishers hadn't been inspected in three years. At Tohono O'odham the keys to cells were so worn that they unreliably locked and unlocked doors—a recipe for disaster in a fire. Many maintenance problems also affect sanitation. "In all too many instances," investigators found toilets that didn't flush, broken showers and sinks, and non-functioning water heaters, notes the report.

### Funding

The BIA's accounting procedures are so outdated and unreliable that the agency could not account for nearly 90% of \$31.5 million in supplemental funding provided since 1999. Ten million of this supplemental funding, allocated between fiscal year (FY) 1999 and FY 2002, was earmarked to hire 305 additional jailers. However, the BIA could only account for \$3 million, which it used to fill approximately 75 positions at BIA-operated jails. The remaining \$7 million—budgeted for 638-contract and self-governed jails—was possibly absorbed into the BIA's general budget and not used for jail personnel, according to the report.

Incredibly, when investigators requested BIA-LES budget submissions for the previous three years, accounting personnel were unable to locate any budget requests or documentation. Investigators later found that BIA-LES managers submit the same budget proposals each year, "with little or no increases for their budget requests." Likewise, most jail managers and police chiefs, investigators discovered, fail to make accurate, realistic budget assessments. "They simply expect to receive the same level of funding

that was received in prior years with little or no variation."

What money is allocated, the BIA-LES simply gives to local officials, with no guidelines on how to appropriate the money or accurately record how it's spent. Not surprisingly, most of these funds are used for law enforcement rather than detention. An official at Rosebud told investigators that only 16% of law enforcement funding went to the jail—and most of that was used for personnel expenses and not prisoners. A police chief related that 90% of his department's budget was used for salaries and the rest used for "major needs such as equipment."

Since 1997, according to the report, the DOJ has provided \$150 million to tribes for new jail construction. Even so, because of poor coordination and planning between the DOJ and BIA, once built these jails often sit idle because the BIA is unable to staff them. This is supported by an April 2004 status report which revealed that, of 13 new jails the DOJ was supposed to have opened, only 2 were up and running. BIA's ineptitude is obviously a contributing factor. In August 2003 the BIA dedicated \$5.1 million to tribes building new jails. This money was supposed to be tracked to ensure it was used for its intended purpose—hiring jail personnel and buying necessary equipment. The BIA, however, never actually tracked the funds. Similarly, BIA-LES could not provide investigators "with expenditure data for \$9.8 million of the \$11.4 million received in 2004 allocated for opening new facilities."

The report's authors noted that they were gravely concerned that the failure of BIA to provide oversight of how funding is used "has or will result in the actual misuse of the funds." The lack of a coherent reporting structure exacerbates the problem. When investigators compared expense records of individual jails with those of BIA-LES, none of the 2002 figures matched, and data from just one jail matched in 2003. "This overall neglect of detention program funding oversight," the report states, "has created an environment in which fraud can be perpetrated with impunity and waste can continue undiscovered, because nobody at BIA is paying attention."

Oversight of funds dispersed under 638-contracts is no better. For example, an FY 2001 audit of the Rosebud Sioux Tribe "identified \$2.5 million in questionable costs." One BIA contracting officer reported she was unable to enforce contract terms because the tribe had barred her from its juvenile jail for seven years. The BIA-LES took no action on her behalf. At the White

## National Disgrace (Cont)

Buffalo Home a jailer told investigators that the Tribal Council Chairman had authorized the use of 638-contract funds to pay for a student field trip in November 2002. The students were not associated with the jail.

Even more disturbing, investigators discovered that a male guard at the White Buffalo Home raped a 17-year-old girl in October 2002. Though the perpetrator had a criminal record, no background check had been performed as required under the terms of 638-contracts. Investigators later learned that the rapist was related to a tribal council member. The report noted that "BIA's ineffective oversight of this particular contract is especially disturbing" because the BIA had already had to take control of the tribe's adult jail and police department because of serious problems with their operation.

### Training

Many guards working at jails throughout Indian Country are not formally trained. In fact, investigators found that a mere 48% of the guards employed at the jails they visited had attended detention officer training. A guard at Haulapai and another at Kiyuska O'Tipi, for example, had worked 12 years and 7 years respectively before receiving the required training. A guard hired at Shiprock in 1999 had still not received training in 2004. This overall lack of training contributes to unsafe conditions, notes the report. At Yakama and Pine Ridge, for instance, cops wear their weapons into the cellblocks, "contrary to nationally accepted standards and common sense." This lack of training extends to jail managers as well. The report attributed many of the problems at Indian Country jails to BIA-LES's failure to pro-

vide jail managers with supervisor and financial management training.

### Other Problems

**Juveniles.** In many instances, juveniles are housed in the same jails as adults. This is allowable under federal law only if there is complete "sight and sound separation" between them. That is, adults and juveniles "cannot see each other and no conversation between them is possible." However, this policy is not always adhered to in Indian jails, a practice that would "make major media headlines were it happening elsewhere in America," notes the report.

A guard at one jail said a 13-year-old boy had been raped by another prisoner in 1997. Records showed the BIA settled the case for \$150,000. At Rosebud juveniles are physically separated from adults but are still able to hear and converse with them. At Sisseton/Whapeton juveniles are held in a locked hallway shackled to a bench, sometimes overnight.

On December 29, 2004, the BIA ordered the Yakama tribal jail in Washington closed until it remedied the numerous problems identified in the report. Yakama Tribal Secretary Davis Washines would not comment on the closure nor tell reporters how many prisoners the jail held, nor where they were sent.

The closure was apparently instigated by the attempted suicide on December 24, 2004, of a 17 year old boy in the jail. The BIA had previously ordered the jail not to house children with adults.

**Overcrowding.** Overcrowding was a problem at 53% of the jails visited, said investigators. Because some jails regularly hold 2 to 3 times their rated capacity, many prisoners are forced to sleep on mattresses littering the cell floors. Regular, severe overcrowding at some jails has also raised health and sanitation concerns. The 34-bed Tohono O'odham jail, for example, routinely holds more than 110 prisoners. Half of them are banished to the floor, where they sleep "over and around one another." These cramped conditions increase the potential for altercations and make injuries more likely, says the report.

**Liability.** The report maintains that the gross mismanagement of Indian Country jails greatly increases the potential liability for the BIA and DOI. In just the three years preceding the report, the BIA paid out \$855,000 to settle several lawsuits. Another \$11 million in claims are pending. If fed-

eral, state, or county jails operated under the same conditions as Indian jails, investigators speculated, they'd be buried with lawsuits and would have likely been shut down by court order long ago. Thus, the report contends that "BIA is sitting on a liability time bomb" that it must act immediately to diffuse so that its modest funding can be used for the intended purpose, "instead of potentially being consumed by legal fees, fines and judgments."

### Recommendations

What the report makes painfully clear is that a fundamental failure of management and oversight—from the top to the bottom—is responsible for the squalid, third-world-like conditions of Indian Country jails. As such, most of the recommendations were obvious and hardly needed a team of government scholars to suggest them. They include: increasing oversight and hiring detention management professionals; conducting inspections; reporting and conducting inquiries into serious incidents and escapes; exploring alternatives to jailing intoxicated prisoners and working to provide on-site medical assistance at larger jails; increasing staffing and training; prioritizing repairs; creating a line item budget for BIA-LES jails and expenses; creating accurate budget projections and implementing internal controls to track funding and report expenditures; implementing a standard clause in 638-contracts requiring a reckoning of funds and the reporting of serious incidents; developing strategic plans for new jail construction; and exploring the use of regional jails to alleviate overcrowding and house longer-term prisoners.

### Conclusion

Investigators' anxiety over the detention program remains heightened, they said, "not because of what we found during our site visits but...because of what we fear remains undiscovered at the sites we did not visit." The fetid disease of indifference and complacency that pervades Indian Country jails has been years in the making and will require a "Herculean effort" to correct, says the report. However, it remains to be seen whether BIA personnel have the drive and courage needed to step up and realistically address the issues identified by investigators. Until that time, the state of Indian prisons in the U.S will remain a national disgrace. ■

Additional sources: *Seattle Times*, *Post-Intelligencer*, *Washington Post*, *Tacoma News Tribune*

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## Kentucky Prison Guard Awarded \$34,000 in Sexual Harassment Suit

On May 27, 2003, a state circuit court in Oldham, Kentucky, awarded prison guard Karen Lemarr a total of \$34,000 for the lost wages, embarrassment, and emotional distress she suffered as a result of a coworker's sexual harassment.

On June 13, 1999, Lemarr was monitoring prisoners from Wall Box 11 at the Kentucky State Reformatory. Noticing the box was dirty, she called for a clean up. Prison guard Marvin Robinson responded. According to Lemarr, once Robinson was inside the cramped wall box he exposed himself to her and made lewd comments. Lemarr was upset but continued to perform her duties. Robinson returned to the wall box 30 minutes later. When Lemarr noticed him this time, he was masturbating.

Lemarr quickly notified another prison official of the incident. Although she discussed the matter with him several more times over the next few days, Ray took no action.

Ten days later Lemarr notified another prison official of the incident. An ensuing investigation resulted in Robinson's termination. Robinson appealed and was reinstated by a personnel board. He quickly retired but continued to deny Lemarr's allegations.

Lemarr sued the Kentucky Department of Corrections (DOC) for damages claiming that she had suffered severe and pervasive sexual harassment. As to the DOC's liability, Lemarr argued that Robinson had a history of sexual misconduct and that Ray took no action after she complained to him. Lemarr sought \$3,905 for medical bills and future care, \$10,803 for lost wages, and additional damages for emotional distress and embarrassment.

The DOC asserted that it did everything it was required to do, specifically noting that as soon as Lemarr properly presented her complaint a full-fledged investigation was launched which resulted in Robinson's termination. As to Lemarr's allegation that Ray did nothing after being notified of the incident, the DOC contended that Lemarr did not complain to Ray in his supervisory capacity, but rather discussed the matter with him as a friend.

At trial, the liability instructions were presented to the jury in two parts. The jury was first asked to determine whether Robinson's sexual harassment was common and whether supervisors were aware of it. The jury answered affirmatively. The next instruction required Lemarr to prove three things: First,

that Robinson made unwelcome sexual advances towards her. Second, that Robinson's sexual harassment was severe and pervasive. And third, that the DOC was aware of the situation and did nothing to prevent it.

Despite the lengthy instruction, Lemarr prevailed. As to damages, Lemarr received nothing for medical expenses, but was

awarded \$4,000 for lost wages, \$15,000 for emotional distress, and \$15,000 for embarrassment. Total jury award: \$34,000.

Lemarr was represented by Vicki L. Buba and Melanie Straw-Boone of the Louisville firm Stone, Pregliasco, Haynes, and Buba. See: *Lemarr v. Department of Corrections*, Circuit Court, Oldham, Case No. 00 CI 0257

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# California Latino Gang Members Locked Down Over 20 Months; Narrow U.S. Attorney Criminal Review Finds “No Abuses”

Latino gang members at California's 124 year-old Folsom State Prison (FSP) were locked down for over 20 months following a riot where “Southern” Hispanic gang members attacked their rival “Northern” Hispanics on April 8, 2002 - injuring 24 prisoners and permanently disabling one guard. Despite over 100 grievance appeals filed, scores of “Northern” affiliates who refused to agree not to initiate retaliation were still being denied two hot meals per day, daily showers, outdoor exercise, telephone calls, canteen, visiting and religious services.

Moreover, a U.S. Attorney review requested on February 6, 2004 by Governor Arnold Schwarzenegger was closed on June 15, 2004 - reporting “no human rights abuses” in the aftermath of the riots. A skeptical California State Senator Jackie Speier called the limited paper review inadequate: “A lot of fireworks but no powder.”

After the 2002 melee and total lockdown of FSP's 3,500 prisoners, groups of prisoners were unlocked after signing non-aggression agreements. But handling of the situation has remained contentious. In December, 2003, then California Department of Corrections (CDC) Director Edward Alameida fired FSP Warden Diana Butler over the riot while all other top FSP managers down to the Captain level were transferred to other prisons, pending investigation. Alameida, himself the subject of perjury allegations regarding supermax Pelican Bay State Prison's federal investigation, was forced to resign shortly thereafter. Following that, Governor Schwarzenegger asked the U.S. Attorney to investigate.

CDC estimates that over two-thirds of its 162,000 prisoners belong to gangs or splinter groups that constantly battle for turf and control. While lockdowns are standard procedure following major outbreaks of violence, this one - in the view of recently appointed CDC Director Jeanne Woodford - “should not have gone on for two years.” Craig Haney, a University of California (Santa Cruz) psychology professor, opined that “to confine inmates under those conditions for that long really presses against the psychological bounds of people's survival.” Senator Speier called the lockdown “indefensible” and a violation of federal standards. “It's like grounding a child for five years and forgetting all about him,” she said.

In addition to the severe restrictions, the grievances focused on food. One filed in December, 2002 complained of having peanut butter and bread as the main course three times per day, contrary to long-established CDC rules requiring balanced nutrition and at least two hot meals per day. One of former Director Alameida's last acts was to deny this grievance.

An unidentified high-level CDC administrator called the lockdown “insane,” saying “you lockdown long enough to do cell searches and investigation - then scatter the troublemakers to other prisons.”

U.S. Attorney McGregor Scott was tasked with the federal criminal review, but parsed the assignment to look only into the aftermath of the riot - not the riot itself. He thus excluded looking into allegations that the riot was literally *permitted* to occur because of connections between Associate Warden Michael D. Bunnell and Northern Hispanics. As to his analysis of the 23 hour-per-day lockdown of Northern Hispanic gang members, Scott declined to open a criminal investigation because there was “no evidence” that prison officials acted with “deliberate indifference” to the prisoners' basic needs. The next step will be a routine review by the U.S. Justice Department's Civil Rights Division to determine if civil penalties should be sought.

The riot allegations call to memory Bunnell's history of prisoner over-familiarity. In 1992, he was fired from his Chief Deputy Warden position at Deuel Vocational Institution when his personal telephone conversations with shot caller

prisoners in white and Hispanic gangs were used in a state probe to implicate him in prison heroin rings. He approved one such prisoner getting \$1,835 worth of CDC-paid outside gold-crown dental work, deleted a drug dealer from a dog sniffing cell-search list, removed a memorandum from a lifer's file [that had implicated him in a 1985 in-prison murder] prior to his parole hearing, and provided others with attractive job assignments and coveted single cells. Carl Larson, a former CDC regional administrator, called what was on the tapes “some of the worst cases of undue familiarity and preferential treatment I have observed.”

Bunnell's criminal charges were squashed, however, when a state appellate court held that the six tapes, were improperly recorded. Later, the State Personnel Board ordered him reinstated [now at FSP] with \$270,000 back pay - which Bunnell mocks on his customized 1998 Chevy pickup's vanity plates: “THNX CDC.” He still faces a lawsuit brought in Sacramento Superior Court by guard Patrick O'Dea, who blames Bunnell for the herniated disc O'Dea suffered in the 2002 FSP riot. In the suit, O'Dea alleges deletion of portions of the audio tape of Bunnell's questionable orders during the riot.

But all is not quiet at FSP. On June 19, 2004, forty Southern Hispanic and white prisoners rioted in the dining hall when a Southern Hispanic being escorted to administrative segregation shouted out an instruction in Spanish, setting off the dinner-time melee. Four prisoners were seriously injured; FSP went back on lockdown.

As of the end of June, 2004, only six Northern Hispanics remained at FSP, pending transfer. Reversing a 20 year-old policy to integrate all factions, CDC now appears to be leaning towards segregating gangs by prison. Many observers, both staff and prisoner, have commented that the likely result at FSP will be the consolidation of power by the Southern Hispanics, in the absence of their principal rivals, leading eventually to intimidation of other ethnic groups and even staff. This concern is heightened by CDC's current reshuffling of its population to house higher security risk prisoners at FSP. ■

Sources: *Los Angeles Times*; *Sacramento Bee*.

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# Tenth Circuit Reverses Dismissal of PLN Suit Challenging Kansas DOC Ban On Gift Subscriptions

by John E. Dannenberg

The Tenth Circuit U.S. Court of Appeals reversed and remanded the district court's grant of summary judgment to prison officials (see: *Zimmerman v. Simmons*, 260 F.Supp.2d 1077 (D. Kan. 2003)) which had upheld a Kansas Department of Corrections' (KDOC) regulation effectively banning all gift magazine subscriptions (including, notably, *PLN*) to Kansas prisoners. Importantly, the Tenth Circuit held that Prison Legal News, Inc. (PLN) had a due process right to be notified by KDOC whenever KDOC refused to deliver *PLN* to a prisoner.

PLN and Kansas prisoners Kris Zimmerman and Joseph Jacklovich, Sr. had filed separate suits against various KDOC officials (Charles Simmons, Kansas Secretary of Corrections, et al.) in U.S. District Court under 42 U.S.C. § 1983 for injunctive relief and damages. [See: *PLN*, July 2002, p.8.] The plaintiffs seek to overturn KDOC regulation 44-12-601, a personal property limitation rule requiring, *inter alia*, that all magazine subscriptions for KDOC prisoners be directly purchased via a prison Special Purchase Order (SPO) from funds in the prisoner's trust account, in an amount not to exceed \$30 per month (with some exceptions). The prisoners complained that this regulation, which allegedly violated their First Amendment free speech and Fourteenth Amendment due process rights, had the effect of preventing them from receiving gift subscriptions - including *PLN*, from loved ones.

Plaintiff PLN filed a separate complaint, adding its concern that because KDOC never notified PLN of the non-delivery of such a subscription, it violated PLN's Fourteenth Amendment due process rights as well. Prisoners at certain classification levels are also not allowed to receive any publications, including *PLN*.

The district court consolidated the three cases, Kansas attorneys Bruce Plenk and Max Kautsch represent all

the plaintiffs, both sides then moved for summary judgment. The district court accorded extraordinary deference to prison administrators by ruling that KDOC's solitary example of alleged "strong-arming" by one prisoner upon another to extort a magazine subscription paid for by the victim's family provided sufficient evidence to support a finding of KDOC's legitimate penological interest. In so holding, the district court pre-terminated its inquiry by only analyzing the first of the four test factors specified in *Turner v. Safley* (1987) 490 U.S. 401. The defendants also pled qualified immunity, so as to immunize themselves from suit. This shifted the burden to the defendants to show that no material issue of fact remained as to whether KDOC's actions were objectively reasonable in light of the law and the information they possessed at the time. The court sidestepped that question by holding that because the regulation did not violate the plaintiff's constitutional rights, the defendants were entitled to summary judgment. Separately, the court held that PLN's due process rights were not violated because the censorship of its magazine was not content-based, and that notification to the prisoners (who could in turn notify PLN of the rejection) satisfied PLN's constitutional rights.

The plaintiffs filed separate appeals, but the Tenth Circuit consolidated the cases into

one. On *de novo* review, the Tenth Circuit reversed on all issues. First, the Tenth Circuit held that the district court erred by its blanket, standardless ruling finding that none of the other three *Turner* factors weighed in plaintiffs' favor. Instead, the appeals court found that genuine issues of material fact remained on all four factors.

In an interesting legal sidebar, the Kansas Supreme Court had meanwhile recently overturned the Kansas Court of Appeals' decision (*Rice v. Kansas*, 76 P.3d 1048 (2003)) that had disapproved the same challenged KDOC gift subscription regulation. (See: *Rice v. Kansas*, 95 P.3d 994 (2004); [*PLN*, Jan. 2005] Thus, the pairs of state and federal court decisions were literally twin mirror images of each other. [See: *PLN*, Apr. 2004, p.6, *Kansas Gift Subscription Ban Rejected by State Court But Upheld By Federal Court*.] The Tenth Circuit took charge by distinguishing the facts relied upon by the Kansas Supreme Court and the U.S. District court. The federal case was one of summary judgment, not review of an evidence based trial. Because the standards for the two cases thus differed, the Tenth Circuit ruled that "*Rice* does not control the outcome of this case." On appeal, the plaintiffs in *Rice* were also represented by Mr. Plenk but at trial they had proceeded pro se. Significantly, in its case, PLN presented expert testimony from

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## PLN Suit (Cont)

a former Kansas DOC commissioner that the ban on gift subscriptions did not impact any legitimate security interest nor improve prisoner behavior. The court in *Rice* did not have such testimony before it.


The Tenth Circuit was not convinced by the evidence of the alleged “strong-arming” incident relied upon by KDOC. Although it was in no position to weigh that evidence, it could and did comment on its questionable admissibility - noting that much of it was hearsay from a convicted felon. “One vehicle can carry only so much baggage,” the court opined, holding that at the very least the evidence was subject to interpretation and thus worthy of a trial before a trier of fact. The court reviewed the three remaining *Turner* factors - alternative means to exercise the right, affect of accommodation, and the ab-

sence of ready alternatives - and finding room for favorable disposition, remanded these back to the district court to resolve.

Finally, as to PLN’s notification rights, the court relied on *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989), “there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners.” The Tenth Circuit followed the Ninth Circuit by approvingly citing *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001) for the proposition that “both prisoners and publishers have a right to procedural due process of law when publications are rejected.” It further followed *Montcalm Publishing Co. v. Beck*, 80 F.3d 105 (4th Cir. 1996) which held “that publishers are entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate-subscribers.” The court cemented

PLN’s challenge by observing that “providing individualized notice to the publisher would appear to impose a minimal burden,” and instructed the district court on remand to “fashion an appropriate procedure.”

The district court ruling was accordingly reversed, and the case remanded. Plaintiffs were ably represented by Bruce Plenk and Max Kautsch, Law Office of Bruce Plenk (Lawrence, KS). Amicus curiae Kansas ACLU was represented on brief by J. Patrick Sullivan, Shook, Hardy & Bacon, LLP (Kansas City, MO). See: *Jacklovich, Prison Legal News and Zimmerman v. Simmons*, 392 F.3d 420 (10th Cir. 2004).

PLN has successfully litigated gift subscription bans against prison systems in Washington, Oregon and Alabama. In *Crofton v. Roe*, 170 F.3d 957 (9th cir. 1999) the court invalidated the Washington DOC’s ban on gift subscriptions, PLN was among the publications censored in that case. 

## From the Editor

by Paul Wright

The index for the 2004 issues of *PLN* is now ready and available for shipping. PLN’s indexes are a great stand alone research tool as well as the best tool to maximize the use of PLN as a research tool. Each index lists all *PLN* articles by issue and article title and topics can be researched by case name as well as topic. With more than 500 individual topics, any subject can be quickly pinpointed and at a glance provide information such as the state of origin, case outcome, damage and attorney fee award, injunctions, and much more. The 2004 index is a bargain at only \$10.00. Or purchase a combined 2002, 2003 and 2004 index for only \$22.50. Indexes can be ordered from PLN on the ordering form in this issue on pages 45 and 46.

As this issue of *PLN* goes to press our matching grant fundraiser is still going on and we won’t know if we have met our \$25,000 goal until next month’s issue of *PLN*. Since we remain reader supported, any donations above the cost of a subscription are what allow us to continue our work.

This issue contains articles on the recent Tenth circuit appeals court ruling in PLN’s favor in our suit against the Kansas DOC’s ban on gift subscriptions. That case is proceeding forward and it remains to be seen if it will result in a settlement or a trial. This issue also contains an article on the court ruling also in PLN’s favor in our suit against the Florida DOC over its censorship of *PLN* and its practice of punishing writers who

receive compensation from publishers for their writings. PLN has no litigation budget and we are able to carry out these important struggles only due to donations we receive from our readers. Sadly, PLN is the only organization fighting against censorship of prisoners’ mail and for their right to receive publications as well as publishers’ ability to send them. Currently PLN has three other cases pending in appellate courts and two others in district courts.

Apparently *PLN*’s fame has spread farther than I imagined when a reader alerted me to a thriller by best selling author Lisa Gardner, *The Next Accident*. The book deals with two FBI agents tracking a serial killer and low and behold, *PLN* is duly mentioned as the personal favorite magazine of one of the novel’s fictional FBI agents. As far as I know, this is *PLN*’s first mention in a novel.


PLN continues to receive a lot of mail from our prisoner readers. I would like to thank all those who send us settlements, unpublished court rulings and news clippings as those are all put to good use and help keep our news coverage up to date with news that is frequently reported nowhere else. However, some guidelines on writing to PLN that will save time and postage. Generally we are not interested in individual cases that are filed. We usually only report on class actions when they are filed that are of national interest. Otherwise, we wait until there is a decision on the merits before we

report on it. If you have filed a lawsuit against prison or jail officials, we will most likely only be able to report it as a verdict or a settlement if and when you win. You can save time and postage by waiting until you have won a case. We do not report on individual criminal cases as we lack the time, space and resources to do so.

We also receive requests for cases and other legal materials. The only materials we are geared up to provide are those which we advertise. If it isn’t advertised in *PLN*, don’t write and ask us for it. When writing *PLN* please be concise and to the point. Don’t send a five page letter and wait until the last paragraph to mention you also need an address change.

If a copy of *PLN* has been censored by prison or jail officials, please send us a copy of the rejection notice you receive and we encourage you to exhaust whatever administrative remedies you have and send us copies of all responses.

Also, if you patronize the services of any PLN advertiser, please tell them you saw their ad in *PLN*. It helps advertisers know which ads are reaching their customers and encourages them to continue advertising with *PLN*. Likewise if you know of any businesses that you think might be interested in reaching *PLN*’s readers let us know who they are and we can contact with a PLN advertising packet.

Enjoy this issue of *PLN* and please encourage others to subscribe. 



# Report Lambastes New York Lockdowns

by: Michael Rigby

**E**motional and physical distress...restricted diets...“greeting beatings”...high rates of mental illness...a reliance on warehousing instead of treatment. This is the troubling reality of disciplinary confinement in New York, according to a 54-page report released on October 22, 2003, by the New York Correctional Association (NYCA), a nonprofit prisoner-advocacy group.

**Build ‘em.** According to the report, the proliferation of lockdowns in New York, as in other states, has been fueled as much by economic considerations as any legitimate interest in prison security. After eliminating parole for violent offenders in 1995, New York received nearly \$200 million in federal funds for prison construction under Bill Clinton’s 1994 Violent Crime Control and Law Enforcement Act. Between 1997 and 2000, the state used this money to construct 10 modern day high-tech lockdown facilities, bringing the total to 11.

In other states these prisons would be called “supermax.” But New York prison officials resist that term. “Either way,” notes the report, “conditions are basically the same: 23 hour lockdown, enforced idleness, and extreme isolation.” The majority of the 5,000 prisoners in disciplinary confinement reside in these high-tech lockdowns (two, Southport and Upstate, comprise entire prisons; the other nine—termed S-Blocks—are free standing facilities on the grounds of existing prisons). The rest are confined to their cells or sent to special housing units (SHUs), which are designated cell blocks on existing units.

Department of Correctional Services (DOCS) Commissioner Glenn Goord claimed the build-up was responsible for a 15-year low in prisoner-on-staff and prisoner-on-prisoner assaults. The report explains, however, that in 1996, one year before the build up began, the rate of prisoner-on-staff assaults was already at a ten-year low.

The report further asserts that the high cost of building supermax prisons is more than offset by their low operating costs. Minimal services and limited movement mean that housing a prisoner in lockdown costs about half what it does in a regular prison—about \$16,000 per year compared to \$32,000.

**Then Fill ‘em.** Needless to say, efforts are taken to keep these low cost beds occupied. Originally only Tier III violations—the

most serious—were eligible for disciplinary lockdown. But after Upstate and the S-Blocks were built, the Department allowed them to accept less serious Tier II violations. In fact, the report found that several men were in lockdown for such minor violations as smoking and horse-playing. One prison official even told investigators that hearing officers had recently been pressured to sentence prisoners to at least 90 days in disciplinary confinement so they’d be eligible for transfer to Upstate or an S-Block. As noted by criminologists Leena Kurki and Norval Morris in the report: “Once a supermax is built, there is a tendency to keep it full.” (Of interest to New York prisoners, the report notes that more than one-fifth of Tier III rulings are reversed on appeal.)

**Mental Health.** Nearly one-fourth (23%) of prisoners in lockdown are mentally ill, according to the report. (The rate for the general population is 11%.) Contributing to the problem is a lack of in-patient beds at the system’s sole psychiatric hospital, Central New York Psychiatric Center (CNYPC), which has not expanded its 206 bed capacity since it opened in 1980—despite a near tripling of the prisoner population. Thus, prisoners in need of psychiatric care are typically treated at CNYPC and quickly returned to lockdown until they again decompensate and are returned to the hospital. One outside psychiatrist described this vicious cycle as a “misery-go-round.”

The report notes that on nearly every site visit to a disciplinary lockdown, investigators were confronted with prisoners “in states of extreme desperation: men weeping in their cells; men who had smeared feces on their bodies or lit their cells on fire; prisoners who cut their own flesh in a form of self-directed violence known as self-mutilation; inmates who rambled incoherently and paced about their cells like caged animals; individuals with paranoid delusions....”

The psychologically damaging effects of long-term isolation have been well-documented, argue the report’s authors. However, no empirical research has shown the contrary—that solitary confinement produces positive changes in behavior. In fact, 74% of those sampled at Southport had done previous stints in disciplinary lockdown. The report contends that “This high return rate for disciplinary housing undermines the notion that lockdown is an effective tool for improving behavior”—just like prisons in general.

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## Lockdowns (Cont)

**Restricted Diets.** One of the most severe forms of punishment in lockdown is the restricted diet, aka “the loaf.” The report describes it this way: “Consisting mainly of flour, potatoes, carrots, and very little fat, the ‘loaf’ is a dense, binding, tasteless one-pound loaf of bread that is served to inmates three times a day, along with a side portion of raw cabbage.” Although the loaf has been banned by the American Correctional Association, the federal Bureau of Prisons, and a number of states, according to the report, the DOCS has expanded its use by more than 100% since 1997. One man, sentenced to 35 years in lockdown, “was put on the diet because he had ‘nothing left to lose, all of his privileges have been taken away,’” according to guards. Another prisoner, this one HIV+, was on the loaf even though Department policy prohibits placing HIV infected prisoners on the restricted diet. “The facility quickly corrected its error, but the fact that it happened shows a dangerous lack of oversight,” notes the report.

**Suicide and Self-mutilation.** Suicide and self-mutilation are common in lockdown. The report referred to a study by the *Poughkeepsie Journal* which found that “more than half (52%) of prison suicides in New York take place in disciplinary lockdown, though disciplinary lockdown contains less than 10% of the inmate population.” The report noted that after one suicidal prisoner was found hanging in his cell on May 1, 2000 at Upstate “he was not taken to the hospital for 45 minutes because the private ambulance service with whom DOCS contracts services did not answer the phone.” The fire department ultimately transported the prisoner to the hospital, where he died 20 minutes later. If he had survived, the attempt may have won him more time in lockdown since prisoners attempting to kill or harm themselves are routinely issued disciplinary tickets. As the report contends, “To punish individuals in such desperate straits can only be described as cruel and misguided.”

**Guards’ Perspective.** According to the report, guards complained to investigators that they receive minimal training, have few resources to handle mentally ill prisoners, and receive little support from the Department or prison administration for traumatic

events experienced in lockdown, such as suicide attempts and cell extractions. At Southport guards told investigators that the work was “degrading” and “humiliating.” “Several had stories of being stabbed, spat at, assaulted, or ‘thrown at.’ One man had twice been put on prophylactic HIV medications after exposure to blood or feces. Many officers, they said, take anti-depressants to cope with the stressful and depressing nature of the job.”

**Double-celling.** The report also lambasted the Department’s practice of double-celling prisoners in lockdown. According to the report, all 3,000 prisoners in Upstate and the nine S-Blocks are double-celled, confined with their cellmate in a tiny 105 sq. ft. area 24 hours a day. There is no privacy. Showers and toilets lack curtains or privacy barriers. These cramped conditions can quickly lead to violence. The report recounted one incident at Upstate in which “Jose Quintana was brutally murdered by his cellmate in May 2001,” after arguing about whether to turn off the light. An investigation by the *Village Voice* (reprinted in *PLN*, August 2001, p. 1) revealed that guards watched for 20 minutes as Quintana was beaten to death.

**Recreation.** Recreation consists of 1 hour a day in an empty 55 sq. ft. cage connected to the cell, during which time prisoners remain shackled. They are not permitted to wear gloves or hats, even in the northern regions where temperatures can be below freezing six months of the year. These austere conditions reportedly cause many prisoners to forego recreation altogether.

**Abuse.** Many prisoners complained of “greeting beatings” upon arrival at lockdown. Even in electronically monitored lockdowns, guards “push you under the camera and beat the shit out of you,” said one prisoner. Prisoners also complained of harassment, such as guards “forgetting” to feed them. A civilian employee at Southport told investigators that “The bad officers know they can get away with anything because it’s sanctioned at the top.”


**Neglect.** Neglect is also prevalent in lockdown, according to the report. As just one example, the report refers to a prisoner who had full-blown AIDS. “He was so ill, that he could barely lift his head off of the pillow.” The man said he was in extreme pain and starving. “He was disoriented but aware that he was dying, in the darkest, dankest cellblock in the prison.” Neglect was also a major factor in at least eight prisoner deaths in 2001, according to the report. For example, in separate incidents two prisoners

were allowed to starve after they announced they were going on a hunger strike. Another killed himself a month after writing a request for counseling that went unanswered. Still another was allowed to commit suicide by hanging himself in the rec pen—in full view of security cameras.

**Lack of Confidentiality.** Prisoners’ access to health care is impeded by a lack of confidentiality, according to the report, which notes that “All clinical consults are conducted ‘cell-front’ by nurses standing directly in front of the cells.” As a result, these consultations are easily overheard by cellmates and neighboring prisoners. Nurses even routinely draw blood through the cell door’s food slot.

**Release.** Shockingly, prisoners confined for years in these horrid conditions are regularly released directly into the public with no treatment or therapy. One guard at Southport told investigators that he routinely violates prison rules by escorting lockdown prisoners unshackled on the day of their release. “‘If the guy’s going to stab someone, I’d rather it be me than the first person he bumps into at the Elmira bus station,’” he said.

**Recommendations.** The report made a number of recommendations to improve conditions in lockdown. Among them: create an independent oversight board to monitor conditions in lockdown; provide appropriate housing for mentally ill prisoners; institute suicide prevention programs; cease shackling prisoners during recreation; cease penalizing those who harm themselves; end the use of restricted diets; provide anger management, self-help, educational, and pre-release programs; use disciplinary lockdown only for serious offenses; avoid double-celling when practicable; expand the capacity of CNYPC; increase funding for therapeutic services to mentally ill prisoners; and appoint a task force to identify ways to improve the safety, morale and training of staff.

**Response.** DOCS Commissioner Goord acted quickly after receiving an advance copy of the report in August 2003—he banned the report’s principle author, Jennifer Wynn, from entering the prisons beyond the visitation area. Goord later imposed new limits on how many NYCA investigators may visit a prison, banned NYCA interviews with prison staff, and declared access to all SHUs off limits. *PLN* has reported extensively on prison lockdowns. See indexes for more. 

Additional source: *New York Times*

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## PLN Suit Challenging Florida DOC's Censorship of *PLN* and Writer Pay Ban Proceeds

On November 16, 2004, Judge John H. Moore, of the District Court for the Middle District of Florida, denied a motion for summary judgment filed by the Florida Department of Corrections (FDOC) in *PLN*'s suit against FDOC. As previously reported in *PLN*, that 42 U.S.C. § 1983 action alleges violations of *PLN*'s First Amendment and due process rights for barring receipt of *PLN* by prisoners, and to enjoin FDOC from penalizing prisoners who receive compensation for writing articles for *PLN*.

The court on April 26, 2004, denied FDOC's partial motion to dismiss, which only addressed the compensation issue. FDOC then sought judgment as a matter of law on the censorship and due process claims. Those claims are based upon FDOC refusing to allow delivery of *PLN* because it contains advertisements for telephone companies other than those assigned to FDOC prisons. While *PLN* has carried such ads since 1998, the Florida censorship did not begin until February 2003.

FDOC argued in its motion that *PLN*'s censorship and due process claims are moot

because a newly enacted procedure allowed *PLN* to be delivered if its telephone service advertisements or "penpal" service advertisements are "incidental" to the publication. The pen pal ads became an issue because the FDOC prohibits prisoners from advertising by any means, for penpals or receiving materials from businesses that offer penpal services.

In contesting FDOC's motion, *PLN* asserted the issues were not moot because FDOC has "flip-flopped" on their policy stance at least three times. Moreover, FDOC remains free to change their policy at the conclusion of this lawsuit. The court agreed.

In so holding, the Court noted that in November 2003, FDOC informed *PLN* that it was changing its policies and procedures concerning the distribution of reading material, which would not allow rejection solely on the basis of the telephone service ads. In December 2003, the FDOC's assistant General Counsel advised *PLN* that telephone ads would result in rejection of *PLN* as required by the Florida Administrative Code (FAC).

In their motion for summary judgment, FDOC said that effective February 2004

*PLN* would not be banned for ad content. *PLN* editor Paul Wright testified that despite this third "flip-flop" *PLN*'s Florida prisoner subscribers are still having difficulty receiving *PLN*. Additionally, the court noted FDOC has not indicated it would amend the FAC, which was the basis for previous rejection. Accordingly, the court on November 16, 2004, held *PLN*'s claims are not moot and denied FDOC motion for summary judgment.

*PLN* will report on future developments of their lawsuit challenging the FDOC's infringement upon the freedom of speech and press. See: *Prison Legal News v. Crosby*, USDC, MD FL. Case. No. 3:04-CV-14-5-16TEM, 2004 U.S. Dist. LEXIS 25025. ☐

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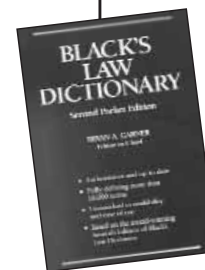
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# Habeas Hints

by Kent A. Russell

This column is intended to provide “habeas hints” to prisoners who are handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is post-conviction practice under the AEDPA, the 1996 law which now governs habeas corpus practice throughout the U.S.

## Some Useful Post-Conviction Motions

In this column, we take a look at some of the most useful post-conviction motions for dealing with issues other than those which are normally addressed in a federal habeas corpus petition by a state prisoner.

### § 2255:

#### Motion to Vacate Sentence by Federal Prisoner

The 28 U.S.C. § 2255 motion to vacate sentence is the federal prisoner’s equivalent of the petition for writ of habeas corpus by a state prisoner [§ 2254]. A prisoner convicted in federal court and seeking to get the conviction and sentence set aside on constitutional grounds must do so by filing a § 2255 motion in the U.S. District Court where the defendant was sentenced.

There are many similarities between the § 2255 motion and the § 2254 petition: (1) The AEDPA statute of limitations, which requires filing within 1 year after the conviction becomes “final” (i.e., 90 days after the conviction is affirmed on direct appeal), applies to both § 2254 and § 2255. (2) The § 2255 motion must be filed on a court-approved form that can be obtained from the court clerk or from the court’s website. The questions on the § 2255 form are virtually the same as those on the § 2254 form. (4) § 2255 is not intended as a substitute for the right to appeal any more than § 2254. Hence, the court is not required to hear any claim on § 2255 that could have been raised on appeal but was not raised, unless the petitioner can show that the failure was the result of ineffective assistance of counsel (IAC). (5) An appeal from the denial of a § 2255 motion also requires a Certificate of Appealability (COA).

The principal differences between § 2255 and § 2254 arise from the fact that, because there is no state “exhaustion” requirement for federal prisoners applying for relief under § 2255, constitutional claims based on facts outside the appellate record

are heard first by the § 2255 court, before any other court has had a chance to deny them. For example, IAC claims — which are usually based on facts outside the appellate record and therefore, in almost all jurisdictions, can be asserted for the first time after the direct appeal is over — will be heard for the first time by the judge who is ruling on the § 2255 petition. Consequently, it is usually easier to get an evidentiary hearing on IAC claims brought under § 2255 than it would be under § 2254, where an IAC claim could only reach federal court if it had already been exhausted by being denied at least once in state court. Similarly, because there is no state court denial of an IAC claim to “defer to” when IAC is raised on § 2255, a “de novo” standard of review will apply, which is more favorable to the petitioner than the § 2254 standard, which requires the petitioner to show that the state court’s denial of the claim was not only wrong, but “unreasonable”.

### Rule 60(b):

#### Motion for Relief From Judgment

A motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure should be considered when a state prisoner seeking federal habeas corpus relief has already had a previous federal habeas corpus petition denied because of some procedural default. For example, suppose that a prisoner’s first federal habeas corpus petition was thrown out of federal court because, due to IAC, the petitioner’s lawyer blew a deadline imposed by the district court, which then resulted in the petition being dismissed. If the prisoner now attempts to file a brand new federal petition, s/he will be confronted by the “successive petition” rule, which prohibits the filing of a second [or third, etc.] petition in U.S. District Court unless the petitioner first obtains permission to do so from the Circuit Court of Appeal. That permission, however, is essentially *impossible* to obtain because the requirements are so limiting: Either the petition must be based on newly discovered evidence demonstrating complete innocence [a showing that can be satisfied in only the rarest of cases]; or on a new, ground-breaking decision made retroactive on collateral review by the Supreme Court [which has only occurred

once or twice in the entire history of the Supreme Court].

The problem summarized above amounts to a “Catch 22”: If the petitioner attempts to file a federal habeas corpus petition in U.S. District Court, it will be thrown out because permission to file from the Circuit Court has not first been obtained. However, if the petitioner attempts to obtain permission from the Circuit Court to file a successive petition, permission will be denied because it is effectively impossible to satisfy the requirements for obtaining it.

Faced with this dilemma, instead of attempting to file a new petition, the petitioner should move to vacate the original judgment of dismissal pursuant to Rule 60(b).

Rule 60(b) permits the moving party to set aside a judgment of dismissal on one of six grounds, the most common being: (1) mistake or excusable neglect [e.g., ordinary attorney negligence or clerical error which results in a dismissal]; (2) newly discovered evidence which could not have been discovered earlier; (3) fraud; or (6) any other good reason. Grounds (1), (2), and (3) are subject to a one-year limitations period, which begins to run from the date of judgment of dismissal. Ground (6) is a catch-all provision which does not have any time limit other than filing within a “reasonable time” following the judgment. Hence, for example, Ground (6) could be used to set aside a dismissal which occurred because of gross attorney negligence or outright abandonment of the petitioner that was not discovered until more than a year had elapsed from the date of judgment.

Recent case law squarely holds that a Rule 60(b) motion is *not* subject to the successive petition rule, and hence a Rule 60(b) motion can be filed in the U.S. District Court *without* obtaining any permission to file it from the Circuit Court of Appeals. See, e.g., *Hamilton v. Newland*, 374 F.3d 822 (9<sup>th</sup> Cir. 2004). Thus, as long as the moving party can come within one of the grounds for relief under Rule 60(b), the motion will have to be heard and determined in the U.S. District Court, even though a previous federal habeas petition by the same prisoner was dismissed, and even though the prisoner has not sought or obtained permission from the Circuit Court to file a successive petition. A Rule 60(b) motion should include a Notice of Motion [identifying the specific sub-section on which the motion is based], supported by a declara-

tion from the petitioner stating facts which demonstrate that the reason for dismissal was one of the grounds provided for under Rule 60(b), and a Points and Authorities [citing *Hamilton* to show that the successive petition rule does not apply to motions filed under Rule 60(b), and demonstrating that the case had potential merit if it had not been dismissed].

### Motion for DNA Testing

Several states now have statutes which permit a prisoner to obtain DNA testing in support of a potential habeas corpus claim. In California, Penal Code § 1405 allows a convicted felon currently imprisoned to make a written motion for DNA testing in the trial court that entered the judgment of conviction. [Note: In states other than California, the prisoner should try and find a statute analogous to the California statute; if none exists, consider filing a California-type request for DNA testing anyway and alleging, upon its denial, that the court's refusal to hear it violates Equal Protection.] Although California prisoners should carefully review the provisions of § 1405 before attempting to make a DNA motion, the most important requirements are summarized below:


Notice of the motion must be served on the Attorney General, the district attorney, and the police department or other agency having custody of the DNA evidence to be tested. The motion, which must be verified under penalty of perjury, must be supported by a declaration from the prisoner stating facts which "raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction."

In determining whether the required showing has been made, the court can consider any evidence, whether or not introduced at trial. Subdivision (b) of § 1405 permits the prisoner to apply in writing for the appointment of counsel to prepare the motion. The application must be addressed to the court and must include a statement by the prisoner that he or she was not the perpetrator of the crime, that DNA testing is relevant to his assertion of innocence, and that DNA testing has not previously been done. The right to file the motion is absolute, and may not be waived, even as part of a plea bargain. If the motion is granted, the State must pay for the testing if the applicant is a prisoner or is otherwise indigent.

An order granting or denying the motion is not technically "appealable", but it can be reviewed by a petition for writ of mandamus or prohibition filed in the Court of Appeals within 20 days following the order of denial.

### Discovery Motions

Most states do not allow discovery on state habeas corpus until and unless the court grants an evidentiary hearing. However, in 2002, California enacted Penal Code § 1054.9, which allows discovery in connection with habeas corpus petitions brought by prisoners who have been sentenced to death or to life without possibility of parole (LWOP). Prisoners facing death sentences will have counsel appointed for them on habeas corpus, but LWOP prisoners will not. Hence, LWOP's should take advantage of the new discovery statute if there is evidence in the hands of the State that might prove useful on habeas corpus. A § 1054.9 motion is filed in the Superior Court where the petitioner was convicted and sentenced. It should contain a showing that the prisoner has made good faith efforts to secure the discovery from trial counsel and from the district attorney [copies of letters requesting the items sought should be sufficient], but that these efforts have been unsuccessful.

In federal court, discovery is governed by the federal rules which apply to post-conviction petitions filed pursuant to § 2254 or § 2255. Both sets of rules are the same. They allow a petitioner to ask permission from the district court to conduct discovery pursuant to the Federal Rules of Civil Procedure. Discovery methods that can be specifically requested are depositions [sworn testimony of a witness taken under oath and transcribed], requests for production of documents, interrogatories [written questions to be answered under oath by the person having knowledge of the pertinent facts], and requests for admissions [statements of fact directed to government agents, who must admit or deny each fact alleged]. Most district judges are reluctant to grant discovery requests until and unless an evidentiary hearing has been granted. However, in cases where additional discovery is necessary in order to establish the right to an evidentiary hearing in the first place, the prisoner should consider submitting specific discovery requests to the court at the time the § 2254 petition or § 2255 motion is filed, and explaining why they are necessary to a fair resolution of the petition. 

*Kent A. Russell specializes in habeas corpus and post-conviction cases. He is the author of the California Habeas Handbook, which explains habeas corpus and the AEDPA. The latest edition (Ed. 4.04, revised Dec. 2004) is now shipping and can be purchased with a check or money order for \$29.99 (cost is all-inclusive for prisoners, others pay \$5 extra for postage and handling; no order form necessary), directly from the Law Offices of Russell and Russell, 2299 Sutter Street, San Francisco, CA 94115.*

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# Oregon HCV Class Action Settled; Limitations Period for Individual Damages Actions Tolled

by Mark Wilson

On April 6, 2004, the Class Action suit against the Oregon Department of Corrections (ODOC) for failing to properly diagnose and treat the hepatitis C virus (HCV), was resolved by entry of a comprehensive settlement.

## The Action

As previously reported, in 2001, Oregon prisoners brought suit in federal court, alleging ODOC had written "and *de facto*, 'as applied' policies of...delay and denial of...proper diagnosis and treatment of" HCV. Plaintiffs alleged violations of their constitutional rights, the Americans with Disabilities Act of 1990, and state law torts. On December 19, 2002, the Honorable Anna Brown certified the action as a class action "for declaratory and injunctive relief only "pursuant to FRCP 23(b)(2). [*PLN*, Aug. 2003].

Beginning September 2003, the parties entered into extensive settlement negotiations, overseen by United States District Judge Donald Ashmanskas. Negotiations occurred on numerous occasions over the course of seven months, culminating in the April 6, 2004 agreement. The major terms of the agreement include:

## Stay of Action

The parties stipulated to the immediate stay of the action, as the terms of the agreement are carried out.

## Appointment of Special Master

Judge Ashmanskas was appointed as Special Master for oversight and administration of the agreement.

## Creation of Medical Review Panel

The parties agreed to the creation of a three-member Medical Review Panel (MRP) comprised of experts in Hepatology, Gastroenterology and public health administration, from Oregon Health Sciences University.

The MRP was charged with a two-part review of the diagnosis and treatment of HCV infected ODOC prisoners, including a review and potential modification of ODOC's written HCV guidelines followed by an 18-month random medical chart review of 100 class members.

The MRP was empanelled as a judicial body, precluding any *ex parte* communications. The MRP's final reports in both phases of its review are public records, having "the effect of noting compliance with the Guidelines and the medical standard of care."

If the "report finds noncompliance with the Guidelines or the medical standard of care, that finding can be used as a basis, upon motion of Plaintiff Class, to extend the review period of one six-month interval. Additionally, "the final report of the MRP can be used in any...subsequent proceeding, if otherwise admissible."

Any disputes concerning the activities of the MRP or the enactment of any of its recommendations shall be brought to Judge Ashmanskas. He will "make a determination on the dispute and shall issue findings." Those findings shall "then be referred to Judge Anna Brown for the issuance of an order mandating defendant to implement the changes, modifications and revisions as appropriate." Judge Brown's ruling shall be final.

## Phase I Review

Phase I of the MRP review began April 6, 2004. In this place the MRP was asked to evaluate ODOC's written HCV guidelines for compliance with the community standard of care for the diagnosis and treatment of HCV. The MRP was also asked to address specific concerns raised by the Plaintiff

Class, and to make recommendations concerning the modification of ODOC's written guidelines "and health care delivery system, if appropriate." [See sidebar].

## Phase II Review

Upon completion of the Guidelines Review, "the MRP shall commence an 18 month chart review of no more than 100 medical charts of class members." In this phase, "[t]he parties shall [randomly] select up to 50 charts from the general group of HCV infected patients" within ODOC and Plaintiff databases. Additionally, "the MRP may at its sole discretion conduct a review of 50 additional medical charts selected from particular categories of treatment criteria, including, without limitations, those selected based on specific medical condition, treatment factors, or population characteristics. The MRP may, in its discretion, select any particular category and method of random chart selection it feels will best accomplish the task."

The MRP is authorized to speak personally with any medical staff, patient or other individual "necessary to conduct a proper review of the medical treatment of the discrete patient. The MRP may...seek information from Plaintiff Class counsel on particularized issues or charts for review." Moreover, "Plaintiff Class, by and through counsel, may supplement the selected 100 charts with any information including Kites and Kite responses."

The purpose of this review is "to assess the compliance of the treatment utilized for the specific patient with the existing Guidelines and the medical standard of care. If the MRP finds the treatment utilized for the specific patient violates the Guidelines or the medical standard of care it shall make recommendations for any changes needed[.]"

## Final Agreement

Upon completion of both phases of the MRP's review and the issuance of its final reports, "the parties shall in good faith negotiate a final agreement which, if executed, obligates the Department to implement all or part of the MRP's recommendations or alternative measures that are within the MRP's scope and are mutually acceptable

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to the parties. This Agreement shall be submitted to Judge[s] Ashmanskas and...Brown for review and the issuance of a final order[.]” The parties shall then “execute and file a stipulated judgment of dismissal[.]”

### Subsequent Damages Proceedings

“[S]ubsequent proceedings by individual class members may be filed...concerning individual damage claims. Th[e] agreement does not bar individual class members from seeking all available rights and remedies in their individual cases.”

### Tolling Agreement

“Defendants agree[d] to toll the applicable statute of limitations for [bringing individual damages actions] for all class members...for two years from the date of the dismissal of this action,...on two years from the time the individual knew or reasonably should have known of any injury arising from the actions of any potential Defendant and the date putative Plaintiff identified the Defendant responsible for injuries.”

Dismissal of the action is contingent upon the MRP’s completion of its work, which will not occur until June 30, 2006, at the earliest. Assuming, the action is resolved on that date, individuals who know or reasonably should know they have been harmed by the ODOC will have two years from the date of dismissal to file a damages action (i.e., until June 29, 2008). The two year clock will not begin to tick for other class members until they know or reasonably should know they were harmed. It is important to note, however, that at this point it is not known exactly when the action will be dismissed.

### Fees and Costs

In the interest of settling the action, Class Counsel cut her fee significantly. Although she had more than \$300,000 invested in the three-year litigation, she agreed to accept just \$175,000 in fees, costs and disbursements.

“Class counsel shall also be entitled to recover fees for subsequent work during the pendency of the case at a rate of two hundred dollars (\$200) per hour up to a maximum of fifty (50) hours per year and a maximum of two thousand dollars (\$2,000) in expenses per year for no more than two years.” This brings the total fee awarded to \$199,000.

Additionally, “[t]he members of the MRP shall be compensated [at a rate of \$500

per hour] by the State of Oregon pursuant to individual service contracts with the State. “Other, unspecified costs incurred by the State in relation to the agreement include, but are not limited to: providing substance abuse treatment to all HCV-infected prisoners who need it, specialist referrals, use of pegylated rather than regular interferon, and providing liver biopsies and treatment to an increasing number of HCV-infected prisoners. [See companion story].

### No Admission of Liability


ODOC “and the individual defendant expressly den[ied] any and all liability or fault” and the agreement “does not constitute any admission of legal liability or fault...nor any admission that the Guidelines are or ever have been constitutionally or medically deficient.”

### Notice of Settlement

ODOC agreed to “place notices of the settlement...in all [ODOC facilities] until the case is dismissed.” Those mutually agreed

upon notices shall “contain at a minimum,...the overview of the major settlement terms, the rights of individual class members to pursue individual damage claims, the applicable dates of the settlement agreement, the relevant tolling agreement and the contact information for class counsel.” The notices are to be posted in English and Spanish in every living quarters and infirmary of each ODOC facility, and the “notices shall be run in each newsletter of each [prison] at least once monthly.” Not surprisingly, however, ODOC has routinely failed to comply with this term of the agreement since the effective date.

The number of HCV-infected prisoners receiving evaluation and treatment by ODOC has sharply increased since the case was settled. Additionally, the MRP recently completed a *major* re-write of the ODOC’s HCV Guidelines, [See sidebar].

PLN will continue to report significant developments in the settlement process, subsequent damages actions and ODOC’s treatment of HCV. See: *Anstett v. State of Oregon*, USDC D OR, Case No: 01-CV-1619-BR. 



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# Expert Panel Significantly Revises Oregon's HCV Guidelines

A panel of hepatitis experts has significantly revised the hepatitis C virus (HCV) guidelines of the Oregon Department of Corrections.

Pursuant to the terms of the settlement resolving Oregon's Class Action HCV suit of *Anstett v. State of Oregon*, a Medical Review Panel (MRP) was appointed to evaluate and modify ODOC's written HCV guidelines. [See companion story].

On April 16, 2004, the MRP began reviewing ODOC's HCV guidelines for compliance with the community standard of care. The review process was stated to "be completed within 60 days or no later than June 6, 2004[,] but took considerably longer than anticipated.

In modifying the guidelines the MRP "tried to take into account community practice in Oregon and correctional practice across the country. [It]...also considered how Hepatitis C issues are treated by both national and state bodies that allocate resources or make recommendations."

After disregarding the first 24 pages, the MRP utilized the ODOC's written guidelines as a template for revised guidelines. However, the MRP's revised guidelines represent a vast departure from the original guidelines in numerous important respects, including:

## Liver Biopsies

The MRP indicated that liver biopsies are not necessary in every case. "The evidence regarding the relationship of liver histology and stage of disease is good. However, that evidence needs to be evaluated in the context of genotype and duration of disease. Treatment success is so common in genotypes 2 and 3 that liver biopsy is not

worthwhile." Biopsies are recommended for genotype 1 patients who have had HCV for more than 15 years – more than 10 years if there is a significant history of alcohol use – or if the duration of disease is unknown.

## Time Limits

Perhaps one of the most significant changes is the imposition of strict timelines for diagnosis and treatment. For all patients, "[t]he noninvasive diagnostic phase of the evaluation...should be done within 90 days" of the patient's request for testing.

Patients not requiring a biopsy "should be aware of treatment options and ODOC recommendations regarding treatment within 30 days of completion of noninvasive diagnostic testing or 120 days" of the patient's request for testing. If indicated, treatment should commence within this time.

For patients requiring a biopsy, it "should be completed within 60 days of the completion of noninvasive diagnostic testing or 150 days" of the patient's request for testing. "Patients...should be aware of treatment options and ODOC recommendations regarding treatment within 30 days of completion of liver biopsy or 180 days" of the patient's request for testing. If indicated, treatment should commence within this time.

The timelines are satisfied "if 90% of patients meet [these] standard[s]."

## ALT Elevations

Prior to the MRP revisions ODOC required a minimum ALT elevation of at least two times the upper limit of the normal range before further workup of HCV antibodies would occur. Under the revised guidelines,

however, *any* elevation of any liver enzyme level must receive further workup.

## Hepatitis A&B Vaccinations

Prior to the revised guidelines, ODOC routinely failed to offer Hepatitis A and B vaccinations to HCV infected prisoners. Under the MRP guidelines, however, "[a]ll patients with chronic HCV infection should be vaccinated for Hepatitis A and B after appropriate informed consent."

## Specialist Referrals

The previous ODOC guidelines made no reference to specialist referrals. The revised guidelines, however, indicated that "[p]atients with signs of cirrhosis should be referred to an outside specialist[]" and "Hepatitis C patients who are also positive for HIV should be referred to an HIV specialist."

## Hepatitis C Interest Group

The MRP proposed "that ODOC organize a Hepatitis C Interest Group composed of ODOC practitioners with experience and interest in the evaluation and treatment of Hepatitis C patients. The Interest Group should include or have access to a hepatologist or gastroenterologist experienced in the treatment of Hep C patients." The MRP noted that "[c]urrently in the community *all* Hep C patients are treated by specialists or primary care doctors experienced in the treatment of Hepatitis C."

"The Group would provide a quality assurance function to the Hepatitis C diagnosis and treatment process[]" and the MRP stressed that it "is not meant to be a barrier" to diagnosis and treatment of HCV. The objectives of the Group include: (1) "Monitor[ing] the guideline process, providing approval for exceptions to the guidelines when appropriate[;]" and (2) "Supervis[ing] the treatment of Hepatitis C patients." Additionally, "[t]he Interest Group should function by consensus. Records should be kept regarding their decisions."

Under the MRP guidelines, all genotype 1 patients would have their cases evaluated by the Interest Group. "If the patient or provider feels strongly that treatment is indicated [when the guidelines indicate otherwise]...[the] case should be referred to the Hepatitis C Interest Group for review."

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Additionally, "[t]reatment should be supervised by the Hepatitis C Interest Group."

### Substance Abuse Treatment

The ODOC guidelines previously mandated that if there was *any* medical or criminal history of substance abuse, no further workup of HCV would occur until the patient provided proof of recent completion of several months of substance abuse treatment." However, ODOC failed to make substance abuse treatment available until prisoners were within one year of release, at which time they were no longer eligible for HCV treatment because they had less than eighteen months to serve.

The MRP made several important changes here. First, the MRP stressed that ODOC "needs to provide substance abuse treatment for Hepatitis C patients[.]" Second, HCV infected prisoners are now required to be "active in drug/alcohol recovery" if there is a "medical or criminal history of substance abuse within [the previous] two years." The prisoner need be active for only one month to receive further HCV workup, but must continue substance abuse treatment throughout the course of HCV evaluation and treatment, or until successful completion.

### Contraindication Documentation/ Follow-up

Previously, HCV treatment was denied if the physician believed there had been substance abuse within the previous six months, but no evidence of abuse was required. Under the revised guidelines, this contraindication must be based upon actual evidence, including "self report, positive drug screen, possession, [or] rule violation[.]" Additionally, the previous guidelines made possession of tattoo equipment a contraindication to treatment, but under the revised guidelines only an actual new tattoo within the previous six months precludes treatment.

Under the previous guidelines, prisoners were routinely denied workup and treatment due to unspecified or ever-shifting contraindications to treatment, which would never be re-evaluated once found. The MRP remedied this problem by indicating that documenting and "actively addressing" contraindications "is imperative." While "no further reevaluation will be necessary until or unless the contraindications resolve," the revised guidelines specify that "routine follow-up to assess contraindications should occur at appropriate intervals. If

contraindications do resolve, the patient should be re-evaluated for treatment." Additionally, "[p]atients should receive summary of testing done, reason for treatment contraindication and education regarding next steps given contraindication."

### Pegylated Interferon

Previously, ODOC routinely failed to treat HCV with pegylated interferon because it is more expensive than regular interferon. The revised guidelines provide, however, that "[a]ll patients should be treated with pegylated interferon and ribavirin[.]"


### Non-Termination of Treatment

"Patients already on interferon or interferon and ribavirin at the time of...entry into custody will be maintained on the drug if tolerated."

### Treatment Availability

For genotype patients, the revised guidelines provide that treatment "is most clearly indicated for consideration for individuals with Stage 3 fibrosis [severe liver disease] with any degree of inflammation [on liver biopsy], who meet the other criteria. "Patients with Stage 2 fibrosis-moderate liver disease – may be eligible for treatment depending on other characteristics. Treatment generally "is not indicated in individuals with Stage 1 fibrosis – mild liver disease. Rather, the revised guidelines recommend monitoring with "re-biopsy in 5-10 years as an alternative[.]" Patients with Stage 4 fibrosis – Advanced, Compensated Cirrhosis – may improve with treatment and treatment should be offered in conjunction with consultation with a gastroenterologist. Finally, Stage 4 fibrotic patients with Decompensated Cirrhosis are unlikely to improve with treatment. Therefore, treatment is not generally recommended.

Over all, the MRP's revised HCV guidelines are a vast improvement over the previous ODOC guidelines and they are now, quite possibly, the most progressive prison HCV guidelines in the nation. Many ODOC prisoners who were previously denied proper diagnosis and treatment are beginning to receive care which comports with the community standard of care, under the MRP's guidelines.

We will continue to significant developments in Oregon's HCV litigation and treatment. See: *Anstett v. State of Oregon*, USDC D OR, Case No. 01-CV-1619-BR. 

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# Alabama Settles Class Action Medical Suit; Institutes HCV Treatment Protocol

by John E. Dannenberg

In a major milestone along the Southern Poverty Law Center's (SPLC) march towards gaining humane medical care in Alabama's prisons, a Settlement Agreement was signed in June, 2004 that commits the Alabama Department of Corrections (ADOC) to providing constitutionally adequate medical care for ADOC prisoners at St. Clair Correctional Facility. St. Clair, a maximum security prison, is one of the largest in the state and houses some of the most severely ill prisoners, including prisoners with cancer, Hepatitis-C (HCV), and on kidney dialysis. One major breakthrough is that for the first time, ADOC will now treat hepatitis-C (HCV), based upon a protocol mirroring an evolving standard reported earlier in *PLN* for other states. (See: *PLN*, May 2004, and this issue).

The Alabama case, *Baker v. Campbell*, along with six other lawsuits, was reported in *PLN* (Oct. 2003, p.5) when a preliminary injunction issued to abate Alabama's sordid prison conditions and medical care resulting in death rates triple that of neighboring states. While the *Baker* case focused initially on the named plaintiffs, the Settlement Agreement expanded the plaintiff class to include all St. Clair prisoners, expressly providing for immediate treatment of four.

One major success for the named plaintiffs was the reverse colostomy provided to James Freeman, who was forced to wear a colostomy bag to collect his bodily waste for the past seven years because the DOC refused to pay for the surgery.

But the settlement's requirement that plaintiff Darrell Mullins be given proper

treatment for his cancer came too late — he died from testicular cancer shortly after the agreement was signed.

The foundation of the Settlement Agreement is an addendum entitled "Agreement of Experts." This addendum addresses what treatment is to be provided for specific illnesses, timeliness of such care, staffing types and levels, the formulary, performance measures and a quality control program. Monitoring is provided by Dr. John Robertson, a correctional medical expert and former director of New Mexico's prison medical system - Dr. Robertson, will tour St. Clair at least four times per year over the Agreement's two-year term. The Settlement Agreement shall prevail over any conflict with ADOC's contract medical provider in the event of disputes.

Significantly, the Settlement Agreement is agreed not to be a consent decree and is not enforceable in federal court. While plaintiffs may seek enforcement in state court only, pursuant to 18 U.S.C. § 3636(c) (2) (B), they are also free to bring a new federal action in the event of non-compliance. Finally, the Agreement requires ADOC to pay SPLC \$30,000 in attorney's fees and costs.

The eleven page Agreement of Experts goes into great detail as to what ADOC prisoners are now entitled. It begins with definitions of "serious medical need" and "medical necessity." Next is a list of seven major disorders for which ADOC must develop and implement chronic care guidelines, per nationally accepted medical standards.


Elements of what constitutes "adequate care and treatment for inmates with serious medical needs" is spelled out in great detail, specifying timeliness, level and frequency of care, and access to outside specialty care. All specialty care must be from a physician. The plan requires ADOC's medical provider to maintain a detailed data base to provide for prompt follow-up and monitoring. Prostheses (including dental) and devices such as hearing aids shall be timely repaired/replaced. Prisoner co-payments may not be charged for care required by clinical guidelines or that requested by physicians, including follow-up care. And co-payments shall be waived for control of communicable diseases and for reports of laboratory tests. Sick call shall conform to prisoner work schedules. Physicians shall be credentialed,

and qualified in their specialty. Dental care shall focus on timely treatment of emergencies, restoration of teeth in lieu of extraction, and on dental hygiene including regular cleaning.

The policies and procedures to be developed by ADOC include nurse screening protocols, HCV/chronic disease treatment guidelines, blood and airborne pathogen control, and MRSA (a highly contagious and deadly quasi-bacterial organism) control.

A lengthy section deals with required quality control procedures. It covers nursing sick call, urgent care, and clinical guidelines for chronic TB, hepatitis, asthma, diabetes, HIV, and hypertension. Guidelines are also specified for specialty care areas, including heart, eye, gynecology, neurology, orthopedics, podiatry and pulmonary. Time limits are placed on reporting of X-rays and laboratory tests.

Of interest to many *PLN* readers is the protocol for ADOC's HCV treatment plan. It provides for 100% screening at intake; those with high risk factors will be given the HCV anti-body blood test. In patients with known immune deficiency (e.g., HIV), advanced tests are required. Once HCV is confirmed, treatment eligibility will be determined. Absolute exclusion will occur upon de-compensated liver cirrhosis, less than 24 months sentence remaining, or a history of a solid organ transplant or of active TB. Relative exclusion criteria include Hepatitis-B co-infection, poorly controlled diabetes, alcohol/illicit drug use within the past twelve months, or life expectancy less than ten years. A liver biopsy is optional based upon HCV genotype. The treatment shall be pegylated interferon and ribavirin combination therapy.

The St. Clair settlement agreement should take ADOC prisoners out of the medical care Dark Ages. No relief, however, could be provided for the principal plaintiff, lung disease patient Jerry Baker. After having been denied his prescribed medications, the 63 year-old Baker dropped from 155 to 115 pounds, finally dying of malnutrition at St. Clair on May 16, 2003, just a few weeks after the lawsuit was filed. See: *Baker v. Campbell*, USDC ND AL, Case No. CV-03-C-1114-M, Settlement Agreement, June, 2004. A copy of the agreement and other pleadings are available at [www.splcenter.org](http://www.splcenter.org). 

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# Jury Awards \$500,000 to Massachusetts Jail Guard Harassed for Breaking Code of Silence

by Matthew T. Clarke

A Boston federal jury has awarded \$500,000 to a guard who was harassed at work by other jail employees after he reported misconduct by another guard.

Bruce S. Baron, a former guard at the Suffolk County House of Correction (the jail), filed suit under 42 U.S.C. § 1983 claiming constructive discharge due to sanctioned, or tolerated, workplace harassment after he reported another guard's misconduct. Baron sued the Sheriff, Sheriff's Department and principle harasser guard Daniel Hickey.

Baron decided he needed a job with security, health benefits, and retirement after his wife came down with multiple sclerosis. About a year after he was hired as a guard, he saw a guard playing cards with prisoners on his monitor. His supervisor also saw it and ordered him to report it to a Superintendent. The card-playing guard received a three-day suspension.

The harassment began the next morning at roll call when other officers physically distanced themselves from Baron and one muttered "rat." Baron was often called "rat" by other guards thereafter. He received threatening phone calls, was ostracized in the cafeteria, and posters depicting him as a rat and calling him "rat" and "child porno user" were distributed throughout the jail. Once, Baron's car was smeared with feces and its tires slashed.

Hickey called Baron "a fucking rat", "a fucking Jew coward," threatened to beat him up, to make him "the second cripple in the family" (referring to Baron's wheelchair-bound wife), ordered prisoners to give their cheese sandwiches to "the rat" and slammed cheese down on Baron's tray in the cafeteria. Some of Hickey's antics were witnessed by and reported by other guards, including a lieutenant, who admonished Hickey and reported the harassment to the Sheriff's Investigative Division (SID). Baron also made numerous complaints to SID. However, SID never even opened a file on the investigation and only investigated the incident reported by the lieutenant. Hickey admitted that harassment but was not disciplined.

Baron received severe discipline for minor infractions. For instance, he was sanctioned with 20 days without pay for reporting to the Boston police information received from a prisoner that his under-aged girlfriend

was being threatened with sexual assault by a neighbor. Under department policy, Baron should have reported the information to his superior. Rather than accept the punishment, Baron quit. Three years later, he filed suit.

The jury found that the Sheriff's Department violated Baron's civil rights by its custom and policy of failing to investigate and discipline employees who enforced the "code of silence," awarding Baron \$500,000 in damages. It also found that Hickey interfered with Baron's contractual relationship with the department, but the specific harassment claims were time-barred, awarding no damages against Hickey. [PLN, Dec. 2003, p. 21]. Defendants filed a motion for judgment as a matter of law notwithstanding the verdict, also seeking reduction in damages or a new trial.

The court held that there was sufficient evidence of a widespread, well-known "code of silence." A former Superintendent had

even admitted it existed, that Baron had been harassed, and that harassing posters were endemic at the jail. Therefore, it held that there was sufficient evidence to uphold the verdict and that the award was not an irrational appraisal of the damages, grossly excessive, inordinate, shocking to the conscious of the court or so high it would be a denial of justice to permit it to stand. The defendants' motions were denied and the verdict and award upheld. The court also awarded Baron \$20,109.55 in attorney fees. See: *Baron v. Hickey*, 292 F.Supp.2d 248 (D. Mass. 2003).

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# Three Americans Convicted of Running Sham Military Jail in Afghanistan

by Matthew T. Clarke

Three Americans, led by ex-special forces soldier Jonathan Keith Idema, 48, of Fayetteville, North Carolina, have been convicted of running an unauthorized jail in Kabul and torturing Afghans they kidnapped in an attempt to extract information about “terrorists”.

Idema, who used the name “Jack,” surfaced in Afghanistan as a self-described security consultant to the Northern Alliance (NA) in 2001. The NA teamed with the United States to drive the fundamentalist Muslim Taliban government out of power. Idema, who had been sentenced to federal prison in the United States for defrauding 60 companies of \$600,000 in 1994, offered security services to journalists and sold some journalists a videotape of an alleged Al Qaeda training camp that aired on CBS’s *60 Minutes* in January 2002. He was also featured in the top-selling book, *The Hunt for*

*Bin Laden*, in which he claims to have fought for ten months with the NA.

The three bearded Americans wore side arms, military-style clothing with U.S. Flags, and dark wrap-around sunglasses. They and their four Afghan helpers arrived in SUVs to take Afghans from their homes, hold them naked and blindfolded in the jail and torture them. The torture ranged from beatings, to hanging their victims upside down for extended periods, to dousing them with freezing and/or scalding water, to playing deafening loud music next to their ears to deprive their victims of sleep.

Idema was able to so accurately duplicate real American government operatives that he thrice duped the International Security and Assistance Force (ISAF), the North Atlantic Treaty Organization troops who provide security for the puppet government in Kabul, into assisting him in raids in the third

week of June 2004. The ISAF conducted sweeps for bomb materials at the raids and finding traces of explosives in two and suspicious electronics in the third. However, the ISAF officials grew suspicious of Idema, launching the inquiry that led to his July 2004, arrest by Afghan police and security forces at the unauthorized jail in a rented house in downtown Kabul. Eight victims were found at the “jail” and released by the Afghan authorities.

Idema’s victims, including an Afghan religious judge, were present at the trial. They told stories of kidnapping, theft, and torture. One victim, who Idema turned over to American authorities, was cleared and released by them. The others have no apparent link to the resistance. Idemas apparent motive for the crimes, other than delusions of grandeur and a desire for high-adventure, was the more than \$50 million in reward monies offered by the U.S. government for the capture of top Al Qaeda leaders.

Idema claimed to have uncovered plots to assassinate Afghan education minister Yunus Qanooni and bomb an American military installation near Kabul. He presented videos showing a grateful Qanooni offering to send his bodyguard soldiers along on a raid to arrest the assassins. In another video, Ghulam Saki, one of Idema’s victims, confesses to having been hired to plant bombs to assassinate Qanooni and Afghan defense minister Mohamed Fahim. However, Saki told Afghan authorities that the confession was a fabrication elicited under torture.

In an unanimous verdict announced by Presiding Judge Abdul Baset Bakhtyari on September 15, 2004, the three Americans and their four Afghan employees were found guilty and sentenced. Idema and Brent Bennett, 28, his right-hand man who was trained by the U.S. Army as a forward air controller, each received 10-year prison sentences. Edward Caraballo, 42, an award-winning journalist who claimed throughout the trial that he was merely filming Idema’s kidnapping and torture activities for a news report, received an 8-year sentence. The four Afghans received sentences between one and five years.

The trial may not have been fair by U.S. standards. Translations were abysmal. The defense was not allowed to cross-examine witnesses and Idema frequently exploded into emotional outbursts. The judges appeared to have difficulty understanding the defense audio and video tapes, which were in English and only partially translated. They eventually became disinterested, cutting the tapes off before they were finished. The Americans were officially charged with kidnapping, torture, theft, and entering the country illegally, each of which carried a maximum punishment of twenty years in prison, but the court did not explain which of the charges they were convicted of.

Caraballo’s defense lawyer, Robert Fogelnest, attempted to protest the unfairness of the trial, but was cut off and told by Bakhtyari to confine his remarks to the charges against his clients.

In the end, the panel of Afghan judges said that the Americans had failed to prove any official standing with the Afghan or the American governments and had only shown private links to some officials of each government.

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Even after receiving the sentences, the Americans continued to claim that their mission had been sanctioned by the U.S. government and that they had been abandoned because, in light of the public revelations about abuse of prisoners by U.S. military personnel in Iraq and Afghanistan, they had become an embarrassment to the U.S. government. This is especially true after the beating deaths of two prisoners at the U.S. military's Bagram base near Kabul, the deaths of two other prisoners at U.S. bases in eastern Afghanistan and reports of allegations of beatings and sexual abuse of Afghan prisoners by U.S. soldiers.

Idema claimed to have been working directly for Lt. Gen. William G. Boykin, the deputy under secretary of defense for intelligence, who became a controversial figure when he publicly gave speeches casting the Bush administration's war on terrorism as a war between the Christian and Muslim religions and depicted Islam as idol worship. The defense showed journalists audio-and video-tapes, faxes and emails which seemed to show Idema communicating with the U.S. government officials to pass on intelligence. However, no document showed official sanction for the Idema operation and the tapes of conversations with Jorge Shim, an aide to General Boykin, reflect Boykin's great concern in "building a firewall" between Idema and Boykin in an attempt to separate Boykin from Idema's activities to prevent potential future bad press.

Both Fogelnest and Idema's defense lawyer, John Edwards Tiffany, expressed surprise at the U.S. government's denial of involvement. Fogelnest asked, "Is this a secret that the Americans have secret ops? How many other Jacks do they have floating around?"

Regardless of whether "Jack" was authorized or not, it is sobering that his methods of kidnapping, theft and torture so resembled the standard American military tactics that they fooled the ISAF. The defense attorneys said that they would appeal the convictions.

On January 8, 2005, Idema's wife, Vickie Robertson, was arrested in Fayetteville, North Carolina and charged with violating the terms of her Texas parole by leaving Texas without her parole officer's permission. Robertson served two prison terms for forgery and credit card theft as recently as 1997. She is awaiting extradition to Texas. 

Sources: *New York Times*; *Washington Post*; *New Jersey Law Journal*; *Associated Press*; *Seattle Times*.



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# South Carolina Prison Industry Program Problematic, Audit Finds

by Michael Rigby

The prison industries program of the South Carolina Department of Corrections (SCDC) is improperly managed, likely displaces workers in the surrounding community, and creates an unfair advantage in the marketplace, according to a review performed by the Legislative Audit Council of the state's General Assembly. A report of the audit's findings, which covered a period from July 2001 to June 2003, was released in October 2003.

According to the report, as of August 2003 the SCDC employed over 1,900 prisoners in its Prison Industries Program (PIP). More than 1,200 worked manufacturing goods and providing services for private companies (making it the largest private exploitation of prison labor in the country). These companies compensate the SCDC for the prisoner labor; the SCDC, in turn, pays the prisoners between 35 cents and \$6.50 per hour. The other 700 plus prisoners make products or provide services that the SCDC sells to other government entities. These prisoners are paid slave wages ranging from nothing to 60 cents per hour.

The PIP does not have adequate goals or performance measures, according to the report. For instance, auditors found that the PIP generally employs better educated prisoners and those with longer sentences, rather than prisoners who could most benefit from the program—those with poor education and work skills and those slated for release within a few years. Notably, recidivism rates for prisoners in the PIP were no better than for those in the general population.

The PIP is probably not self sustaining either, noted a 1998 audit. The audit recommended that the SCDC use a true cost analysis system. Not surprisingly, the SCDC has yet to implement such a system. Currently, the SCDC annually reports information on product sales and deductions from prisoner wages. According to the report, this procedure is inadequate and does not “accurately reflect the degree to which the program has met its goals.”

In addition, the SCDC has inadequate methods for collecting child support, victim restitution, and room and board from prisoners wages, according to the report. For instance, the SCDC determines child support by asking prisoners to disclose this information when they're hired. The report noted, however, that this “may not be a reliable method of collecting such information.” For example, although a sampling of 22 prisoners revealed that two owed victim restitution, auditors found that only one actually had money deducted from his wages.

The PIP also creates an unfair advantage in the marketplace, according to the report. This is because companies that employ prisoners can pay lower wages, forego fringe benefits, and are typically provided with subsidized rent (the SCDC charges most companies \$1 a month for a minimum of 176,000 sq. ft. of space), subsidized utilities (one company lowered its electric bill from 7 cents per Kilowatt hour to 4 cents by reimbursing the SCDC directly), and other perks (the SCDC illegally pays half the cost of prisoner training, an arrangement that saved one company \$50,000).

This training arrangement caught the attention of U.S. Justice Department officials who wrote in a May 14, 2003, letter that “sharing the cost of training does not meet the spirit of the fair competition requirement since competitor manufacturers in the community are not provided with the same support.”

The report further found that SCDC saves these companies money through improper billing. In two instances, according to the report, the SCDC failed to bill companies for more than 8,700 prisoner hours, which amounted to \$29,000. In another instance, a company was billed \$2.06 an hour for prisoner labor rather than the \$7.06 per hour it should have been billed. The report noted that there is no independent review of SCDC invoicing.

More importantly, the PIP probably displaces private sector workers in violation of federal law. 18 U.S.C. 1761(a) provides that prisoners employed by private companies involved in interstate commerce must be paid a wage comparable to that for similar work in the local community and may not displace private sector workers. The SCDC, however, fails to adequately assess whether private sector workers are displaced. Auditors found, for instance, “four counties with above average

unemployment rates in which private companies employ inmates.” The report also noted that the SCDC generally started prisoners at the Federal Minimum Wage (FMW) even when comparable wages in the community might be higher, further increasing the likelihood of displacing workers in the community.

But the FMW is still apparently more than the SCDC wants to pay. Auditors noted one example in which SCDC sends manufactured shirts directly overseas without crossing state lines in order to circumvent the FMW. Even worse, the SCDC maintains many contracts that do not involve interstate commerce. Under these contracts the SCDC may pay prisoners substantially less than the FMW. Notes the report: “Allowing certain industries to pay less than minimum wage can result in a significant competitive advantage.”

South Carolina law goes even farther than federal law, mandating that no prisoner participating in the PIP “may earn less than the prevailing wage for work of similar nature in the private sector.” South Carolina Code of Laws 24-3-430(D). However, each year beginning with fiscal year 02-03, according to the report, the General Assembly has overridden the requirement, allowing prisoners to be paid less than the prevailing wage.

As if all this weren't enough, South Carolina law also gives the SCDC “a legally mandated competitive advantage over private sector vendors when selling goods and services...to state agencies,” notes the report. To begin with, state agencies are not required “to solicit competitive bids, quotes, or proposals when purchasing items from SCDC.” What's more, the law actually requires state agencies to purchase SCDC goods and services when its prices are equal to or lower than those of private vendors. Even when SCDC prices are higher, notes the report, state agencies are still allowed to purchase its goods and services. Consequently, “SCDC's competitive advantage over private vendors gives it the ability to increase its revenue by charging higher prices to state agencies.”

A free copy of the report can be obtained online at [www.state.sc.us/scla.c](http://www.state.sc.us/scla.c). See *PLN* indexes for more on the exploitation of prison labor. These complaints mirror the reality of prison slave labor across the country. 

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# Doctors of Death and the Medicalization of State Murder

by Michael Rigby

Prisoners often wonder if prison medical personnel really have their best interests at heart. But in the case of Sanjeeva Rao, a Georgia prison doctor, there is no doubt. He aims to see them dead.

When the state of Georgia began using lethal injections in 2000, Rao stopped promoting the health of prisoners and started assisting in their executions. Although Rao doesn't give the injections himself, he does ensure the executions are carried out successfully. If the prisoner's heart continues to beat after the deadly drugs are administered, for instance, Rao prescribes more. In 2001, after a nurse jabbed a needle into Jose High, a former drug addict, for 39 minutes in an unsuccessful attempt to find a usable vein, Rao inserted the needle into High's neck so that the execution could proceed.

Even with many states sanctioning doctor-assisted executions, such acts are forbidden by virtually all codes of medical ethics, including those of state medical boards. The American Medical Association's code reads for example, that "a physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."

These physicians are apparently never sanctioned by state medical boards, but many in the medical community believe these doctors of death should be punished. "The state medical boards should just yank the licenses of those people," said Dr. Sidney Wolfe, director of health research for Public Citizen, a consumer advocacy group.

Taking the fight a step further is Dr. Arthur Zitrin, a retired New York University psychiatry professor and former head of psychiatry at Bellevue Hospital. "My major thrust," said Zitrin, "is to identify physicians who have participated in executions in one way or another, with the objective of charging these physicians with Professional misconduct for violating medical ethics."

Zitrin, with the aid of Georgia lawyers Michael Mears and Matthew Rubenstein, planned to file a complaint against Rao with the Georgia medical board in June 2004. "I'm also on the trail of a doctor in Virginia, and one in Illinois," he said.

Doctor participation in state executions is poised to become an even bigger issue. On May 24, 2004, the U.S. Supreme Court ruled

in a case brought by Alabama death row prisoner David L. Nelson, whose veins have been damaged from years of drug abuse. Nelson challenged Alabama's plan to make a two inch incision in his arm or leg in order to carry out the execution. "There was no assurance," wrote Justice Sandra Day O'Connor in the opinion, "that a physician would perform or even be present for the procedure." The implication here is that the plan may have been acceptable if a doctor were present. See: *Nelson v. Campbell*, 124 S. Ct. 2117 (2004).

The rise of lethal injection as the prevalent mode of execution in the U.S. has been fueled by a desire on the part of death penalty supporters to make executions more palatable to the general public. It has also led to the medicalization of state murder. "What's unique about this procedure is that it's specially designed to imitate medical procedures," said Dr. Jonathan I. Groner, a professor of surgery at Ohio State University.

To ensure this euphemistic perception continues, about 25 states currently require or allow doctors to be present at executions. In addition, at least eight states, including Georgia, are pursuing legislation aimed at protecting these pseudo-physicians from professional discipline.

Rao has apparently bought into the concept of medicalized murder, referring to prisoners in medical terms even when he's hastening their death. "I always say 'a patient,'" Rao testified in a 2002 lawsuit brought by a condemned prisoner challenging the death penalty as inhumane. "That's by habit."

What Rao and others like him fail to realize, however, is that all the sanitized terms and phony medical procedures in the world cannot legitimize a process that is by its very nature abhorrent, demeaning to everyone involved, and unworthy of a civilized society. ■

Source: *The New York Times*

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# Prisoner's Release Fails to Excuse PLRA's Exhaustion Requirement

The Sixth Circuit Court of Appeals held the Prison Litigation Reform Act's (PLRA) administrative remedy exhaustion requirement was not excused by the fact the plaintiff had been released at the time the district court considered the motion to dismiss. While a prisoner at a Tennessee federal special needs prison, Jerry L. Cox, filed this action. Cox alleged prison officials assaulted and forcibly medicated him upon the order of the prison's doctor, Jan Mayer. The incident left Cox with a herniated disc in his lower back, which required surgery.

Cox filed an informal grievance. Six months later he had not received a response and he filed this action. Subsequent to filing the complaint, Cox advised the Tennessee Middle District Court he had been released from prison. Mayer moved to dismiss for failure to exhaust administrative remedies. Initially, the Court ordered dismissal, for Cox abandoned those remedies by failing to pursue other administrative remedies within the time frame set by prison procedures when a response was not forthcoming. On rehear-

ing, the Court held that as Cox could immediately refile the action, judicial economy was best served by not dismissing the action. Mayer appealed.

The Sixth Circuit said the issue presented was a matter of first impression for any Circuit. That issue was whether a federal court must dismiss an action filed by a plaintiff prisoner who does not exhaust administrative remedies before filing suit when, at the time the court considers the motion to dismiss, the plaintiff is no longer a prisoner. The Court found the plaintiff was a prisoner who brought the action, it complained of prison conditions, and administrative remedies had not been exhausted prior to bringing suit. As such, the Court held the PLRA mandates dismissal.

The Court held the PLRA's language is unambiguous in requiring exhaustion when a prisoner challenges prison conditions. The Court said that judicial economy is best served by requiring exhaustion in all prisoner cases. To hold otherwise, the Court said, "would encour-

age all prisoners nearing completion of their sentences to eschew the grievance process in favor of the Courts."

Cox argued his failure to exhaust was "cured" by application of Fed. R. Civ. P. 15(d), which pertains to supplemental pleadings. The Court rejected this position because Cox failed to file a Rule 15(d) motion. Moreover, even if he had, the outcome would be the same because a procedural rule cannot overcome a substantive requirement or restriction contained in a statute. The Court reversed and remanded for dismissal without prejudice. In dissent, Judge Moore said a district court order fulfilled Rule 15(d)'s requirements. Additionally, that rule was promulgated specifically to apply to circumstances such as at issue here to prevent refileing based on events occurring subsequent to the original filing. See: *Cox v. Mayer*, 332 F.3d 422 (6<sup>th</sup> Cir. 2003). Note: Prisoners close to release can avoid the PLRA entirely by filing the action *after* release. Beware, however, of the statute of limitations. ■

## California Sex Offender Satisfies Registration Obligation If He Mails Notice

The California State Supreme Court held that a sex offender satisfies his legal requirement to register with the police and tell them where he is living if he timely mails a notice to them by United States Mail.

David Smith lived in Long Beach, California in April, 1999. On April 10, 1999, he moved to Boulder, Colorado to be near family. He said that on April 12, 1999, he mailed a change-of-address notice to Long Beach Detective James Newland. After nine days in

Boulder, he moved to Port Jervis, New Jersey, near his daughter. He notified the California Department of Motor Vehicles and the Franchise Tax Board of his new residence.

Detective Newland said he never received any notice from Smith and did not know his whereabouts. When Smith didn't appear for his annual registration renewal on September 25, 1999, Newland followed Smith's trail and had him arrested in Port Jervis. Port Jervis police stated that during booking, Smith told them he had left Long Beach on April 10 without notifying authorities because he said he wanted "to start a new life." Smith later denied this.

Smith was convicted of violating Penal Code § 290(f)(1) for failure to register, and sentenced to five years in prison. The jury was told, in response to its inquiry, that a person "willfully and unlawfully fails to inform" authorities if they did not receive an address change notification. The California Court of Appeals upheld Smith's conviction, basically requiring him to have personally confirmed the receipt.

On review, the California Supreme Court first grappled with the ambiguity of the statutory language "inform." It rejected the state's

position that Smith could have simply filed for a return receipt, because with normal mail transit times, he would not have received confirmation back within five days. Alternatively, they suggested Smith could have phoned the police to see if they received the notice. But this was insufficient because if he determined that they had not, he would likely not have had time to mail a new notice before the five-day deadline. Likewise, the suggestions of e-mail or fax notification were rejected because they are not mentioned in the statute. From this, the court concluded that mere mailing of the notice within five days satisfies § 290(f)(1).

As to disposition, the court observed that Smith's sole defense was his testimony that he mailed the notice. Since the jury was erroneously instructed that § 290(0)(1) imported a duty upon Smith to ensure that the notice was actually received, and that a failure of the police to receive the notice translated to a determination he had willfully violated § 290(0)(1), the court held that the instruction was not harmless. Accordingly, the Supreme Court reversed the prior Court of Appeal's affirmation of Smith's conviction. See: *People v. Smith*, 32 Cal. 4th 792; 86 P.3d 348 (Cal. 2004). ■

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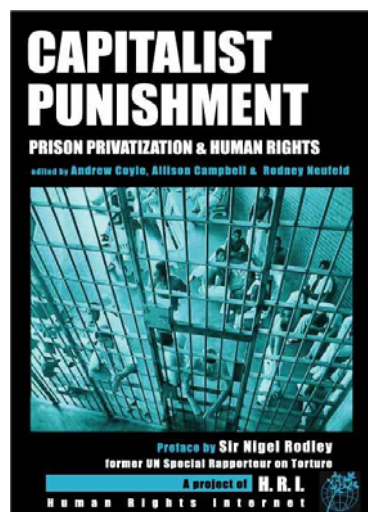


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# WHAT HAPPENS WHEN PRISONS ARE RUN FOR PROFIT?

## NEW EXPERT INSIGHT INTO PRISON PRIVATIZATION AND HUMAN RIGHTS

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of facilities and allocation of personnel. Special attention is paid to the effect on vulnerable groups such as women, children, and disproportionately incarcerated minority and indigenous communities.

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author of *Crime and Punishment in America*

**Senior Editor: Andrew Coyle** is the Director of the International Centre for Prison Studies at the University of London, UK, Managing Editor of *Punishment and Society*, and author of *The Prisons We Deserve*. He is a former governor of several prisons in the UK, and has visited prisons in numerous countries as an expert consultant for the UN and the Council of Europe.

This book is a project of H.R.I. [Human Rights Internet] Ottawa, Canada

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### TO ORDER

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# AEDPA One-Year Clock Starts When Administrative Parole Appeal Is Denied

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals held that for 28 U.S.C. § 2254 habeas corpus filing-deadline purposes, the AEDPA one-year filing clock starts at the time that state administrative remedies — not state court remedies — are exhausted. Thus, the federal jurisdictional one-year filing limitation period is to be calculated as the sum of two components: (1) the interval between the denial of administrative remedies and the commencement of state court remedies, and (2) the interval between the exhaustion of state court remedies and the initial federal court filing under § 2254.

Paul Redd, Jr., a California state prisoner serving a 1976 indeterminate “life” sentence for murder, appealed his denial of parole by the Board of Prison Terms (BPT), which became effective on June 17, 1998. As required, he first exhausted his administrative remedies by filing a BPT Form 1040 appeal, which was denied on December 7, 1998. However, Redd did not file a state habeas corpus petition challenging his parole denial until August 9, 1999. Proceeding to exhaust all state court remedies, he was finally denied relief by the California Supreme Court, effective January 19, 2001.

Redd then filed his 28 U.S.C. § 2254 federal habeas corpus petition on September 18, 2001, alleging continuing due process violations in his parole denial. However, the U.S. District Court (N.D. Cal.) denied his

petition as untimely under the AEDPA, 28 U.S.C. § 2254(d). The court reasoned that because the requisite triggering event of “the factual predicate” of habeas claims that “could have been discovered through the exercise of due diligence” (§ 2254(d)(1)(D)) had occurred when the BPT denied his Form 1040 appeal, Redd had already used up nine months of his one-year allowance. When added to his post-state-court proceedings interval (another nine months), a total of more than one year had run.

On appeal, the Ninth Circuit reviewed the AEDPA’s language to rebut Redd’s argument that the one-year federal filing period commenced only subsequent to the exhaustion of state court remedies. The court relied upon the language of 28 U.S.C. § 2244(d)(2), which provides for tolling of the one-year period during the pendency of a “properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim,” to decide that “other collateral review” includes administrative remedies.

Redd countered that the requisite “factual predicate” was the event of the California Supreme Court’s denial of his state habeas petition, and that the timing period should begin only at that time — when he first became eligible to file in federal court. The Ninth Circuit disagreed,

reading § 2254(d)(1)(D) to “clearly contemplate that ... the statute of limitations will begin to run before exhaustion of state remedies and thus before the federal petition can be filed.” The court noted that such was the established rule for habeas claims filed based upon newly discovered evidence and this rule applied similarly to Redd’s parole challenge.

Accordingly, the court affirmed the district court, concluding it did “not think it unduly burdensome to require state prisoners challenging parole board decisions to file state habeas petitions expeditiously if they wish to preserve the option of federal habeas review.” See: *Redd v. McGrath*, 343 F.3d 1077 (9th Cir. 2003).

California lifers should carefully heed this new hurdle when challenging their illegal parole denials. Nonetheless, an important caveat is that time commences when the prisoner is served with the BPT’s administrative denial. Since the BPT neither serves its 1040 denials personally nor by U.S. Mail (they are slid surreptitiously under cell doors while prisoners are out), arguably the prisoner is never properly served unless and until they acknowledge it. It is not uncommon for BPT 1040 denials to be back-dated months before the prisoner finds the paperwork slid under their door. Since the BPT cannot prove when you were served, arguably no time clock starts until you produce the denial as an exhibit to your first state habeas application. ■

## New Jersey Jail Guard Settles Elevator Fall Suit for \$750,000

On December 15, 2003, Global Elevator Technologies (GET), a company under contract with the Union County (New Jersey) Jail to provide elevator maintenance services, agreed to pay \$750,000 to a guard who suffered back and knee injuries in a December 2000 elevator accident.

The plaintiff, Union County Jail guard Sporer, 30, claimed that after entering the elevator on an upper floor and descending several stories, the elevator car began a free fall at the eighth floor and came to an abrupt stop between the second and third floors.

Sporer contended that he suffered a severe lumbar herniation which later required a discectomy and fusion. The surgery was largely unsuccessful, alleged Sporer, and the recuperation period was long and extremely

painful. Sporer also claimed that he continues to suffer severe pain and weakness.

In addition, Sporer allegedly suffered an internal derangement of the left knee that necessitated two arthroscopic surgeries. Although the second arthroscopic surgery was largely successful, Sporer claimed that he will continue to suffer pain and difficulties walking. Sporer’s claims were supported by orthopedist Gregory Charko of Woodbridge.

Sporer sued GET alleging that the company had not inspected and maintained the elevator as per the terms of its contract, and that the company’s negligent failure to perform the required maintenance precipitated the free fall. Sporer’s elevator expert, engineer Eugene Stifler of Sparta, asserted that the incident would not have occurred if the

elevator had been properly inspected and maintained.

Sporer claimed that as a result of the injuries he would likely be unable to return to work and was, as a practical matter, permanently unemployable. Sporer further claimed that due to extensive overtime work he had been earning approximately \$80,000 per year as a jail guard.

The case settled prior to trial for \$750,000. Sporer was represented by Michael Forester of the Clark law firm Perrotta, Frase, Forrester & Panitch. See: *Sporer v. Global Elevator Technologies*, Union County Superior, case number unknown. ■

Source: *New Jersey Verdict Review & Analysis*



# Tough Justice Leads To Quadriplegic's Death In CCA-Operated D.C. Jail

by Michael Rigby

Washington D.C. Superior Court Judge Judith E. Retchin is known for being tough on crime. She's so tough, in fact, that when a quadriplegic man came before her for possessing a small amount of marijuana—his first offense—she sentenced him to ten days in jail. It was a death sentence.

Jonathan Magbie, 27, spent nearly his entire life paralyzed from the neck down. Struck by a drunk driver at the age of 4, Magbie was confined to a motorized wheelchair that he controlled with his chin. He was barely five feet tall and weighed just 120 pounds. Magbie relied on others for virtually everything, whether scratching an itch or flushing accumulated fluid from his lungs. He could not even breath on his own.

"Jonathan was totally dependent," said his mother, Mary Scott. When asked how he was able to inhale marijuana, she said simply, "he learned to do a lot of things."

Ten days in jail for a first time marijuana possession offense is considered exceptionally punitive by D.C. Superior Court standards. In fact, even the U.S. Attorney's office had not objected when Magbie's attorney, Boniface Cobbina, and a pre-sentence report recommended probation.

But Retchin, a former federal prosecutor, would hear none of it. She pointed out that when police stopped the car in which Magbie was riding in April 2003 they found

a gun and cocaine. Magbie also told presentence investigators that smoking marijuana made him feel good and that he had no intention of quitting. "Mr. Magbie, I'm not giving you straight probation," Retchin said, according to a transcript of the September 20, 2004 hearing. "Although you did not plead guilty to having this gun, it is just unacceptable to be riding around in a car with a loaded gun in this city."

Before he was sentenced, one of Retchin's staff members contacted Chief Judge Rufus G. King III's office to inquire if D.C. Corrections could care for Magbie. Yes, came the reply. However, even the Correctional Treatment Facility (CTF), which houses prisoners with medical problems, would not have easily been able to care for someone like Magbie, said Philip Fornaci, executive director of the D.C. Prisoners' Legal Services Project. "I certainly would not say they killed him or any conclusion like that," said Fornaci. "But it certainly seems likely that he wouldn't have died if he hadn't gone to jail."

When Magbie arrived at the D.C. jail, intake personnel quickly determined he needed "acute medical attention." Roughly nine hours later, Magbie was transferred to Greater Southeast Community Hospital, which handles prisoner hospitalizations. But the hospital discharged Magbie the very next day and sent him to CTF, which is operated

by Corrections Corporation of America. A CTF physician determined that Magbie needed hospitalization and asked Greater Southeast to readmit him, but the hospital refused. The physician then asked Retchin to order the hospital to readmit Magbie, but she declined saying she did not have the authority.

With Magbie at CTF, his mother and Cobbina argued with medical staff for two days before finally being given permission to bring his ventilator to the jail. At 10 a.m. on September 24, 2004, Ms. Scott showed up at CTF with the ventilator only to learn that her son had been returned to the hospital. That night, four days after he was put in jail, Magbie died.

Following Magbie's death his family marched on the courthouse with signs accusing Judge Retchin of killing him. "I'm not saying that he shouldn't have been punished, because he did smoke marijuana," Ms. Scott said the day after burying her son. "I just don't think it should have cost him his life."

The District of Columbia inspector generals office has launched an investigation into whether or not the jail was equipped to handle the obvious and serious medical needs of a ventilator dependent quadriplegic. Both the jail and hospital defend their treatment of Magbie.

Source: *Washington Post*

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# Government Says No Criminal Conduct in New Jersey Mass Prisoner Beating, But Jury Awards Abused Prisoner \$19,000; Sexual Harassment Suit Settled for \$250,000

by Matthew T. Clarke

Despite government reports claiming that guards committed no crimes in the alleged mass beating of prisoners at Bayside Prison in 1997, on June 9, 2004, a Camden, New Jersey federal jury awarded a New Jersey prisoner \$19,000 for the mistreatment he suffered.

Laverna White, a former New Jersey state prisoner, filed suit under 42 U.S.C. § 1983, alleging he was brutalized by members of the Special Operations Group (SOG) of the New Jersey Department of Corrections (DOC) during a lockdown that followed the fatal stabbing of guard Fred Baker by prisoner Steven Beverly. [See *PLN*, Nov. 2003, p. 10.] White, who weighed 310 pounds at the time of the July and August 1997 lockdown, was living in a trailer while serving a three-year sentence at the prison farm. He said the abuse started when he asked guard Richard Hinckley if he could shower and wash his clothes.

Hinckley called in SOG members who shackled and handcuffed White and carried him, suspended by the shackles and handcuffs, to a maximum-security area. White's injuries included an asthma attack, a scraped head, contusion to his left knee, and nerve damage to his wrist. The jury awarded White \$1,000 in compensatory damages plus \$6,000 in punitive damages against prison administrator Gary Hilton, SOG chief officer Theodore Roth and the second in command of the DOC.

White's was the third of 371 individual federal cases filed by prisoners at the 1,200-man medium-security prison following the 1997 lockdown. The defendants won the first case and the second case was dismissed. Investigations by the DOC, U. S. Department of Justice, New Jersey Department of Public Safety, and New Jersey Attorney General's Office, the latest of which was released on March 25, 2004, all found that, while there

were instances of unprofessional conduct by prison staff, there was no cause for criminal action. Some media outlets claim the reports "discount the allegations of abuse."

While it may be questioned whether the report of a government investigating itself can ever serve to discount allegations of abuse by government officials, it cannot be questioned that a federal jury found in favor of one of the prisoner victims. Perhaps the government investigators do not consider the DOC employees' behavior criminal, but the jury found it was unlawful. The difference may be that the jury heard and evaluated the credibility of prisoner and prison employee witnesses, whereas the governmental investigators accepted any version of the facts that would make the whole scandal go away. One thing is certain: when a third of the population of a prison files federal civil rights lawsuits alleging brutality, it isn't because of a few isolated incidents of "unprofessionalism". As this issue of *PLN* goes to press, another jury awarded a prisoner \$245,000 for being beaten at Bayside. We will report details in an upcoming issue of *PLN*.

## Rikers Island Gunshot Victims' Suit Dismissed

A New York state court has dismissed a lawsuit brought by two men who claimed they were shot while asleep at the Rikers Island prison in New York City.

Bronx Judge Alison E. Tuitt dismissed the suit on May 21, 2004—four days into the trial—because the prisoners had not shown that the guards knew they were in danger.

Attorney for one of the plaintiffs, Emil J. Sanchez, said the pair would appeal the decision because it is not necessary to show that prison officials knew a danger existed in cases where security procedures were not followed. Sanchez said the city has extensive protocols to ensure that weapons are not smuggled into its prisons.

Three prisoners had originally filed suit: James Mingo and Douglas Harris, who were shot in the chest, and Larry Browning, who was shot in the arm. Mingo withdrew from the lawsuit shortly before the case went to trial.

If the case had not been dismissed early on, the defense intended to argue that the prisoners shot themselves as part of a plan to collect damages from the city. According


to Mark S. Cheffo, an attorney representing the city, investigators learned of the plan from Mingo's girlfriend, who confessed to smuggling in the gun.

Sanchez discounted the woman's claim, saying she had been "spurned" by Mingo and was hoping to "cut some type of deal on another charge."

Sanchez further asserted that the city was engaged in a "cover-up," attempting to shift responsibility for the smuggled weapon from the prison guards to the plaintiffs.


"Without involvement of corrections officers," said Sanchez, "it is very difficult to smuggle a gun into a prison."

Browning was represented by Emil J. Sanchez, who served as trial counsel for Friedman & Khafif; Harris was represented by Amelio Marino of Marino & Venetiziano. See: *Harris v. City of New York*, court unknown, Case No. 578/98.

*PLN* routinely reports on prisoners being shot or shooting themselves in US detention facilities. 

Source: *New York Law Journal*

## Sexual Harassment Settlement in NJ Prison

In an unrelated case, in May, 2003, the New Jersey DOC settled for \$250,000 a sexual harassment suit brought by a female guard at Riverside State Prison in Camden, New Jersey. Marianne Jervis filed the suit alleging guards Alonzo Piercy and Mickle Branch harassed her using obscene sexual comments and unwanted physical contact at the minimum-security prison. She also alleged that they undermined her authority at the prison and threatened to leave her unprotected during a lockdown. Guard supervisors "did nothing" when Jarvis complained, allowing the harassment to escalate. Piercy was previously convicted of assault charges for offensive touching charges filed by Jarvis. Jarvis will also be allowed to retire on a disability pension as part of the settlement. See: *Jervis v. N.J. Dept. Of Corrections*, USDC D NJ, Case No. CAM-L6990-99. 

Sources: *Camden Courier-Post*; *philly.com*; *wcbs880.com*; *DOC press release*.

# Qualified Immunity Denied In Failure To Protect And Delay of Emergency Treatment

by Bob Williams

The Sixth Circuit Court of Appeals has held that guards are not entitled to qualified immunity for failing to segregate co-defendants in a known hostile relationship and that doctors are not entitled to qualified immunity in delaying emergency treatment after an assault.

Alfred Scicluna was attacked in the Michigan State Muskegon Correctional Facility (MCF) by his co-defendant, Eugene O'Sullivan. Scicluna's resident unit manager and counsel, Felix Carrizales, was warned by both Scicluna and his sister of the hostile relationship and that continued housing in this situation violated MDOC regulations. Carrizales took no action. After the attack, Scicluna was treated at a community hospital where a portion of his skull was removed. The civilian surgeon recommended cranioplasty to replace the skull portion.

MCF's medical director, Dr. Richard Huff, recalled Scicluna from the hospital, rejected further surgery, prescribed an anti-seizure drug to toxic levels and transferred him to a prison without facilities to treat him. The next day, Scicluna was transferred again with orders for an immediate neurosurgical consultation but he was not seen for three weeks. When finally seen, Dr. Paul Harvey lowered Scicluna's medication below toxic levels and transferred him back to Dr. Huff's care.

Scicluna filed a § 1983 complaint claiming deliberate indifference to his safety against Carrizales for his failure to protect; deliberate indifference to a serious medical need against Dr. Huff, for failing to properly treat him, and Dr. Harvey for delaying treatment for three weeks. All three defendants filed separate motions for summary judgment based on qualified immunity. The district court denied the motions leading to an interlocutory appeal where the defendants must be willing to concede the facts alleged by Scicluna and argue only the legal issues.

In evaluating qualified immunity the Court looks to three factors: whether "(1) a constitutional violation occurred, (2) the right violated was clearly established, and (3) the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable

in light of the clearly established constitutional rights."

Despite Carrizales's argument of lack of documentary evidence and his assertion that a reasonable person would not have known he faced liability for failure to protect, the Court found that documentary evidence is not essential, other sources could be used including pleadings, depositions, affidavits, etc. When viewed in the light most favorable to Scicluna the evidence shows Carrizales was warned by both Scicluna and his sister and also knew of the Michigan Department of Corrections directive requiring separating co-defendants and that the directives warned of personal liability for non-compliance. Qualified immunity was therefore properly denied.

Dr. Huff claimed in a brief that he thought Scicluna would be treated at another prison but did not submit a sworn affidavit or other evidence to this assertion. He also claimed a reasonable person would

not have known the transfer was deliberate indifference. The Court held that "a right can be clearly established even if there is no case involving fundamentally similar or materially similar facts if the premise of a prior case alerts officials to the close applicability of the legal principles to a subsequent set of facts." By extension of *Estelle v. Gamble*, 97 S.Ct. 285 (1972), deliberate indifference to a serious medical need was well-established twenty years before this 1992 incident. Qualified immunity was also properly denied on the medical claims.

Finally, Dr. Harvey claimed he did not know of the immediate order and, as with Dr. Huff, claimed the right to medical care was not clearly established. The Court found Dr. Harvey's failure to explain the delay allows a reasonable inference to be drawn that he purposefully ignored the emergency order. Qualified immunity was denied to him as well. See: *Scicluna v. Wells*, 345 F.3d 441 (6th Cir. 2003).

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# California Prisoner Trust Accounts Allegedly Used To Launder Gang Drug Taxes

A phantom “Banco de Pelican Bay” has sprung up at California’s supermax Pelican Bay State Prison (PBSP), wherein 14 Mexican Mafia (nicknamed “Eme”) prisoners had their prison trust accounts frozen in October, 2004 because of suspected laundering of Eme drug money. Some accounts carry balances of over \$20,000, the source of which is alleged to be street drug dealers in Los Angeles who pre-pay a “tax” for protection if and when they come to prison.

PBSP spokesman Lt. Steve Perez said “[t]he evidence indicates that the money is definitely coming from a tainted source.” The FBI visited PBSP in mid October, 2004, investigating possible federal money laundering crimes. PBSP gang investigator Robert Marquez stated “We had one member tell us that he made \$60,000 a year sitting in his cell and that he paid for his kid’s college education with it. The laundering process is completed when the funds deposited in the Eme trust accounts are sent back out to friends and relatives in amounts ranging from hundreds to thousands of dollars giving the money legitimacy.”

Eme is considered to be the oldest, largest and most feared prison gang in California prisons and possibly the largest crime organization in the state. A major trend in the last decade has been to extort “rent” or “taxes” for Eme prison lords from gang members 800 miles away in Los Angeles.

Charles Carbone, a San Francisco attorney who has represented some alleged Eme members as plaintiffs in lawsuits against PBSP, claims that prison authorities are overstating Eme’s threat, calling the Department of Corrections “hypersensitive and somewhat paranoid” over the money transfer issue. Carbone said the gang’s leadership has undergone a schism in recent years and “is not the threat it once was.”

Law enforcement proponents who have made a cottage industry out of aggrandizing street and prison gangs sharply disagree. Scott Decker, criminology professor at the University of Missouri, St. Louis a leading gang expert warns that Eme’s organizational structure has resulted in increasingly sophisticated and lucrative criminal operations throughout Southern California. Los Angeles based U.S. Attorney Bruce Riordan said “[r]ent payments start on the street corner and are paid pretty much every week. A percentage is taken by the street gang members

and a percentage is forwarded to the [Eme] brothers. Then it’s laundered not in the Swiss bank sense of the word, but it passes from hand to hand, and then it is put on the prisoner’s books.”

In one 2002 prosecution of the “Columbia L’il Cycos” branch of Los Angeles’ notorious 18th Street Gang, Riordan found they were netting \$250,000 per month from just one tiny neighborhood in the MacArthur Park area. One Eme member’s wife had \$400,000 on her when arrested by the FBI. The convicted gang member, Francisco Ruiz “Puppet” Martinez, was being paid \$40,000 per month during the 90s, including the three years he spent in PBSP’s vaunted Security Housing Unit. Recent expansion to the Sacramento area has been noted, where the tax goes to “Sureño” gang members.

Over the last nine years, federal racketeering (RICO) prosecutions have netted more than 20 Eme members, including some who were already in prison when prosecuted. But incarceration doesn’t stop the problem.

Prison investigators estimate that 100-150 of the hardest core members on the streets and in state and federal prisons are very much in control of street activities. An estimated 30,000 loyal Sureños exist in California prisons, with another 100,000 more on the streets, controlling “staggering” amounts of money. One Eme gang sector in Orange County was “selling \$1 million a week in drugs,” said Al Valdez of the Orange County District Attorney’s Office. However, prosecutors are either exaggerating, lying or are incompetent given that they have yet to seize or forfeit “staggering” amounts of money from Eme members.

One former Eme “soldier” reported that over his years on one California prison yard, he collected from \$500 to \$2,000 per week. The 14 frozen accounts at PBSP each continue to have money flowing in at rates up to \$500 per week. With news of the freezing of the accounts, money is being redirected elsewhere. ■

Source: *Sacramento Bee*.

## CMS Liable for Prisoner’s Failed Hip Prosthesis; \$75,000 Awarded

by Robert H. Woodman

On January 9, 2004 the U.S. District Court for the Eastern District of Missouri found that Correctional Medical Services (CMS) and one of its employees, Gary Campbell, D.O., were liable for fourteen (14) months of pain and suffering endured by a Missouri state prisoner whose hip prosthesis failed. The court awarded \$75,000 to the prisoner.

James Roy Hill, III, the Missouri prisoner, had a hip replacement in 1992 while incarcerated. The hip prosthesis began failing a few years later while Hill was incarcerated at the Northeast Correctional Center, Bowling Green, Missouri. CMS’ Dr. Campbell, however, did nothing about getting a replacement prosthesis or alleviating Hill’s pain and suffering for 14 months. Hill was finally referred to an orthopedic surgeon and had a new hip replacement in 2000, which was successful.

Hill sued Campbell, CMS, and several other persons under 42 U.S.C. § 1983 claiming that Defendants were deliberately indifferent to his serious medical need and

to his pain and suffering. He demanded \$450,000 in damages. The Court granted summary judgment to all Defendants except Campbell and CMS, and the case went to trial. Appointed counsel Joan M. Lockwood of Gray, Ritter & Graham, PC, St. Louis, Missouri, represented Hill, PC. Defendants denied that their conduct constituted deliberate indifference. Further, Campbell denied knowledge of Hill’s requests for referral before the 2000 referral that resulted in the successful hip replacement.

Following trial, the court found Defendants liable and awarded Hill \$75,000 in damages. Defendants filed motions for new trial and for remittitur. The Court denied the motions and awarded Hill \$37,540 in attorney fees and \$1,695 in costs. In October 2004, the parties settled the case with CMS dismissing their appeal. See: *Hill v. Correctional Medical Services, Inc.*, USDC ED MO, Case No. 4:02-CV-00646 (unpublished). ■

Additional source: *St. Louis Verdict Reporter*.

# Absolute Immunity For Acting On Court Order Denied In Failure To Protect Claim

by Bob Williams

The Third Circuit Court of Appeals has upheld the denial of absolute immunity against prison guards who claimed they were following a court order when they failed to protect a known prison informant, even after protective custody was also unanimously recommended.

In 1986, Jerome Hamilton cooperated in a drug trafficking investigation at the state Multi-Purpose Criminal Justice Facility (Gander Hill) which resulted in the arrest of prisoners and guards and a snitch jacket for Hamilton. He was subsequently the victim of numerous attacks and was transferred among various Delaware state prisons.

With no where left to go, Hamilton was transferred outside the state system on compact with Virginia. While in Virginia, Hamilton sued Delaware prison officials in state court resulting in his return to Gander Hill for court appearances. During a December 1991 hearing the court ordered Hamilton held for two months at Gander Hill while discovery took place. The Delaware Department of Corrections (DDOC) recommended protective custody.

Three months passed without action when a guard, in front of other prisoners, said Hamilton was "a good telling mother fucking snitcher." Hamilton filed a grievance.

The Multi-Disciplinary Team (MDT) unanimously recommended protective custody for Hamilton. On June 24, 1992, the DDOC Central Institutional Classification Committee (CrCC) decided to take "no action." On August 5, 1992, prisoner Steven Clayton, Hamilton's cellmate, attacked Hamilton fracturing his jaw and hospitalizing him where metal plates had to be inserted. Clayton pled guilty to assault and admitted it was because Hamilton was "a snitcher on inmates and officers."

Hamilton filed a § 1983 complaint in federal court against MDT members and the CICC Chair claiming deliberate indifference to his safety. Summary judgment was granted for the defendants because MDT could not effectuate their own recommendations and no reasonable fact-finder could find the CICC Chair knew Hamilton was in substantial risk of serious harm.

On appeal the Court reversed, finding that even if MDT could not place Hamilton in protective custody they could have placed him in segregation or taken other additional

measures. The CCIC Chair knew of the unanimous recommendation for protective custody and thus a reasonable fact-finder could infer the Chair was aware of the serious risk to Hamilton. See: *Hamilton v. Leavy*, 117 F.3d 742 (3rd cir. 1997). [PLN, March 1998] After Hamilton amended his complaint on remand to add numerous defendants, the district court denied the defendants' second motion for summary judgment claiming immunity.


On interlocutory appeal the Court affirmed the denial absolute immunity but remanded for a determination of both judicial and qualified immunity. After reviewing the state court's orders the Court concluded that the DDOC was not required to keep Hamilton at Gander Hill, unless he could be protected, and was not under any requirement to still have him there on August 5, 1992, when he was attacked. The argument that the defendants were entitled to absolute immunity because they were following a court order was therefore rejected.

To receive quasi-judicial absolute immunity the official's actions must be found to be functionally comparable to that of a judge. A court must also determine if the official acted independently and what safeguards attended the decision-making process.

The district court made no such findings. The Third Circuit extended their rule announced in *Forbes v. Township of Lower Merion*, 313 F.3d 144 (3rd cir. 2002) (requiring a district court to set out the facts it relied upon and the legal reasoning used to determine a summary judgment motion based on qualified immunity) to require the same find-

ings for claims of quasi-judicial absolute immunity. A remand was ordered for this finding.

Addressing qualified immunity, the Court found a remand necessary holding that the district court may have tacitly applied the law of the case doctrine to determine that the holding in the prior appeal conclusively resolved summary judgment for qualified immunity. Since discovery had subsequently taken place, possibly resulting in new evidence, and new defendants had also been added who have not had the opportunity to argue qualified immunity, this doctrine cannot be applied without a hearing to determine if the new evidence materially deviates from the prior evidence used to deny qualified immunity. After eleven years this case has still not gone to trial. See: *Hamilton v. Leavy*, 322 F.3d 776 (3rd Cir. 2003).

On remand, the district court held the defendants were not entitled to judicial immunity. The court also held the defendants were not entitled to qualified immunity for their actions. See: *Hamilton v. Leavy*, 2004 U.S. Dist. LEXIS 5886. 

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## New York Prisoner Awarded \$105,000 For Shoulder Injury

On December 15, 2003, a court of claims in Syracuse, New York, awarded \$105,000 plus interest to a state prisoner who suffered a torn rotator cuff as the result of a construction accident.

New York state prisoner Tommy Knights, 50, was laboring on a construction project at the Auburn Correctional Facility on May 14, 1998, when an iron support bar fell from the top of a wall above the doorway where he was working and struck him on the head.

Knights was taken to the hospital and treated for a severe lumbar contusion. Soon after, Knights began to experience pain in his left shoulder. It was then determined that Knights' rotator cuff was torn. The torn rotator cuff necessitated approximately four years of physical therapy and an April 2002 surgery in which surgeons ground Knights' acromion in order to decompress and repair his shoulder joint.

Knights sued the state of New York claiming that the injury precludes him from

performing work that requires lifting or overhead tasks and prevents him from engaging in physical recreation activities such as weight-lifting, jogging and basketball. Knights further claimed that he experiences pain when he raises his left arm and that the injury causes sleep difficulties.

At trial an independent medical expert testified that Knights' shoulder injury likely resulted from the accident. The expert further testified that a second surgery would be required to remove part of Knights' shoulder bone, that Knights' shoulder pain will be ongoing, and that Knights will continue to have difficulty lifting objects or performing overhead tasks.

Knights' vocational expert, Kenneth W. Reagles, Ph.D., approximated that Knights would be able to work for 5.5 years after his scheduled parole date of July, 2007. However, Reagles further opined that because of Knights' age and limited education, Knights would only be qualified for construction

work, which he would be unable to perform because of his injury.

The court held in this damages decision (a liability verdict was rendered in Knights' favor on December 4, 2002), that Knights suffered from mild but permanent shoulder impairment. Based on this, the court awarded Knights \$20,000 for future medical costs, \$35,000 for future pain and suffering, and \$50,000 for past pain and suffering, for a total award of \$105,000 plus 9% interest from the date of the liability decision.

However, the court refused to award Knights any damages for lost earnings reasoning that there was no guarantee Knights would actually be released on his scheduled parole date.

Knights was represented by Paul F. Shanahan of Rochester, New York. See: *Knights v. State Of New York*, Syracuse Court of Claims, Case No. 99939. ■

Source: *VerdictSearch New York Reporter*

## California Sexual Predator Unconditionally Released

California's first "graduate" of the state's sexually violent predator (SVP) program, who was released in August, 2003 to highly supervised conditions while living in a trailer on the grounds of Soledad State Prison, was granted unconditional release by a state judge in San Jose, California on Sept. 13, 2004.

Brian DeVries, 45, is a habitual child molester who admits to having victimized 30 children and was convicted of assaulting nine small boys for which he did time in New Hampshire, Florida and California between

1978 and 1997. When released from New Hampshire, he amazingly was hired at the YMCA and as a teacher at elementary schools in Florida where he next offended. Today he reflects back on surrounding himself then with children as being "like an alcoholic trying to be a bartender." After molesting an eight year-old boy in California, he tried to shoot himself. Upon paroling in California in 1997, he was civilly committed as an SVP for treatment at Atascadero State Hospital.

In August, 2003, he was conditionally released from Atascadero, but no one wanted him around. After attempting 116 possible placements amid much public outcry, the state gave up and housed him on prison property near Salinas, California. (See: *PLN*, Feb. 2004, p.18, California Has Difficulty Placing First Released Sexually Violent Predator.)

After one year of being hounded by the media, ostracized by local townsfolk and tracked by a Global Positioning System monitor, DeVries

asked the court to declare him not a risk and to release him from supervision. DeVries' attorney, Public Defender Brian Matthews, argued that his client, with seven years of therapy, drug testing and voluntary surgical and chemical castration, "is a different person now" and deserved to be released.

Santa Clara County Superior Court Judge Robert Baines, after evaluating voluminous evidence, evaluations, and two disagreeing expert opinions, granted Matthews' motion for release. DeVries was picked up at the courthouse by his parents who offered him a place to live on their property near Shelton (Mason County), Washington, to the chagrin of then Washington Governor Gary Locke. "California has abandoned th[e] fundamental responsibility to monitor Mr. DeVries," Locke complained. Two days later, temporarily living at his father's home in Olympia, DeVries registered as a sex offender (as he must for life) with the Thurston County sheriff. When finally settled, DeVries plans on running a jewelry business he started with a longtime friend.

Judge Baines admonished DeVries upon ordering his release "Good luck, Mr. DeVries, and for God's sake, don't prove me wrong." ■

Sources: *Los Angeles Times*; *Seattle Post-Intelligencer*; *San Jose Mercury News*.

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# New York's Felon Disenfranchisement Law Not Saved By Federal Voting Rights Act

by John E. Dannenberg

The Second Circuit U.S. Court of Appeals held that New York Election Law § 5-106, which disenfranchises [i.e., suspends voting rights] of parolees and currently incarcerated felons is not overridden by the federal Voting Rights Act (VRA), 42 U.S.C. § 1973 [which prohibits racially discriminatory state voter qualification laws]. In a lengthy decision that analyzed a Second Circuit en banc decision on this topic (*Baker v. Pataki*, 85 F.3d 919 (2nd Cir. 1996)) wherein the court was evenly divided [and its decision therefore had no precedential value], the Second Circuit now applied intervening U.S. Supreme Court and other Circuit case law to reach a unanimous ruling.

New York state political prisoner Jalil Muntaqim, a.k.a. Anthony Bottom, filed a pro se complaint in the U.S. District Court (N. D., N.Y.), alleging, inter alia, that New York state's § 5-106 had a racially suspect effect. That is, since New York state felons and parolees are disproportionately black and Hispanic [stemming allegedly from racially biased sentencing], the statutory disenfranchisement scheme necessarily causes a disproportionate reduction of black and Hispanic voters in the community at large. Muntaqim grounds his complaint in the VRA the federal statute that expressly forbids state laws that color voting rolls by any racially restrictive registration qualifications.

Muntaqim's case is the latest in a long history of undoing the pre Fourteenth/Fifteenth Amendment rampant practice of preventing blacks (especially in southern states) from voting at all. Congress' most recent statutory pronouncement was in 1982 when it amended the burden of proof in existing voting rights protection laws (former § 1973) from requiring a "discriminatory purpose" [i.e., affirmative animus] to instead only impute a "result [of disenfranchisement] on account of race." Under the newer formulation, then, even inadvertent biases must be repaired.

In *Baker*, the two evenly opposed opinions held that (1) because the "results" test of § 1973 is not inherently violative of the Fourteenth or Fifteenth Amendments, that, absent a strong plain statement by Congress, it would be a violation of the separation of state and federal powers for Congress to quietly prohibit a state statute, or [on the other hand] (2), because there is no ambiguity in the language of the VRA, no such "plain

statement" [that Congress intended the VRA to apply to felon disenfranchisement statutes] is required.

In *Muntaqim v. Coombe*, No. 94-CV-1237 (Jan 24, 2001) below, the district court held that § 1973 did not limit New York's authority to disenfranchise felons, siding with the *Baker* camp that required a "plain statement" of such Congressional intent.

On appeal, the Second Circuit noted that two other circuits had concluded that felon disenfranchisement laws did violate the VRA. In *Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir. 2003), a divided panel rejected the district court's holding below that it was not racial discrimination per se that caused loss of the right to vote, but rather the prisoner's decision to commit a crime. The Eleventh Circuit reversed, based on *Thornburg v. Gingles*, 478 U.S. 30 (1986), which held that the proper question was whether the underlying social/historical condition had initially caused the inequality resulting in felon status which in turn pre-disposed disenfranchisement. The Eleventh circuit is rehearing the case en banc.

Similarly, in *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) [see: *PLN*, Nov. 2004], the Ninth Circuit concluded that a claim of felon disenfranchisement under Washington State's scheme was cognizable under § 1973. "Although states may deprive felons of the right to vote without violating the Fourteenth Amendment, when felon disenfranchisement results in the denial of the right to vote or vote dilution on account of race or color, [§ 1973] affords disenfranchised felons the means to seek redress."

More recently, with seven judges dissenting, the Ninth Circuit denied Washington's petition for rehearing en banc. See: *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004). The supreme court later denied review as well.

The Second Circuit, however, ruled here that the question turned solely on the "clear statement rule." That is, unless and until Congress expressly includes felon disenfranchisement by so amending § 1973, the court will not step in to judicially expand the scope of the statute thereby upsetting the balance of power between the states and the federal government. "The question before us," the court wrote, "is not whether Congress exceeded its authority when it enacted § 1973; rather it is whether Congress would exceed its authority if § 1973 were applied to state felon disenfranchisement statutes." Flatly disagreeing with the Eleventh and Ninth Circuits, the Second Circuit held that "because Congress did not make an unmistakably clear statement that § 1973 applies to state felon disenfranchisement statutes, we will not apply § 1973 to § 5-106." See: *Muntaqim v. Coombe*, 385 F.3d 793 (2nd Cir. 2004). In it's 2004 term the supreme court declined to grant review in both this case and *Farrakhan*, ensuring the circuit split continues. ■

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# Connecticut Prison Writers Settle Lawsuit, Writing Program Reinstated

by Michael Rigby

Eight Connecticut prisoners who were sued by the state after the publication of their book, *Couldn't Keep It To Myself: Testimonies from our Imprisoned Sisters*, will get to keep most of their earnings, according to the terms of an April 19, 2004, settlement. The state had sought \$117 a day from each woman for every day they were in prison. For one of the authors, Barbara Lane, who also won a prestigious literary award, that amounted to a whopping \$339,505.

The women composed the 11 essays comprising the book during a writing class taught by renowned novelist Wally Lamb at the York Women's Prison in Niantic, Connecticut. The writings were personal reflections and essays that had nothing to do with their crimes. Rather, the writings mused about the criminal justice system and contemplated the sexual abuse, violence, drugs, alcoholism, and poverty that are recurrent themes in the lives of many prisoners. The well written anthology caught the attention of Harper Collins, which decided to publish the book. As part of the deal, each woman would receive \$5,600 in royalties following their release from prison.

But the fact that the women had actually earned money while in prison bothered state Attorney General Richard Blumenthal. In January 2003, just before the book was released, Blumenthal sued to garnish the royalties. Blumenthal attacked the women's assets under the state's 1997 "cost of incarceration" law, which allows the state to sue prisoners for the cost of living in prison. Designed to gouge prisoners coming into a large amounts of money while in prison, the state Department of Administrative Services has used the law in more than 200 cases to confiscate over \$1 million from prisoners.

Many free speech groups saw Blumenthal's attempt to sue the women as a veiled attempt to stifle free speech. In particular, PEN—a prominent New York literary group composed of 2,700 poets, playwrights, essayists and novelists, including Salmon Rushdie, Toni Morrison, and D.L. Doctorow—complained to the attorney general's office.

When Blumenthal refused to drop the lawsuit, PEN decided to give Lane its Newman's Own Freedom of Expression award, which includes a \$25,000 prize. The award is sponsored by actor Paul Newman. Officials at PEN said they gave Lane the prize to protest the law. "It's not like they're getting

\$5 million or even \$500,000," said Larry Siems, director of PEN's Freedom to Write and International programs. "This is not a case of someone getting rich at taxpayer expense."

In early March 2004, when prison officials found out that Lamb had nominated Lane for the PEN award without their approval, they were incensed. "Nominating an inmate for an award attached to \$25,000 is no small matter," York school principal Dorthula Greene wrote in a March 11, 2004 letter to Dale Griffith, a staff member who for five years has helped Lamb with the writing program. "As you know from the arduous process of publicizing the book ... actions such as this nomination take on monumental ramifications beyond you and Wally Lamb. The nomination should have not taken place without the knowledge of your supervisors."

Retaliation soon followed. On March 29, Department of Correction (DOC) Commissioner Theresa Lantz halted the writing program. Principal Greene ordered the class's hard drives—which contained the personal writings of 15 women and represented five years worth of work—erased and its computer disks turned over, according to anonymous sources who work at the prison. Griffith was transferred.

To some, the prison's reaction to the success of its own rehabilitative program was puzzling. "We were extremely disappointed to learn there had been this negative reaction inside the prison. It seemed like a real lost opportunity at York when there was limelight to be shared by everybody," said Siems.

The DOC's reaction made unwelcome headlines. In a subsequent April 13, 2004, meeting with Lamb, Lantz said the problem "boiled down to miscommunication" when Lamb failed to notify officials that he had nominated Lane for the prize. "That communication would have been greatly appreciated," said Lantz. "In the prison business you don't like surprises." Nor some would say, success by prisoners.

But critics argue that the DOC's handling of the situation was reflective of a larger public relations problem. "Their noses got out of joint here and they reacted badly. They should be celebrating," said Joanna James, a union representative of the Connecticut State Employees Association, which represents prison teachers. "I think the department reacted badly when somebody got a significant amount of attention who is an inmate."


After the meeting, Blumenthal announced that a settlement was on the horizon and praised the writing program's rehabilitative efforts. But Blumenthal's motives were not wholly altruistic. Only when it became clear that the book's royalties would not be huge did he become willing to settle. "Bringing the action certainly was within the authority to enforce the law. But at the same time this settlement recognizes that the book was not a cornucopia of financial riches," he said.

On April 19 the state settled with the women for \$500 each, with the York writing program receiving \$3,500 and the remaining \$500 going to the Department of Mental Health and Addiction Services.

In addition, Lane will get to keep her \$25,000 prize from PEN, said Blumenthal, adding that "Barbara Lane will never be required to pay \$300,000-plus for her incarceration." Lamb's writing workshop was reinstated with its original staff of Lamb and Griffith, and prison officials are now promising to expand the program.

Lamb was unable to meet with the women until April 23, but they were pleased to learn that the computer files containing their writing had been recovered from a backup file. Lamb said it will take time to rebuild the program and the women's trust, but the process has begun. "At long last, the Department of Correction not only sees the value of the program, but has now gotten behind it," he said.

State legislators are now considering changing the law to distinguish between prisoners making money from a skill learned in prison and those who come into sudden windfalls from lawsuits, the lottery, or inheritances. "There is a need to refine and improve [the law] so that it does not apply to income earned after someone is released from prison, and impede the return to productive activity," Blumenthal said.

Although this story ends happily, it's the exception and not the rule. The majority of prison writers remain oppressed as prison officials around the country search for ways to silence them. PLN is currently challenging the Florida prison system's practice of punishing prisoners who receive payment for their writing. See *PLN*, December 2003, p. 14, and this issue for more. 

Sources: *The Day*, *Republican-American*, *Associated Press*, *Hartford Courant*

# Los Angeles County Pays \$800,000 To Settle County Jail Medical Suit for Untreated Lupus

by John E. Dannenberg

On June 3, 2002, the Los Angeles (L.A.) County, California Claims Board agreed to pay \$800,000 to settle medical negligence and consortium loss claims by a prisoner and his wife for the failure of the Los Angeles Sheriff's county jail and medical staff to properly treat the prisoner's serious medical needs while incarcerated at the North County Correctional Facility from October 1997 through January 1998.

Thirty-six year old Larry Small was seen by L.A. County Sheriff's North County medical staff on October 20, 1997, complaining of a two week long fever and 13 pound weight loss. His blood tests showed both anemia and renal (kidney) insufficiency. Although he was given antibiotics, no follow-up was given.

Small's wife, sister and cellmate alleged that from October 20 to November 17, 1997, Small continued to suffer fever, lose weight and developed a rash across his nose - while jail personnel refused his requests for further medical aid. On November 18, medical personnel examined a rash on his upper arm, while new blood tests confirmed the earlier diagnoses. But they failed to take Small's temperature, take his vital signs or monitor his further weight

loss. This time he was given a topical skin ointment, but no further follow-up. Despite complaints from Small's wife, he was not seen again until December 5, when medical personnel again failed to conduct any tests, make further diagnoses or schedule follow-up. He continued to deteriorate to December 26, when jail clinic personnel observed an additional 27 pound weight loss, persistent fever, night sweats, skin rash and loss of appetite. He was given more antibiotics and transferred to the Men's Central Jail on December 27, where his low white blood count was noted, but no action taken. Central Jail returned Small to North County on December 27, without treatment.

On January 4, 1998, Small was found unconscious, whereupon he was transferred to Henry Mayo Newhall Memorial Hospital. Imaging tests there indicated a brain lesion, so he was transferred to USC Medical Center for further evaluation and treatment. USC interpreted the scans as a severe brain inflammation stemming from SLE (lupus) disease - a condition that while difficult to diagnose, is typified by the precise symptoms Small exhibited all the while in the county jail. USC gave him anti-inflammatory steroid treatment.

Although Small was released from custody on January 29, he stayed at USC until February 25, whereupon he went to Rancho Los Amigos National Rehabilitation Center until April 9, 1998. Small continues to suffer from permanent brain damage, including severe cognitive deficits, memory deficiencies and confusion as a result of lupus.

Anticipating trial, county counsel estimated future medical care costs of \$6,254,892, future earnings loss of \$928,200 and pain and suffering of \$250,000 (statutorily limited). His wife could receive \$250,000 for loss of consortium, and attorney fees and costs could reach \$350,000. They proposed a settlement of \$800,000, consisting of \$250,000 cash each to Small and his wife plus attorney fees of \$300,000. County counsel admitted to their own legal costs to date of \$220,000 defending against the suit.

Government counsel's liability evaluation admitted that county personnel's failure to address Small's severe symptoms between October 20, 1997 and January 4, 1998 put them in jeopardy of a jury determination of deliberate indifference to Small's serious medical needs. See: *Small v. County of Los Angeles*, Los Angeles Superior Court Case No. BC 208050.

## Seventh Circuit Interprets "Brought" As Used 42 U.S.C. § 1997e(a)

The U.S. Court of Appeals for the 7th Circuit has interpreted the word "brought" in 42 U.S.C. § 1997e(a) to mean "when the complaint is tendered to the district clerk." The court then used that interpretation to affirm a district court dismissal of a prisoner's civil rights lawsuit.

In 1999 Bobby Ford was serving state time at Illinois' Stateville Correctional Center (Stateville), where he was beaten by guards without provocation. Stateville staff also refused Ford medical attention for injuries he sustained during the beating. Ford filed a grievance, which eventually found its way to the Administrative Review Board (Board), which did not respond.

After waiting for six months without a response from the Board, Ford filed a civil rights action under 42 U.S.C. § 1983 in federal court. The Board then promptly contacted Ford to get his statement for the grievance, but Ford declined, relying on his

lawsuit for relief. The lawsuit was received by the court clerk on December 28. Two days later, the Board announced its decision in favor of the guards.

Because the district court received Ford's complaint two days before the Board rendered its decision, it found that Ford "brought" his complaint before exhausting his administrative remedies, a fatal mistake under 42 U.S.C. § 1997e(a). The district court then dismissed Ford's excessive force claims with prejudice, and dismissed the medical claims without prejudice. Ford appealed.

On appeal, the Seventh Circuit held that the word "brought" in 42 U.S.C. § 1997e(a) means "when the complaint is tendered to the district clerk." The appeals court then agreed with the district court that Ford had prematurely filed suit and promptly dismissed the case.

However, the 7th Circuit reversed the lower court insofar as it dismissed the ex-

cessive force claims with prejudice, holding that dismissals under 42 U.S.C. § 1997e(a) must be without prejudice. See: *Ford v. Johnson*, 362 F.3d 395 (7th Cir. 2004).

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# Ninth Circuit: “Chilling Effect” Not Required To Establish First Amendment Violation

by Marvin Mentor

The Ninth Circuit U.S. Court of Appeals dealt with the following conundrum: does a prisoner who exhaustively fights purported violations of his First Amendment rights, by dint of his sheer effort to do so, thereby unwittingly prove that they were not violated? Here, the district court below had ruled that the prisoner's filing of a federal lawsuit ipso facto precluded relief from the within retaliation claim solely because the very act of filing demonstrated the non existence of retaliatory constraint. The Ninth Circuit rejected this circular reasoning and reversed the district court's F.R.Civ.P. Rule 12(b)(6) dismissal below.

Kavin Rhodes, appearing at all times in pro per, sued prison officials at the California Correctional Institution (CCI) in Tehachapi, alleging what can only be described as a marathon of retaliations for exercise of his First Amendment right to file grievances. The genesis of Rhode's conflict with CCI staff was the repeated offsite repair of his personal typewriter, which Rhodes alleged was then intentionally damaged in handling by Receiving and Release guard M. Robinson. When Rhodes grieved Robinson, the retaliation escalated. Repair shipments

were delayed and Robinson forced Rhodes to send either his CD player or his television home before getting his repaired typewriter reissued. For Rhodes' troubles complaining about that, Robinson withheld both the typewriter and the CD player.

Rhodes wasn't Robinson's only alleged victim, so Rhodes drafted a group grievance signed by 120 prisoners. The grievance was disregarded, both at lower levels and again by Facility Captain A. Lopez. Instead, the grievance was forwarded by CCI ombudswoman Sara Malone to the prisoners' Men's Advisory Council. But the prisoners' Council of course has no authority to rule on a grievance against staff. Robinson also allegedly altered the markings on Rhodes' CD player so as to make it look like Rhodes had stolen it from another prisoner as a pretext to confiscating it.

Robinson next tried to limit Rhodes' property to “two electric appliances,” per prison property rules. But battery operated items, such as Rhodes' typewriter, are not counted as “appliances.” Indeed, when Rhodes bought the typewriter, he was forced to pay the prison \$20 to have them disconnect his cell's electric outlet to ensure he only used batteries.

Rhodes was then put up for transfer, as further alleged retaliation, but this was overruled because he had volunteered to donate a kidney and needed to remain at CCI for potential donor compatibility tests. Subsequently, Rhodes was taken to the chapel by three guards and under threat of pepper spray, stripped and sexually assaulted again with taunts of transfer. As a final insult, prison staff destroyed his typewriter.

All of Rhodes' grievances had been dismissed or denied. Even two complaints he filed with the Kern County Grand Jury were denied. Undaunted, he sued Robinson and other involved CCI staff under 42 U.S.C. § 1983 alleging violation of his First Amendment right to be free from retaliation for filing grievances (citing *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997)).

The U.S. District Court (E.D. Cal.) granted the defendants' Rule 12(b)(6) motion to dismiss (asserting qualified immunity) because Rhodes was “unable to show a chill or deterrence of the exercise of his First Amendment rights” since the record showed Rhodes was able to perfect grievances, Grand Jury complaints and his § 1983 lawsuit. In other words, because he was able to demonstrate that he had been retaliated against, the existence per se of his lawsuit was proof that his First Amendment rights remained inviolate.

The Ninth Circuit would not countenance such a tautology. Citing extensively from Joseph Heller's novel *Catch-22*, the court found that this logic would preemptively “insulate any retaliatory conduct from later sanction.” Indeed, the district court decision was held to be a *Catch-22* rule that “would result in the anomaly of protecting only those individuals who remain out of court.”

Actual chilling of one's rights, in any event, is not a prerequisite of a First Amendment claim, the court added, particularly where qualified immunity is raised as a defense. It would be unreasonable for a peace officer to be expected to know at the time he acted that his act would result in subsequent legal developments.

Such a state of affairs would thereby “make qualified immunity hinge upon precisely the kind of post hoc judgment that the doctrine is designed to avoid.” Accordingly, the Ninth Circuit reversed and remanded for further proceedings. See: *Rhodes v. Robinson*, 380 F.3d 1123(9th Cir. 2004).

## Oregon Prisoner's Allegation Of Economic Damages States Sufficient Claim

The Oregon Court of Appeals held that a state prisoner's allegation of economic damages stemming from the purported improper release of his medical records and substandard medical care stated a claim sufficient to withstand a motion to dismiss.

Plaintiff Frank E. Voth, an Oregon state prisoner, brought action against prison officials and medical personnel alleging they improperly released his medical records and subjected him to substandard medical care, and that he suffered economic damages from this conduct. Voth asserted several claims for relief, including one brought pursuant to 42 U.S.C. § 1983. On defendants' motion, the trial court dismissed Voth's claim for failing to allege 1) timely tort claim notice, and 2) that he had suffered economic damages. Voth appealed.

On appeal, defendants conceded that Voth's “allegation that he had given tort

claim notice pursuant to ORS 30.275 was sufficient to survive a motion to dismiss,” that no tort claim notice is required for § 1983 claims, and that Voth's remaining claims “should have been resolved in a summary judgment proceeding rather than on the basis of a Rule 21 Motion to dismiss.” However, the defendants claimed that because “plaintiff had failed to plead any factual basis for his claim to economic damages,” the trial court's dismissal should still be affirmed.

The Court of Appeals reversed and remanded holding that Voth's complaint, which “specifically alleges that he has suffered \$50,000 in economic damages as a result of defendants' conduct” was “sufficient to survive a motion to dismiss for failure to state a claim.” See: *Voth v. Smith*, 188 Or.App. 59, 69 P.3d 1274 (Or.App. 2003).

# BOP Ad-Seg Rules Create a Liberty Interest

by David M. Reutter

The Eleventh Circuit court of Appeals has held that BOP administrative segregation policies create a liberty interest. The Court reversed a Georgia federal district court's order granting prison officials' motion to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

The lawsuit at issue was filed by Salvador Magluta for events that occurred while he was a pre-trial detainee at the United States Penitentiary in Atlanta (USP). Magluta was indicted by a grand jury in the Southern District of Florida in April 1991 on twenty-four drug trafficking and conspiracy charges. Magluta was arrested in October 1991 and placed in federal custody. Prior to his trial and eventual acquittal in 1996, Magluta was held in three different federal facilities – first in Miami, then in Talladega, and later in USP.

Magluta filed his *Bivens* action while a pretrial detainee in 1994, alleging he was placed in "administrative segregation" – the "hole" – in conditions constituting solitary confinement for more than five hundred days in USP, and this lengthy and harsh pretrial detention was done at the direction of and with the knowledge of the four named defendants, F.P. Sam Samples (Southeast Regional Director of BOP), Michael W. Garrett (Deputy Southeast Regional Director of BOP), Fred Stock (Warden USP), and Michael Bell (Associate Warden USP).

First, Magluta alleged that the harsh conditions while he was a pretrial detainee were solely for the purpose of punishment. Second, he alleged that 28 C.F.R. § 541.22, which governs the Bureau's placement and review of prisoners in administrative detention, creates a protected liberty interest, and that his placement and continued confinement in administrative detention – in the absence of the notice, hearings, and assorted reviews § 541.22 requires – violated his procedural due process rights under the Fifth Amendment.

The district court stayed the action pending outcome of Magluta's criminal charge. Upon acquittal, the court lifted the stay. Around that time, Magluta was indicted in South Florida for passport fraud. While on bond at the end of that charge's trial, Magluta failed to appear in court. He was convicted in his absence.

While he was a fugitive, the district court granted the defendant's motion to dis-

miss the *Bivens* action citing the fugitive disentitlement doctrine. When he was arrested less than a month later, Magluta filed a notice of appeal. The Eleventh Circuit reversed because there was "no nexus between Magluta's fugitive status and his *Bivens* action." See: *Magluta v. Samples*, 164 F. 3d 662, 664 (11<sup>th</sup> Cir. 1998).

Upon remand, the action was again dismissed as being a "shotgun" pleading. While the Eleventh Circuit condemned that type of pleading, it reversed to afford Magluta the opportunity to make a "short plain statement of the claim." See: *Magluta v. Samples*, 256 F. 3d 1282 (11<sup>th</sup> Cir. 2001).

Once again, upon remand the matter was dismissed. On appeal, Magluta argued, first, that the harsh conditions were imposed for punishment and were not justified by any legitimate governmental objectives. It has long been held that a pretrial detainee may not be punished prior to a lawful conviction. The determination of whether a condition of pretrial detention amounts to punishment turns on whether the condition is imposed for the purpose of punishment or whether it is incident to some legitimate government purpose.


Construing the complaint in its entirety and in a light most favorable to Magluta, the Eleventh Circuit concluded the alleged facts support an inference that Magluta's harsh treatment in pretrial confinement was solely for the purpose of punishment or retribution for filing court actions filed by him or his co-defendant, and was not justified by any legitimate government objectives.

Magluta alleged the reason for his administrative confinement – an escape concern – was based upon false and fabricated information without even minimal indicia of reliability and imposed for the purpose of punishing him and inhibiting preparation for his criminal trial. Because Magluta alleged the conditions of his confinement with particularity, the court held the defendants

would not be entitled to qualified immunity if he proved all his factual allegations.

Magluta's second claim alleged 28 C.F.R. § 541.22 created a protected liberty interest, and he was deprived of that interest without due process. The court held § 541.22 contained substantive predicates that created a liberty interest, at the time of the events at issue. The Court, however, said there would be "no liberty interest and no constitutional violation in the instant case if the *Sandin* [*v. Conner*, 115 S.Ct. 2293 (1995)] 'atypical and significant hardship' standard were met." The court found Magluta's allegations meet the *Sandin* standard and the standard in *Hewitt v. Helms*, 130 S.Ct. 864 (1983) which was made obsolete by *Sandin*, but which was the law at the time Magluta was a pretrial detainee in 1994.

The state of law at the times alleged gave the defendants warning that their placement of Magluta "in solitary confinement (under conditions unlike other pretrial or convicted prisoners), locked in an extremely small, closeted space, and with minimal contact with other human beings for a prolonged time exceeding 500 days," violated his protected liberty interest.

This is not a ruling on the merits and the matter was remanded for further proceedings. See: *Magluta v. Samples*, 375 F.3d 1269 (11<sup>th</sup> Cir. 2004). 

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# Oregon Parole Increase Following Appeal Violates Due Process, Presumption of Vindictiveness Applies

The Ninth Circuit Court of Appeals held that the imposition of a longer sentence imposed on remand after a successful appeal of an order of the Oregon Parole Board (Board) was presumptively vindictive and the Board failed to rebut the presumption of vindictiveness.

In 1986, George Nulph was convicted of multiple offenses and sentenced to five consecutive sentences totaling 155 years, with a minimum of 75 years. Under the Board rules in effect in 1986 “the Board was required to treat two or more consecutive judicially imposed minimum terms as a single unified term and either override them all or uphold them all. In 1987, however, the Board rules were amended to allow the Board to override “one or more of the judicially imposed minimums.”

In 1987, the Board applied the 1987 version of the rule and overrode three of Nulph’s five consecutive minimum sentences, stating “the minimum terms [are] not an appropriate penalty for the criminal of-

fense and the minimum terms are not necessary to protect the public.” The Board further explained: “We feel that the sentences or the minimums that were imposed by the courts is [sic] excessive and that setting you within your guideline range of 360 months, is an appropriate sanction at this point for your criminal conduct.”

Nulph challenged the 1987 Board order, arguing that the Board’s application of the 1987 rules violated the ex post facto and due process clauses. The Ninth Circuit agreed, vacated the 1987 order and remanded the case to the Board. *Nulph v. Faatz*, 27 F.3d 451 (9th Cir. 1994).

In 1995, the Board held a new hearing, applying the 1986 “all-or-nothing” rule. After deliberation, the Board unanimously voted to “sustain [all the] judicially imposed minimum[s].” Accordingly, the Board reset Nulph’s term of imprisonment from 360-months to 900-months imprisonment. In doing so, the Board concluded that “[t]he minimum term is an appropriate sanction for

the criminal conduct and [is] necessary for the protection of the public.”

Nulph then challenged the 1995 remand order in state court but the appeal was denied. Nulph then filed a federal habeas action pursuant to 28 U.S.C. § 2254. The District Court rejected Nulph’s due process claim, finding that there was evidence of vindictiveness.

On appeal, the court determined that the “AEDPA’s deferential standard [i.e., 28 U.S.C. § 2254(d)] does not apply. . . because the state court did not reach the merits of Nulph’s due process claim.” Following its holding in *Pritle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002), the court noted that “‘when it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo.’ 313 F.3d at 1167.” As such the court reviewed Nulph’s claims de novo.

The Court agreed with the District Court that the *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969)] presumption of vindictiveness applied. “Because the Board imposed a harsher sentence (45 more years) on direct remand from Nulph’s successful challenge.... and because the Board’s reasons for increasing Nulph’s sentence do not ‘affirmatively appear,’ there is a reasonable likelihood of vindictiveness.” Thus, vindictiveness was presumed “unless the state [could] meet its burden to rebut the *Pearce* presumption.”

“The presumption can be overcome only if the state proffers ‘objective information [from the record] concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.’”

The court rejected the Board’s rationale for its decision, finding that Nulph did not freely elect the application of the all-or-nothing rule and the Board did not present any facts to show why, on remand, it found a 75-year term of imprisonment to be appropriate when it had previously found that term to be excessive and unnecessary to protect the public. Thus, the State “failed to carry its burden to rebut the presumption that Nulph’s harsher sentence on remand was in retaliation for his successful challenge to his original sentence.” Thus, “it is evident that Nulph has been deprived of due process of law under *Pearce* and its progeny.” See: *Nulph v. Cook*, 333 F.3d 1052 (9th Cir. 2003).

## Massachusetts Jail Prisoner Awarded \$20,000 For Crushed Knuckle

A superior court in Suffolk County, Massachusetts, awarded \$20,000 to a man who sustained a knuckle fracture when a cell door was allegedly opened without warning.

Plaintiff Gary Taylor, 47, was arrested for disorderly conduct and intoxication and imprisoned in the Boston Municipal Court-house Jail. On May 15, 1997, Taylor was consulting with his attorney from inside the cell, holding on to the bars as he talked. According to Taylor, a guard came by and, without warning, opened the cell door, crushing Taylor’s hand between the bars.

Taylor sustained a boxer’s fracture to his knuckle which, in turn, caused minor nerve damage. Taylor contended the injury made it difficult to manipulate fine tools used in

his work as a sculptor and that changes in the weather caused his knuckle to ache.

Taylor sued the Commonwealth of Massachusetts claiming the jail guard was negligent in failing to warn him before opening the cell door. Taylor sought damages for pain and suffering only; he made no claim for lost wages or medicals. At trial, Taylor’s criminal attorney testified that no warning had been issued.

The commonwealth defended, alleging that jail guards always issued warnings before opening cell doors. The commonwealth reasoned that if Taylor and his attorney did not hear the warning in this instance, it was probably because of the noise level in the jail.

On February 18, 2004, after deliberating three and a half hours, the jury found in Taylor’s favor and awarded him \$20,000.

Taylor was represented by Simon Dixon of Lawrence, Massachusetts. See: *Taylor v. Commonwealth Of Massachusetts*, Suffolk County Superior Court, Case No. SUCV200000880.

Source: *The Massachusetts, Connecticut, Rhode Island Verdict Reporter*

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# Federal Court Orders Mississippi to Desegregate HIV+ Prisoners

by Matthew T. Clarke

On June 7, 2004, a federal district court in Greenville, Mississippi, ordered the Mississippi Department of Corrections (DOC) to cease excluding HIV+ prisoners from being housed in a Community Work Center (CWC), ending Mississippi's policy of total segregation of HIV+ prisoners.


As of March 28, 2004, the DOC incarcerated 238 HIV+ prisoners, the vast majority of them male. All male HIV+ prisoners have been housed at Unit 28 of the maximum-security state prison in Parchman, regardless of their offense or other classification factors. Likewise, all HIV+ female prisoners, about 30, have been housed at the Central Mississippi Correctional Facility in Rankin County. None of the HIV+ prisoners have been allowed to participate in community work programs.

Prior to September 2001, HIV+ prisoners were not allowed to participate in educational or vocational programs. At that time, the DOC adopted the recommendations of a task force that studied the issue of HIV+ prisoners' access to in-prison programs and issued a report in 2000 recommending that HIV+ prisoners be allowed to participate in

vocational and educational programs. This was the first step in breaking down the discrimination against HIV+ prisoners in Mississippi.

ACLU Nation Prison Project Associate Director and lead plaintiffs' attorney Margaret Winters called the ruling of U.S. Magistrate Judge Jerry A. Davis a "wonderful victory." She said that HIV+ prisoners will now be admitted to CWCs on the same basis as other prisoners, without consideration of their HIV+ status. DOC Commissioner Chris Epps agreed, saying that the issue will now be whether the prisoner can meet the rigid criteria to CWC housing, including the requirement that the conviction be for a non-violent crime.

In a June 28, 2004, hearing the plaintiffs showed evidence that DOC officials had failed to prevent an outbreak of Methicillin-Resistant Staphylococcus Aureus (MRSA), a highly-contagious, difficult-to-treat, serious infection which can be fatal and leave life-long damage even in persons without compromised immune systems. During a visit to Unit 28, former Chief Medical Officer for the New York Department of

Corrections Dr. Robert B. Greifinger, discovered numerous cases of MRSA. He also diagnosed a prisoner "with dozens and dozens of weeping lesions all over his torso and limbs" as likely suffering from MRSA. That prisoner's condition was known to the prison's medical staff, but they had never taken a culture from the lesions to determine whether it was MRSA. James J. Balsam, an environmental health and safety expert, inspected Unit 28 in March 2004, and discovered that poor laundry operations and the failure of the prison to provide cleansing and sanitation supplies contributed to the spread of MRSA and the creating of "a very real and serious threat to the life, health, and safety" of the HIV+ prisoners housed there. Thus, the agreement on CWCs does not terminate the suit, which continues on the issues of inadequate living conditions and medical care at the HIV+ prisoners' units. See: *Gates v. Barbour*, No. 4:71CV6-JA.D, consolidated with *Moore v. Fordice*, No. 4:90CV125-JAD (USDC NDMS). 

Additional Sources: ACLU Press Releases; *Mississippi Clarion-Ledger*.

## California Demands \$1.6 Million In Diverted Telephone Revenues From Private Prison Contractor

by John E. Dannenberg

The California Department of Corrections (CDC) has charged private prison contractor Marantha Corrections LLC with "misappropriating" more than \$1 million in telephone revenues at its 500 bed prison in Adelanto, California, and ordered CDC's contract with Marantha terminated "for cause," effective September 30, 2004.

CDC Director Jeanne Woodford stated in a June 29, 2004 letter to Marantha that Marantha was "either unwilling or unable" to account for the phone funds, and as a result, was in breach of its \$8.1 million contract with CDC. CDC spokesperson Margot Bach noted the squabble was not over performance, safety or security issues, but solely with their contract. The disputed funds are the commissions from phone calls that are collected by Marantha which are supposed, to be turned over to the state's Inmate Telephone Revenue Fund.


According to CDC documents obtained by the *Sacramento Bee*, Marantha's Chief

Executive Terry Moreland had blocked the state from auditing Marantha's phone fund account. Moreland argued that they were insulated from audit because the phone service had been provided by Marantha's "landlord." CDC found out that that "landlord" was just another company controlled by Moreland, who retorted that this "made no difference." "The issue is who owns the fund," he said.

Statewide, the fund collects over \$28 million per year from CDC's 32 state and community correctional facilities. The money is supposed to defray overall costs of incarceration. Moreland insisted that there is no provision in their contract to capture these commissions at Adelanto and give them to the state. He hotly denies owing CDC \$1.6 million, claiming his firm is not "an agent for the state." Moreland opined that "you have somebody new who has come into office [an apparent reference to Woodford] and is trying to fix a lot of problems, and certain

people from the old guard put some things in front of them to sign." Bach admits that other than the phone dispute, Marantha is "doing a great job" running Adelanto, especially noting a vegetarian diet it offers.

After an August 20, 2004 meeting with Moreland, CDC granted Marantha a one month extension on the state's notice to close the Adelanto prison, while they continued to negotiate the issue and the Office of the Inspector General investigated. CDC currently has six private prisons under contract housing 2,280 prisoners, in addition to deals with six cities and counties to run community correctional facilities. A recent study by former Governor George Deukmejian recommended greater use of such private prison contractors.

In January 2005, Moreland announced he would lease the Adelanto prison to San Bernadino County Jail officials for \$3.8 million a year. 

# Iowa Must Give Kosher Meals To Civilly Committed Sex Offender

by John E. Dannenberg

The United States District Court (S.D. Iowa) ordered that Kosher meals be provided without co-payment to an Orthodox Jewish prisoner who is committed to the Civil Commitment Unit for Sexual Offenders of the Iowa Department of Human Services (DHS). The Settlement Agreement entered into by DHS also excuses the prisoner from work on religious holidays and provides for ceremonial holiday food.

Douglas Thompson is civilly committed under Chapter 229A of the Iowa Code. It is undisputed that he is an Orthodox Jew who adheres strictly to kosher dietary laws. His initial requests for kosher food were resisted by DHS on general grounds of added cost. Later, DHS limited its disagreement to the issue of requiring Thompson to co-pay for his kosher meals from his earnings. Thompson countered that such a co-payment requirement is unconstitutional.

Thompson sued for injunctive relief under 42 U.S.C. § 1983 as well as under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc. There being no material dispute on the facts, the court took the case under submission on opposing motions for summary judgment. The principal questions addressed by the court were (1) whether the co-payment plan was reasonably related to legitimate penological interests of maintaining fixed budgets for institutional food and for preventing ad-

verse effects on other prisoners and (2) whether there was a rational connection between the co-payment plan and Iowa's asserted interest in teaching financial responsibility to prisoners.

Relying on the four-part test of *Turner v. Safley*, 482 U.S. 78 (1987), the court concluded that requiring co-payment only of those prisoners asserting religious rights is "wholly repugnant to the free exercise of religion guaranteed by the First Amendment." As to "effects on other prisoners," the court found that the defendants failed their burden of producing credible and specific evidence to support their claim. And because DHS failed to provide numbers to demonstrate any adverse impact on their budget, the financial burden factor was ruled de minimis and therefore unpersuasive.

The court dispensed with Thompson's RLUIPA claim because he had already won on the arguably more stringent *Turner* test. Having found co-payment unconstitutional, the court granted Thompson's cross-motion for summary judgment. See: *Thompson v. Vilsack*, 328 F.Supp.2d 974 (S.D. Iowa 2004).

What is troubling about the court's ruling is that it applies to convicted prisoners, when Thompson is a civilly committed sex offender and technically is classified as a mental patient. Unlike prisoners, the state has no legitimate interest in punishing mental patients, only in treating them. That trouble-

some issue will be resolved in a different case as this one settled.

The parties stipulated to a Settlement Agreement. It provides that within fourteen days, DHS will begin providing Thompson with kosher meals. The Agreement specifies procuring the meals from appropriate outside vendors in pre-packaged form, except for foods in their natural state, such as eggs, fruits and vegetables. An outside consultant advised on how to properly deliver kosher meals without a kosher prison kitchen. Iowa retained the option of providing such a kosher kitchen in the future.

Unleavened and ceremonial foods required in the observance of the eight days of Passover shall be provided. Thompson is excused from work for nine specified Jewish holidays. Whenever fasting is required, he is to be served his regular meal after the fast period is over.

Thompson may lose his privilege if he is observed violating kosher dietary laws; if he passes his specially provided food to others; if he eats both from the general diet as well as his own; or if it is determined he no longer practices the Jewish faith.

Finally, the defendants agreed to pay Thompson's attorney reasonable fees as a prevailing party. Thompson was represented by Patrick E. Ingham of Iowa City. See: *Thompson v. Vilsack*, USDC SD IA, Case No. 4:03-CV-90121. ■

## Texas County, Deputy Settle Sex Assault Case For \$50,000

A woman who claimed she was sexually assaulted by a Kleberg County, Texas, sheriff's deputy has settled her civil rights lawsuit against the county and the deputy for \$50,000.

On May 16, 2001, Sarah Jean Hernandez, 22, was arrested at a border patrol checkpoint in Sarita, Texas, for possession of marijuana. Kleberg County sheriff's deputy Robert Andrew Barbour was then dispatched to pick up Hernandez and transport her to a jail in Kingsville, 40 miles away.

En route to the jail, Hernandez claimed, Barbour forced her to undress and photographed her topless and wearing only her panties. Barbour then refused to return her clothes until she agreed to meet him for sex. (Barbour was later convicted of tampering with physical evidence for throwing away the pictures.)

Later that night, after Hernandez posted bail, Barbour picked her up and took her to an isolated warehouse area. Barbour tried to digitally penetrate her vagina and forced her to perform oral sex, said Hernandez. Hernandez further alleged that Barbour demanded intercourse but relented when she told him she was menstruating.

In her 42 U.S.C. § 1983 lawsuit against Barbour and Kleberg County, Hernandez also claimed that Barbour teased her about her appearance and flirted with her at the checkpoint, that he denied her access to legal counsel, and that he interrogated her even though she invoked her Fifth Amendment right to remain silent. As to the county, Hernandez alleged it lacked policies to protect female prisoners and failed to properly train and supervise its officers.

Hernandez claimed the incident caused her mental anguish and forced her to receive counseling. She sought compensatory and punitive damages.

The case settled on April 20, 2004, for \$50,000. The settlement included guidelines to protect females in custody and also provided that employees who report sexual harassment will be protected from retaliation.

Of note, after the Hernandez incident, two other Kleberg County deputies allegedly sexually assaulted females in custody. One quit, the other was fired.

Hernandez was represented by Christopher John Gale and Mark Anthony Sanchez, both of the San Antonio, Texas, law firm Gale, Wilson & Sanchez. See: *Hernandez v. Kleberg County*, USDC SD TX, Case No. C-03-143. ■

Source: *VerdictSearch*

# Are Prisons Obsolete?

by Angela Y. Davis

Open Media/Seven Stories Press, 127 pp. \$8.95 paperback

Review by Silja Talvi

*"On the whole people tend to take prisons for granted," Angela Y. Davis.*

But are we, as a society, willing to face the reality of what goes on inside? And are we willing to take any measure of responsibility for how prisoners end up once they are released from years of confinement?

From Davis' perspective, we aren't ready to face any of it as long as it isn't happening to us.

"We thus think about imprisonment as a fate reserved for others, a fate reserved for the 'evildoers,'" Davis writes. "The prison therefore functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers."

Those communities? Low-income neighborhoods, poor rural communities, and inner city areas where people of color are heavily represented. The ranks of the prison population are dominated by the people whose lives have been affected, from birth, by the social and economic circumstances of their lives. And the more disadvantaged your life, the more likely you'll end up in prison.

There are no absolutes in a formula such as this one. To be sure, there are people in prison whose relatively privileged lives served as no protection from their incarceration. But the socioeconomic dimensions of imprisonment in America are not only real, as Davis explains, but a present-day extension of our nation's brutally racist and classist history.

In particular, Davis points to the post-slavery "Black Codes" in place throughout southern states. "The new Black Codes proscribed a range of actions—such as vagrancy, absence from work, breach of job contracts, the possession of firearms, and insulting gestures or acts—that were criminalized only when the person charged was black. Thus, former slaves, who had recently been extricated from a condition of hard labor for life, could be legally sentenced to penal servitude."

Racism in the current day criminal justice system is hardly as blatantly worded as the "Black Codes," but no less severe. Non-violent drug charges can lead to multi-decade or even life sentences, and people of color are disproportionately represented across the board.

And those bodies in prison constitute an ever-growing, profit-generating market for one of the newer sector incarnations of free-market American capitalism. From the use of prison labor by private companies and state/federal-run prison industries to the millions to be made from selling toiletries, food, and phone services to prisoners, prison is profit.

Except, of course, where state budgets—and taxpayers—are concerned. While private companies are directly and indirectly benefiting from the surplus pool of incarcerated men and women, resources for education, health and human services are drying up from coast to coast.

What Davis proposes, instead, is a serious look at the abolition of our prison system—and of the notion that incarceration

is a necessary component of a functioning democracy. Davis urges readers to begin to see the complex web that represents the prison industrial complex, and to imagine the possibility that this web can be detangled and detached:

"[T]he prison industrial complex is much more than the sum of all the jails and prisons in this country. It is a set of symbiotic relationships among correctional communities, transnational corporations, media conglomerates, guards' unions, and legislative and court agendas. If it is true that the contemporary meaning of punishment is fashioned through these relationships, then the most effective abolitionist strategies will contest these relationships and propose alternatives that pull them apart."

But in the space of this short Open Media book, Davis is vague when it comes to proposing those alternatives. Aside from the more obvious suggestion of the decriminalization of drug use and prostitution, and the provision of education and healthcare for all, readers looking for explanations as to the alternative handling of, say, sexual predators, for instance, won't be satisfied with what's presented here.

But if Davis' intent is to start her readers thinking about the ease with which we've accepted a mass incarceration system—and the imperative for us to begin envisioning alternatives—she succeeds. Transformation of the criminal justice system is necessary, Davis argues convincingly, no matter what our eventual differences about how to treat those who have shown that they cannot live amongst us without causing harm. ■

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## News in Brief:

**Arizona:** In an uprising at the Lewis prison complex in Florence, on May 7, 2004, 100 prisoners refused to leave the prison yard for two hours and 50 refused to leave the dining hall after a fight between two prisoners in the yard. When guards tried to break up the fight, prisoner bystanders threw rocks and water bottles at them. Guards fired "stinger" rounds to enforce obedience which was unsuccessful. Only when tactical squads of guards appeared did the prisoners return to their cells.

**Brazil:** On September 23, 2004, seven teen age prisoners were killed and five wounded in a riot at the Sao Francisco Education Center in Piraquara. The prisoners were killed by other prisoners during a riot where they claimed poor treatment and conditions.

**California:** In June, 2004, a lawsuit filed in federal court in Los Angeles by Kathy Magnuson claimed that Wackenhut employee Anthony McCord, a "booking specialist" at the jail, made sexually suggestive remarks to Magnuson while she was booked into the Redlands jail on shoplifting charges. McCord watched while Magnuson was strip searched by female guards at the San Bernardino county jail. McCord later called her on her cell phone.

**California:** On December 5, 2004, Riverside county jail guards Joseph Bessette, 42, and John Burns, were charged with numerous counts of rape and sexual battery for having sex with at least eight female prisoners in the Riverside jail. The prisoners told investigators they had been raped, groped and forced to perform sex acts in exchange for clothing and hygiene items.

**Canada:** On November 28, 2004, an unidentified guard at the Central North Correctional center in Penetanguishene was

charged with drug trafficking and breaching the peace for selling cocaine and marijuana to prisoners inside the regional jail. Called the "super jail" it is run by the Utah based, for profit company Management and Training Corporation.

**Connecticut:** On December 1, 2004, Mark Brown, 34, a guard at the Juvenile Training School in Hartford was arrested on larceny and worker's compensation fraud charges. While collecting disability benefits from claimed work related injuries, Brown raced motorcycles in New Hampshire. His racing season included at least six crashes.

**Egypt:** In November, 2004, the Interior Ministry announced it had released almost 700 political prisoners, mostly Islamic militants, as part of an amnesty program.

**Florida:** On November 17, 2004, Ruth Brodis, 43, a nurse at the Charlotte county jail in Punta Gorda who is employed by Prison Health Services, was arrested on charges she was smuggling prescription drugs into the jail for her fiancé, Tyler Schwartzkopf, 34.

**Florida:** On November 22, 2004, Richard Rodriguez, a bankruptcy court clerk in Miami, was sentenced to a year and a day in jail after pleading guilty to bribery charges. In exchange for kickbacks, Rodriguez would give creditors advance notice of unclaimed funds.

**Florida:** On November 27, 2004, Richard Dove Jr. a K-9 unit guard at the Santa Rosa Correctional Institute was shot three times with a shotgun by Brian Baker, 36. Baker was wanted for driving with a suspended license and fled when deputies attempted to serve him with a warrant. Guards from the nearby prison aided local police in the search for Baker in rural fields. Baker was eventually captured and has been charged with attempted murder.

**Florida:** On November 29, 2004, Gregory Louis, 39, a guard at the Hernando county jail in Brooksville was arrested and charged with sexually assaulting a 17 year old female prisoner in the jail on two occasions. The jail is operated under contract by Corrections Corporation of America.

**Georgia:** On November 21, 2004, Haralson county jail prisoners Homer Brown, 18, and Robert Hill, 23, escaped through the jail's ventilation system.

**Georgia:** On November 23, 2004, Robert B. Ellis, Jr., a former district attorney in Alapaha judicial circuit, was sentenced to 18 months in federal prison and fined \$5,000 after pleading guilty to lying to FBI agents

when he denied having a sexual relationship with drug informant Jody Manning. Manning had complained to FBI agents that Ellis has coerced her into having sex with him. The married, but not monogamous, Ellis claimed they had engaged in a consensual affair. Ellis resigned as district attorney shortly before pleading guilty.

**Kansas:** On August 27, 2004, the Wyandotte county sheriff closed the jail kitchen run by private contractor Aramark due to serious sanitation problems. Joe Connor, the county health director said "They did have a cleanliness problem in the kitchen." Media reports claimed no one suffered food poisoning or illness as a result. Aramark is paid \$690,000 a year to feed the jails' prisoners.

**Louisiana:** In late November, 2004, Tanzanika Ruffin, a New Orleans assistant district attorney was fired after Ruffin threatened to prosecute and arrest Dwayne Anthony if he did not pay \$275 to a handyman who had painted Anthony's home. Ruffin made numerous visits to Anthony's home and eventually received \$200 from his fiancé. Ruffin then demanded \$100 for "processing the money" at the DA's office.

**Louisiana:** On December 1, 2004, assistant New Orleans city attorney Henry Dillon III, 47, was arrested and charged with raping a 20 year old woman he had lured to his law office to allegedly discuss criminal conduct charges. The victim was charged with lewd conduct after being found partially clothed in a car with her boyfriend in a local park. Dillon was the prosecutor on the case and told her to come to his office to discuss the charges after a court hearing. Once there, Dillon allegedly raped her. The victim promptly reported the assault. Dillon was fired. However, in 1998 Dillon was also charged with raping a former colleague while employed as a prosecutor and he returned to his job after he was fired. The state attorney general declined to prosecute that rape charge holding there was insufficient evidence to prosecute. Dillon is very politically well connected both personally and through his family to the city and state's political and

### TIG Prisoner Penpal Project

Accepting requests from trans, intersex, gender questioning and two-spirit prisoners who would like a penpal. Requests must include a brief paragraph about yourself and your interests, what kind of penpal you are interested in, and be received by March 30, 2005. They will be compiled and distributed in May primarily to folks outside of prison.

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The U.S. Supreme Court's June 2004 decision in *Blakely v. Washington* affecting federal and state sentencing enhancements has been described as "the most significant criminal case of our time." To receive a copy of *Blakely* (32 pgs.), send \$3 (stamps OK) to: PLN, 2400 NW 80th St. #148, Seattle, WA 98117.

legal community which apparently has provided him with impunity from prosecution. Once again this rape case was sent to the state attorney general's office for prosecution as the Orleans Parish DA claimed a conflict of interest. Dillon is free on bail pending disposition of the charges.

**Michigan:** On November 22, 2004, Dr. Daniel Smalley, 56, a doctor at the Oaks Correctional Facility pleaded guilty in federal court to four counts of tax evasion with a tax liability of \$139,794. According to the indictment, between 1997 and 2002, while employed by the state of Michigan, Correctional Medical Services, Wexford Health Services and Geneysis Integrated Group as a prison doctor at various Michigan prisons, Smalley did not pay his taxes.

**Mississippi:** On November 9, 2004, three prisoners escaped from the Wilkinson County Correctional Facility in Woodville. The prison is operated by the private, for-profit Corrections Corporation of America. CCA officials contacted the nearby Louisiana State Penitentiary for help recapturing the escapees and LSP staff captured one. The remaining two were caught by local police as they walked alongside a road.

**Missouri:** On December 1, 2004, the Missouri DOC announced it was banning over 35 Sony PlayStation 2 video games from its prison recreation centers after a reporter informed prison officials that games for the machine include *Hitman: Contracts* in which players use various weapons to carry out contract slayings in the game. The games and machines are bought by prisoner canteen funds. Dave Dormire, superintendent of the Jefferson City Correctional Center told media "We didn't closely review these. We were told these games had more like cartoon violence." Apparently among those unable to distinguish between fact and fantasy are Seattle University professor Jacqueline Helfgott and Jim Houston, a professor at Grand Valley State University in Michigan who both claimed violent movies and video games had a negative effect on prisoners, yet not presumably on the tens of millions of other people who play them. A month later the fovernor ordered all video games banned from state prisons.

**Myanmar:** The military dictatorship on November 17, 2004, announced it would release 3,937 prisoners that were improperly held or charged by the National Intelligence Bureau.

**New York:** On November 4, 2004, a man whose identity was not released by media, jumped from a police interrogation room in a lower Manhattan courthouse building

in an escape attempt. The man fell 50 feet after managing to elude police when they removed his handcuffs to allow him to put on a jacket while he was taken to a courtroom for booking. The detainee suffered several broken bones and serious injuries but was expected to live. He had been arrested earlier in the day in possession of one kilo of cocaine.

**New York:** On November 9, 2004, Mona Parris, 32, a guard at the Fishkill Correctional Facility pleaded guilty in Dutchess County Supreme Court to felony third degree rape for having sex with a male prisoner at the facility. In exchange for the plea, she was promised a sentence of no more than 6 months in jail.

**Sweden:** On November 26, 2004, police in Stockholm arrested an unidentified 25 year old man they claimed was shooting cell phones into the recreation yard of a maximum security prison with a bow and arrow. The suspect would tape cell phones and battery chargers to arrows and fire them over the 12 foot walls of the Mariefried prison in Stockholm. Police believe cell phones were used in three recent highly publicized escapes from Swedish prisons. Police said as far as they knew, use of a bow and arrow to get cell phones into prisons was "a first."

**Texas:** On November 1, 2004, the Texas Department of Criminal Justice enacted physical fitness requirements for its prison guards. All guard applicants must now pass a fitness test that includes doing six push ups and 16 sit ups in one minute and a one mile run or walk in fifteen minutes. The test is not retroactive to current staff nor are employees tested for physical fitness once they are hired. Approximately ten percent of new guard applicants failed this modest requirement that has since gone down to four percent.

**Texas:** On November 11, 2004, Williamson county jail prisoner Timothy Brown, 46, supposedly fell out of his bunk in the jail infirmary. He died in a hospital three days later. Brown was an alcoholic with various medical problems related to his illness. Brown's stepson Daniel Rice, said he saw Brown at the hospital shortly before his death and he had a cut across his head, a head injury, two black eyes and a bruise on his chest. Brown was unconscious with brain stem injuries until he died. According to jail staff, Brown sustained the fatal injuries by falling two feet off his bunk. An autopsy revealed that Brown was in the end stages of liver disease caused by alcoholism and that when he fell and struck his head he hemorrhaged to death as his blood could not clot.

**Texas:** On November 22, 2004, death row prisoner Pablo Melendez Jr., 29, at-

tacked fellow death row prisoner Robert Pruett, 25, with a homemade 25 inch spear as Pruett was escorted in handcuffs past Melendez's cell in the Polunsky unit near Livingston. The attack failed though when the spear struck prison guard Bradley Davidson on the head and left him with a two inch wound near his temple which required stitches. He was not seriously injured. Pruett is on death row after being convicted of killing a prison guard at the McConnell Unit in Beesville in 1999. Prison officials were investigating how Melendez made the spear.

**Utah:** On November 7, 2004, John Gardener, 27, a prisoner at the Utah State Prison in Draper was killed when his head was crushed by his closing cell door. Gardner was serving time for theft and was apparently the first known case of a prisoner being killed in Utah prisons by a cell door.

**Washington:** On November 10, 2004, Reginald Merchant, 32, a King county jail prisoner, escaped from a jail bus as it moved through Seattle traffic to a court hearing. A local bystander recaptured Merchant who was in jail awaiting trial on first degree attempted robbery charges and a Louisiana parole violation.

**Washington:** On November 17, 2004, Dennis Smith, 42, was found hanging dead in his cell at the Washington State Penitentiary in Walla Walla. Smith had been serving a sentence of life without parole in the Clark county murder of Carolyn Kiloby. He had been imprisoned since 1996.

**West Virginia:** On September 12, 2004, Cabell County jail guards Bernis Peeples and Naomi Miller pleaded guilty to federal civil rights charges stemming from beating an unidentified prisoner in the jail. Peeples pleaded guilty to assault and Miller to obstructing justice for trying to cover up the attack. Both charges are misdemeanors. 🐾

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## California Prosecutor Fights Deportation Of Paroled Sex Offenders

Today, nobody wants to keep paroled sex offenders around. Except the Los Angeles County district attorney, that is.

In an odd "man bites dog" scenario, the district attorney is trying to retain four foreign nationals who were paroled in California after serving prison terms for sex offenses while their public defender is trying to have them deported. The district attorney argues that as sexual predators, they are a danger to society wherever they go so California should civilly commit them. The public defender counters that federal law requires deportation, and questions why California should pay for their expensive treatment.

Wesley Wheaton, a recently paroled child molester with a history of rape convictions, desires to be returned to his native

Canada. Canada will accept him if he agrees to undergo treatment there. But upon parole, Wheaton was sent to the Los Angeles County Jail to await trial as a sexually violent predator (SVP). Although his public defender asked a state judge to release him to federal custody for deportation proceedings, the judge declined, saying that Immigration (who has a warrant for Wheaton's arrest as an illegal alien) is not actively pursuing his custody.

Wheaton's only hope is for Immigration to demand his custody, the judge ruled. Three other illegal immigrants from Mexico and Guatemala are likewise being detained and prosecuted as SVPs by the Los Angeles County district attorney. ■

Source: *Los Angeles Times*

## Other Resources

### ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

### Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

### CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

### FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

### Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rulings, administrative developments and news about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

### Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 881, Coquille, OR 97423.

### Hepatitis C Awareness News

Hepatitis C and HIV/HCV newsletter free on request. Write: National Hepatitis C Prison Coalition, PO Box 41803, Eugene, OR 97404.

### November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 795 South Cedar, Colville, WA 99114.

### Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

### Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.



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**Represent Yourself in Court: How to Prepare & Try a Winning Case**, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. **\$34.99**. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

**Law Dictionary**, Random House, 525 pages. **\$17.95**. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

**The Blue Book of Grammar and Punctuation**, Jane Straus, 68 pages, 8-1/2 x 11. **\$11.95**. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

**Legal Research: How to Find and Understand the Law**, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. **\$39.99**. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

**Spanish-English/English-Spanish Dictionary**, 60,000+ entries, Random House, **\$5.99**. Two sections, Spanish-English and English-Spanish. All entries listed from A to Z. Hundreds of new words. Includes Western Hemisphere usage. 1034

**Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. & Canada**, by Jon Marc Taylor, 341 pages. **\$24.95**. Includes contact info & outlines courses offered by over 250 education providers. Info on high school, vocational, paralegal, law, college and graduate courses. One of a kind prisoner resource. 1047

**The Citebook**, 21st ed., by Tony Darwin, Starlite, 306 pages, **\$41.95**. This plain language legal manual lists positive cases (cases that give you a right, not take one away) and gives a short synopsis detailing each. 1057

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**Worse Than Slavery: Parchman Farm & the Ordeal of Jim Crow Justice**, by David Oshinsky, 306 pgs **\$14.00**. Analysis of prison labors roots in slavery. Focuses on prison plantations and self sustaining prisons. Must reading to understand prison slave labor today. 1007

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**Prison Writing in 20th Century America**, by H. Bruce Franklin, Penguin, 1998, 368 Pages. **\$13.95**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022 ☐

**Soledad Brother: The Prison Letters of George Jackson**, by George Jackson; Lawrence Hill Books, 368 pages. **\$16.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 30 years ago. 1016 ☐

**The Politics of Heroin: CIA Complicity in the Global Drug Trade**, April 2003 Rev Ed, by Alfred McCoy; Lawrence Hill Books, 734 pages. **\$32.95**. Latest Edition of the scholarly classic documenting U.S. government involvement in drug trafficking. 1014 ☐

**No Equal Justice: Race and Class in the American Criminal Justice System**, David Cole; The New Press, 218 pages. **\$15.95**. Shows how the criminal justice system perpetuates race and class inequality, creating a two tiered system of justice. 1028 ☐

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# PRISON

## Legal News

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March 2005

### California Corrections System Officially Declared “Dysfunctional” - Redemption Doubtful

*by Marvin Mentor*

Culminating a multi-year crescendo of criticism leveled at California's Corrections system from frustrated legislative, judicial and executive leaders, the Corrections Independent Review Panel (CIRP) recently tasked by Governor Schwarzenegger declared in its 359 page June 30, 2004 report, *Reforming Corrections*, that Corrections was in such disrepair as to be “dysfunctional.” The panel, chaired by former California Governor George Deukmejian (under whose earlier leadership Corrections more than doubled in size), was unflinching in its derogation of Corrections' past management as well as of the overly influential prison guards union, the Califor-

nia Correctional Peace Officers Association (CCPOA). “This system is in chaos,” said Joseph Gunn, executive director of the blue ribbon CIRP, when testifying at a California Senate hearing. He unabashedly described the system as “so far gone it can't reform itself without independent outside public oversight from a [civilian] commission,” which he called the “linchpin” of the CIRP report's 239 recommended changes. But less than 24 hours after the report's release, Governor Schwarzenegger flatly rejected the civilian oversight commission concept because it would diminish his executive branch power. Corrections Oversight Committee co-chair Senator Gloria Romero was “dumbfounded” that the CIRP report would thus be rendered “dead on arrival” before any legislative hearings could be convened to consider it. On January 5, 2005, Governor Schwarzenegger announced a reorganization of Corrections (renamed the Department of Correctional and Rehabilitative Services) which, while sweeping, omitted CIRP's recommended civilian oversight foundation.

To fully air the problem, this article will recount underlying findings of the California State Auditor, the Office of Inspector General (independent watchdog agency overseeing Corrections), the Special Master of the United States District Court (for California Department of Corrections (CDC) issues), as well as of the CIRP. Finally, although critics are doubtful that Corrections can be meaningfully redeemed from within, this writer will offer a hopeful incentive-based solution that, if adopted, would of its own force drive all parties towards the meaningful reinvention of “corrections,” the demise of artificially synthesized “recidivism,” and

the motivation of successful reintegration of released prisoners into society.

#### California Department of Corrections: A Behemoth

With 165,000 incarcerated prisoners in 33 prisons and another 114,000 on parole, and with 54,000 employees (including 31,000 guards) feasting on a \$6.2 billion annual budget, CDC is unquestionably a challenge to manage. Even the basic task of housing prisoners is problematic, with the population at about 200% of prison design capacity. Add in the medical needs of an aging segment of 27,000 lifers (who are being politically denied parole) and 641 on Death Row, the daunting task presented by gangs, protective custody isolation, violent offender classification, and infectious disease treatment - and you've got a mammoth puzzle. When failures occur, lawsuits invariably follow, with Corrections losing suits over the years on Death Row rights, mental health treatment, basic medical care, AIDS and Hepatitis-C treatment, Youth Authority abuses, timely parole revocation hearings, and deadly mistreatment by guards.

But Corrections' problems do not end with prisoner-fomented issues; the 54,000 staff require discipline, too. Documented staff problems include bringing drugs and other serious contraband into the prisons, sexual trysts with prisoners, sexual harassment of both prisoners and other staff, on-duty fights between staff, beatings/abuse of prisoners and racially motivated strife among staff and prisoners alike.

Guards are sworn peace officers, allegedly held to high ethical and moral standards.

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**PUBLISHER**  
**Rollin Wright**

**EDITOR**  
**Paul Wright**

**EXECUTIVE DIRECTOR**  
**Donald W. Miniken Jr.**

**CIRCULATION MANAGER**  
**Jennifer Umbecker**

**COLUMNISTS**  
**Mumia Abu Jamal, Denise Johnston, Daniel E. Manville, Kent Russell**

**CONTRIBUTING WRITERS**  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Rabih Aboul Hosn, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams, Mark Wilson & Robert Woodman**

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## **CA Corrections (Cont)**

But when they are charged with crimes in or outside of prison, their union (CCPOA) comes to their defense with lawyers. Due process is afforded by the Office of Investigative Services (OIS), an internal CDC department charged with resolution of Category II (serious) staff charges. However, a major failing is that 25% of the time OIS fails to complete their "investigation" of serious charges on a peace officer within the twelve month jurisdictional time limit, thus causing a total dismissal of charges. And when guards are fired, the State Personnel Board reinstates 62% of them with full back pay.

All of this might have been swept out of public view, except that inquiring state auditors, the state Inspector General and the federal courts have put their feet down. The investigative news media have had a feeding frenzy on these events, augmented by their persistent use of the state Public Records Act to uncover and report on the wrongdoings and concomitant gargantuan waste of taxpayer money. An overarching theme is that the prison guards' union has paid millions of dollars from its dues-generated treasury to politicians - from the Governor to Senators and Assembly Members (see sidebar: Pay to Play). This investment buys unprecedented guards' contract provisions - including a 37% pay raise, intervention on management decisions, preview of video tapes used in pending guard disciplinary actions, abusive sick leave and overtime policies, and more. With California mired in financial crisis, the unending growth of hemorrhaging prison expenditures has become the target of official criticism. We begin with the State Auditor.

### **Excessive Guard Overtime Chastised**

Already in July, 2002, the State Auditor reported (Report No. 2002-101) that the inability of CDC to hire enough guards (they had 20,000 to handle 157,000 prisoners) was a driving factor in rising cost overruns. Specifically, the lack of 3,200 new hires -- projected to not be corrected until 2009 because of limited training facilities -- was causing \$220 million in guard overtime pay, versus the budgeted \$74 million. Added to CDC's budget shortfall of \$200 million, in the previous year, the costs were deemed out of control.

The Auditor noted that an overtime bid policy based on seniority caused overtime hours to be billed at the highest rates. One

senior guard averaged 167 hours of overtime on top of each 168 hour normal pay period for six months. This practice, in turn, only caused increases in on-the-job injury, illness and workers compensation claims. And the five year guards' contract that was ratified in February, 2002 was projected to cost another \$518 million per year. The basic remedy recommended by the Auditor to minimize costs was simply to hire more guards to work at straight time rates.

The Auditor revisited CDC in its October, 2004 Report No. 2004-105. Here the topic was the untimely processing of employee disciplinary actions. With the 1,000 adverse actions in 2002 having had an average processing time of 285 days (the statutory limit is 365 days for peace officers, and three years for other staff), approximately 25% of peace officer cases and 12% of non-peace officer cases had to be dropped for exceeding time limits. Part of the frustration came from protections afforded by California's unique Peace Officer Bill of Rights (POBAR), which provides access to witness tapes, gives 30 days notice of intent to impose discipline plus 30 days time to oppose any adverse comment placed in a personnel file, and gives protection against the use of lie detectors, photographs, personal information disclosures and locker searches. [On May 3, 2004, Attorney General Lockyer filed suit in Sacramento Superior Court challenging the legality of such compelled video-tape disclosures.]

CDC responded that it was aware of these shortfalls and was preparing upgrades already in response to a scathing report on the same subject by a federal judge overseeing supermax Pelican Bay State Prison's legendary staff brutality complaints. In particular, CDC's upgrade of its disciplinary code would set strict guidelines for each type of employee misconduct, with standardized penalties. This would include imposition of salary cuts and suspensions for employees who lie under oath or otherwise to refuse expose wrongdoing ("Code of Silence"). [One wonders why a peace officer lying under oath would not be simply charged with perjury, private citizens don't have the luxury of taking a pay cut in lieu of felony prosecution.]. It remains to be seen what the CDC actually does since prison systems inherently require a lack of staff accountability to function as they do.

The Auditor recommended a litany of procedural improvements. Not lost on the Auditor was the \$11 million that CDC spent annually in legal expenses processing employee misconduct and discipline actions.



## CDC's Watchdog Barks

California's Legislature, in its wisdom (Penal Code (PC) § 6125), created an independent watchdog agency, the Office of the Inspector General (OIG), to monitor, investigate and report on all aspects of the correctional system. First investigating, then seeking interactive response from CDC, it issues periodic reports to the Legislature. In October, 2001 [Special Review of the Office of Investigative Services, CDC] (and again in March, 2002 [Review of the Employee Disciplinary Process, CDC, it reported on CDC's four year-old internal employee discipline group, the Office of Investigative Services (OIS).

The 2001 report identified management issues that jeopardized the OIS's effectiveness. These included an inaccurate and unreliable management information system, no system for prioritizing cases, abuse of overtime pay, inadequate oversight of field offices, inadequate background checks of both its own investigators as well as borrowed staff, lack of training, and deficiencies in handling and storing evidence.

The OIS is tasked with investigating employee felonious conduct, inappropriate relationships with other employees or prisoners, conduct involving moral turpitude, reported spousal abuse, misuse/theft of state property, misuse of peace officer status, excessive force against prisoners, "Code of Silence" dishonesty, association with prison gangs and drug/contraband smuggling.

The 2001 study found that the OIS, with 60 Special Agents, was so understaffed that it had to borrow 38 untrained, hastily screened bodies from CDC. Even so, the 60 day period mandated for completion of investigations (violated 85% of the time) was being blown, on average, by 181 days. Limited by the one-year ceiling (California Government Code § 3304(d)), the logjam (slow-playing?) caused 10% of these officer disciplinees to "walk" on Category II cases due to time exhaustion.

Moreover, the "thorough" background check (required by PC § 6065(b)(I)) of any peace officer appointed as an OIS agent was being flouted by a departmental limit of 11 hours for each candidate. As a result, references were not checked; financial histories were omitted; past serious disciplinaries were not investigated; and psychological exams were not on file. The OIG recommended elimination of the 11 hour cap.

Training records revealed that 39% of new agents never completed the 40 hour basic training requirement within one year,

and only 43% completed the required 16 hours of annual retraining.

In 19% of the case files reviewed, there was no conflict-of-interest certification. In other files, conflicts were acknowledged, but simply ignored. And in yet other cases, OIS agents were tasked with adjudging incidents they had personally investigated in former CDC staff assignments.

Criticism of evidence handling included: unalarmed evidence room; six staff members other than the evidence room custodian making entries and processing evidence; armory room staff having unfettered access to the evidence room; the evidence custodian using loose sheets instead of a bound logbook, as required; and an audit revealing undocumented removal of evidence.

The March, 2002 OIG review of CDC's employee disciplinary processing revealed worse results than in 2001. In the Category II peace officer cases sampled, now 43% blew the 365 day processing time limit. The OIG found that CDC did not even have clear guidelines for defining the one-year period. The OIG also discovered that CDC had not established policies and procedures governing settlement of employee disciplinary actions, and had no means of monitoring or evaluating the settlement process. 31 % of settled case files contained no documentation of the rationale for the settlement. This lack of standards was highlighted by settlement rates that varied from 13% at one prison to 57% at another. In other words, peace officer discipline for Category II misbehavior was more likely than not to be "settled" on a standard-less "okey-doke" or mooted through excessive processing time. The OIG recommended a major policy review. [On September 16, 2004, a new disciplinary manual dispensing uniform punishment statewide was introduced, while a Bill requiring it was on the Governor's desk awaiting signature.]

## The Judiciary Weighs In

After fifteen years of fighting CDC on excess use-of-force on prisoners at supermax Pelican Bay State Prison (PBSP), as well as trying to mitigate the cruel and unusual punishment of indeterminate ad-seg housing instituted to allegedly isolate ethnic and gang enemies (see, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. (1995))), District Judge Thelton E. Henderson relied upon his Special Master, John Hagar, to report again on the status of court-ordered ("Post-Powers") changes to CDC's unconstitutional PBSP policies. (See: *Madrid v. Woodford*,

C 90-3094-T.E.H., Special Master's Final Report Re Department of Corrections 'Post Powers' Investigations and Employee Discipline, June 24, 2004.)

"Powers" (PBSP Sgt. E.M. Powers) and guard J.R. Garcia were convicted in federal court (U.S.D.C., N.D. Cal. Case No. CR-00-0105 MJJ; affirmed, *U.S. v. Garcia*, 9th Cir., Oct. 29, 2004, U.S. App. LEXIS 22559) on conspiracy and violation of prisoners' rights (18 U.S.C. §§ 242, 243) and sentenced to six years in prison. Their crimes were to set up the fatal stabbing of an alleged child molester in the PBSP yard, the assault of another prisoner in the gym and the assault of a third prisoner in the chapel. Following trial, U.S. Attorney Melinda Haag gave the case files to CDC for use in administrative misconduct proceedings.

But the essence of the Judge Henderson's angst was that the court-approved "use-of-force remedial plan" had not been followed. Rather, the perpetrators and their investigators engaged in cover-ups to quash any administrative punishment. When Judge Henderson assigned Hagar to investigate, the problems escalated to include a "Code of Silence" evasion of fact-finding, CCPOA interference with the investigation, and perjury accusations against then CDC Director Edward Alameida and Chief Deputy Director Thomas Moore. Hagar's interim report to the court in January, 2004 revealed a pattern of suppression of guard misconduct investigations that caused the court to expand its orders beyond just PBSP.

Hagar's investigation at CDC's Directorate level resulted in the accusation of CCPOA-supported guard misconduct cover-ups by Alameida and Moore on three specified occasions. One such event, in July 2003, questioned the sudden CCPOA-proposed "budget cutting" closure of a 51-person internal investigations office in Rancho Cucamonga wherein ostracized investigators Robert Moldanado and Richard Feaster had successfully probed guards' beating of shackled prisoners at Chino State Prison. Other cases pending involved guard-prisoner sex and staff's smuggling of drugs. Alameida's Investigative Services Director Martin Hoshino wrote a December 29, 2003 memo that ordered agents from the closed Rancho Cucamonga office not to speak to the state Legislature, their staff, the Governor's office or the news media. Senators Romero and Jackie Speier called this a violation of the First Amendment and whistleblower protection statutes.

Another Chino incident was the accusation of guard Shayne Ziska (then a candidate

## CA Corrections (Cont)

for CCPOA chapter president), who after being on paid administrative leave for four years pending an FBI investigation (see: *PLN*, Nov. 2003, p.3), was indicted in July, 2004 for aiding the Nazi Low Riders prison gang. His charges include participating in a corrupt organization, conspiracy, violent crime aiding racketeering and deprivation of rights under color of law - allegedly helping the Nazi Low Riders to distribute drugs and assault two prisoners. Awaiting prosecution in the Metropolitan Detention Center in Los Angeles, Ziska now faces up to 60 years imprisonment.

Alameida also drew heat from his firing of Folsom State Prison Warden Diana Butler over alleged mishandling of investigations of a major riot in 2002, followed by the removal from Folsom of every high ranking official down to and including the Captain level. Captain Doug Pieper committed suicide when he was pressured to cover up the riot investigation. Folsom Associate Warden Max Lemon received death threats from prison staff when he broke the silence and testified -literally in tears - to the Legislature.

A third event connected Alameida to the guards' "Green Wall" code-of-silence clique.

### Special Master Reports Corruption

Hagar implicated Alameida and the CCPOA in his reports to the court, depicting a culture of corruption and cover-up at the highest levels of CDC that became a template for unprincipled behavior throughout the department. "Timely, fair and effective investigations may well be impossible," he wrote, adding that the labor contract provided the CCPOA "with the ideal instrument to enforce the code of silence." Hagar found that PBSP had become a breeding ground for guards to learn to misbehave on the job. "Some correctional officers acquire a prisoner's mentality: they form gangs, align with guards and spread the code of silence." [Editor's Note: The code of silence exists more as the exception than the rule among prisoners who lack the resources and means to enforce it that prison staff have at their disposal.] Hagar added that criminal investigations concerning guard misconduct at PBSP "have been disrupted over the last 10 years by the CCPOA," citing evidence of document tampering and pressure by union officials to not talk to internal affairs investigators.

Hagar had specific examples of union largesse: Guard Schembri told the truth about a fellow guard's assault on a prisoner

for which Schembri was labeled a "rat"; but guard Lewis was fired after he fatally shot a prisoner and used racial slurs against others - for which Lewis was honored at a later guard union convention as a "hero." Senator Speier found Hagar's report "a more riveting read than *The Da Vinci Code*," commenting, "This corroborates my worst nightmares about what's going on inside our institutions. When corrupt people are watching over corrupt people, the only thing that results is corruption.... There's a thug mentality that must be ended within the CCPOA." Alameida later admitted in a sworn statement that he had been called in by high-ranking officials in former Gov. Davis' administration and was told to consider union budget proposals that spared union jobs but slashed managerial jobs. (Davis had accepted over \$3 million from the CCPOA.)

Hagar's final report on PBSP concluded unequivocally that Alameida and Moore, at CDC headquarters, had shut down court-ordered PBSP disciplinary investigations of Powers and Garcia at the urging of the CCPOA. Hagar found that Moore and Alameida had simply lied regarding their termination of the post-Powers investigation. Hagar concluded by recommending criminal investigations of Alameida and Moore, plus perjury and civil contempt charges against CDC until CDC overhauled its internal affairs policies.

Judge Henderson was further upset by whistle-blower Richard Krupp's July 26, 2004 letter describing how headquarters cover-ups were still alive and well. Krupp, an internal CDC auditor, had exposed and documented out-of-control sick leave and overtime procedures used by guards -- since ballooned to \$250 million worth -- and properly reported it. His reward was to be harassed and transferred to a dead-end job reading 200 college students' research proposals about visiting prisons. On July 2, 2004, nine days after Krupp testified to the Senate Rules Committee about management abuses in CDC, Chief of Institutions Division Julio Valadez ordered an investigation of Krupp's wife, a 25-year employee of CDC, whose alleged "offense" was to report suspected abuse of CDC car fleets to her supervisor. Both Krupps are now suing CDC.

Henderson threatened a federal takeover of CDC, to which Governor Schwarzenegger shrugged, "He can take it. It's no sweat off my back." In December, 2003, Alameida resigned. In July, 2004, Judge Henderson accepted Alameida's declining mental health concerns to drop criminal proceed-

ings against him. Moore is still facing civil sanctions for closing out the "post-Powers" perjury investigation at CDC headquarters. It remains to be seen if, when all is said and done, anyone is held accountable.

In November, 2004, Henderson issued a 27-page ruling following Hagar's final report, finding that Alameida had engaged in "gross abuses of the public trust [by electing to] shut down the investigations in order to appease the CCPOA." He ordered sweeping new powers to Hagar to monitor use-of-force, guard misconduct investigations and "code of silence" abuses throughout the state - in essence, a "mini-takeover." Henderson's order expressly excluded CCPOA from participating in use-of-force reviews at PBSP. Significantly, Hagar also received authority to investigate the CCPOA's labor contract, to ensure that it does not undermine any of Henderson's previously ordered remedial plans. Henderson's order openly lauded the recent appointments of Corrections Secretary Roderick Hickman and CDC Director Jeanne Woodford as a positive step. But Senator Speier was more candid, "The judge knows that the influence of the union is what ails the Department of Corrections."

Hickman, a former guard and continuing CCPOA member, knows that "influence," too. His hard line stance has drawn heat from the website "Paco Villa's CCPOA blog," which belittles Hickman (nicknamed "Spud") and his reforms - depicting him as the Cowardly Lion of the Wizard of Oz.

### Reforming Corrections

Governor Arnold Schwarzenegger was well aware when he was elected in November, 2003 that the then \$5.6 billion state correctional system was "in disarray, wrapped in secrecy and with almost no accountability, financial or otherwise." He found out the gruesome details when the handpicked panel of 36 (CIRP) that he appointed to independently review Corrections delivered its report, *Reforming Corrections*. But he did not anticipate the strong medicine prescribed by CIRP leader, former Governor George Deukmejian, a Republican law-and-order conservative who himself spearheaded the massive expansion of CDC in the 1980s. "Management in corrections has been deficient and dysfunctional," Deukmejian wrote. "It's extremely important that we have an independent [civilian] commission to lead the way and monitor what's going on."

Reaction was mixed. Schwarzenegger's aides moved to quickly dismiss the idea of a civilian commission. Criminal justice experts applauded CIRP's conclusion that more

education, drug testing and job-training programs for prisoners were the way to cut California's excessive parole failures, noting that this was a move back to a rehabilitation model. Senator Romero was disappointed. "Is this all there is?" Her corrections oversight committee co-chair Senator Speier thought the civilian commission made no sense because they would have no experience in the prison system.

### **CIRP: Corrections Has Fatal Flaws**

Reforming Corrections begins ominously. "California's correctional system suffers from a multitude of problems -- out-of-control costs; a recidivism rate exceeding that of any other state; reported abuses of inmates by correctional officers; an employee disciplinary system that fails to punish wrongdoers; and the failure of correctional institutions to provide wards and inmates with mandated health care and other services."

"How did it [fail]? The answers are complex, yet simple: there has been too much political interference, too much union control, and too little management courage,

accountability, and transparency."

"The legislative confirmation process has given the state wardens who ... owe their allegiance to political forces rather than to a set of principles and to the corrections organization. Each warden acts as a feudal baron. [Even] the Secretary [of Corrections] has little or no power."

"It is clear that the pendulum has shifted too far to the union's side. The union has been granted authority over traditional management rights.... These concessions have undermined the ability of... management to direct and control the activities of the department."

The report goes on to describe the equally disturbing failure to develop capable leaders with "the courage or integrity to stand up to political pressure."

So, just who wrote such a damning report? Not some liberal prisoner-coddler. The 36-person team included twelve from CDC, four from the Youth Authority, three from the GIG, eight from the California Highway Patrol, three from the BPT -- all led by former Governor Deukmejian. These veterans had carnal knowledge from decades of in-the-trenches experience. They labored

for four months, and then spoke honestly.

The prime recommendations were (1) reorganize Corrections from the top down; (2) change the culture - getting rid of the "code of silence" and reinforcing strong ethical behavior; (3) select and train the best employee candidates; (4) establish and enforce fair employee discipline and use-of-force policies; (5) change the prison experience from warehousing to preparation for reentry to society.

### **Reform Must Start At The Top**

From their own career experiences, this panel personally knew that a bureaucracy of peace officers could never succeed. For this reason, they laid down the fundamental premise that Corrections must be run by a Civilian Corrections Commission, to function as the department's Board of Directors. This concept mirrors that of many large city police departments, and is widely respected. Reforming Corrections outlines the new organizational structure -- a flattening of the three prior independent CDC, Youth Authority and BPI hierarchies.

Importantly, "the role of labor unions

## **Pay To Play: Guard Union Spreads the Wealth**

From January 3, 2000 to February 9, 2004, 26 of the 40 California state Senators and 50 of the 80 Assembly Members received funds - ranging from \$1,000 to \$333,000 - from the California Correctional Peace Officers Association (CCPOA), the guards union, and/or Native Americans and Peace Officers Political Action Committee (NAPO). [NAPO acts as a shill to funnel CCPOA money to legislators, as do Senate and Assembly "Leadership Funds."] Legislators responded in July, 2004, when, feigning to abate the state budget crisis, they inked a controversial "renegotiated" guards' contract. But the deal that was cut has been harshly criticized by U.S. District Judge Thelton Henderson as giving the guards power that frustrates the repair of prisoners' constitutional rights violations the court has been trying to make for fifteen years.

In exchange for a 5% pay raise delay for six months (worth \$108 million, out of a total 37% pay raise), the CCPOA gained new controls over prison management. It also was guaranteed previews of confidential video tapes that are in evidence pending

excess-use-of-force and other employee misconduct investigations. Senator Gloria Romero said this would have a "chilling impact on prisoners and guards who seek to file complaints on rogue guards." [Curiously, while the CCPOA was arguing that release of such video-tapes "will open the door to increased public and media scrutiny of how guards and prisoners conduct themselves," they simultaneously lobbied to successfully defeat legislation that would have permitted the media access to prisoners.]

Another contract feature was the guarantee of no guard layoffs unless the prison population dropped by 6%. This rings hollow since the number of parolees returned to prison on "technical" parole violations is at the sole discretion of the union's parole agents. Thus, bed-vacancy-driven "recidivism" ensures there will be no such layoffs. Indeed, as of December, 2004, CDC was projecting a \$109 million budget overrun from guard overtime costs related to the increased population.

Six-figure Senate beneficiaries were President Pro-tem John Burton (\$333,000), Tom Torlakson (\$302,500); Bob Margett

(\$279,500); Jack Scott (\$200,000), Minority Leader Jim Brulte (\$180,000); Dede Alpert (\$125,000) and Ed Vincent (\$100,000). In the Assembly, Barbara Matthews received \$157,000 and Rebecca Cohn received \$101,000. Another six-figure recipient was Attorney General Bill Lockyer.

It should be noted that these amounts do not include money given directly to the political parties, political action committees (PAC), or sums spent to sway elections. For example, the CCPOA gave over \$1 million in November, 2004 to defeat Proposition 66, the Three-Strikes Initiative Act that would have voided 4,500 non-violent third time offenders' life sentences - thereby threatening union jobs. In all, the *San Jose Mercury News* reported that between January, 2000 and February, 2004, the CCPOA doled out \$12.6 million in political contributions: \$4.6 million to candidates for public office, \$1.5 million in "stink" money to siphon off voters against candidates they disfavored, \$1.9 million to PACs and \$4.6 million in "other expenditures." ■



## CA Corrections (Cont)

should be limited to wages, hours, working conditions and health and safety of their members.” They should not “participate in management functions” and “their participation in disciplinary procedures should be limited to a representation role of bargaining units.” Merit should replace seniority for job assignments. And misconduct and citizens’ complaint documents should not be purged from employee files.

Next, a Code of Conduct will be drawn up, which every employee must sign. Public transparency will be provided by making the Civilian Corrections Commission meetings open to the public. Reforming Corrections recommends that the use-of-force policies developed at PBSP under federal court pressure become the statewide model. Job descriptions must be written for all levels. For example, there were no job descriptions for wardens and many other key positions. And a risk management group is recommended to assess budding legal or fiscal problems so as to permit damage control.

Upbraiding the current healthcare program, CIRP instead recommends a novel marriage of Corrections with the University of California to develop and deliver medical, mental and dental health care.

Recidivism is attacked by implementing a program that defines each day of a prisoner’s time in a plan to prepare him/her for reentry. Concepts embrace education, substance abuse training/treatment, vocational classes and life skills. On the other end, low-risk parolees should be discharged from parole earlier than -- as little as three months after release -- and be provided with community assistance.

Reforming Corrections anticipates closing prisons, but not before 9,500 “ugly” beds are decommissioned. These include triple-bunks, double-celling in 35 square foot cells, and day rooms and gymnasiums used as dorms.

CIRP looks forward to the expiration of the current CCPOA contract in July, 2006 to make a clean slate consistent with the new goals of Corrections.

Finally, CIRP found Corrections’ use of information technology woefully “antiquated,” and recommended a major upgrade.

### Implementing CIRP’s Plan

Reforming Corrections begins with a strategic plan in each of the above areas - encompassing a total of 239 specific;

prioritized changes. (A 48 page appendix offers all proposed statutory and constitutional changes in a cookbook form suitable for legislative implementation.)

In addition to the Civilian Commission and compression of the three major current departments into one Department of Correctional Services (DCS), the plan eliminates the BPT, the Narcotic Addict Evaluation Authority Board, the Youth Authority Board, the Prison Industry Authority Board and the Joint Venture Policy Advisory Board. All these functions are absorbed into the new DCS.

Regarding ethics and culture, the Code of Conduct punishes cooperation with the “code of silence.” Off-duty peace officer conduct is demanded now to be identical to the high standard required on duty. Each employee will be annually rated as to conformance with these standards.

Under Personnel, salaries shall be adjusted - up or down - commensurate with responsibility. Hiring preference will be given to peace officer candidates with college training, law enforcement experience, or military experience. A Behavioral Science Unit shall be established to provide psychological reviews of employees.

As to adoption of prison regulations, CIRP recommends eliminating conformance with the Administrative Procedures Act. A step that will further enhance lawlessness in the Department. The prisoner appeals process will be streamlined, and all medical appeals shall be answered by a doctor.

### Population Management

“The key to reforming the system lies in reducing the numbers.” CIRP proposes a three-prong approach to cutting California’s prison population, but only for non-violent offenders (i.e., not subject to “strike”-enhanced or life terms). First, release suitable prisoners over age 60. Second, establish supplemental sentence reducing credits based upon completion of specified educational, vocational or drug-treatment goals. Third, develop a “presumptive sentencing model” for new commitments. This would entail the sentencing judge giving both a maximum term and a “presumptive” term (perhaps one half). Each such prisoner would be given a rehabilitative plan -- with goals -- upon arrival. Release could come at any time (after the presumptive term is served) that the goals are completed. This amounts to sort of an indeterminate sentencing law, but with a fixed top and

no parole board.

California’s largest pool of potential prisoners is its 114,000 parolees, whom union parole agents draw from in a bed-vacancy-driven “recidivism” program. To reduce the parole violator population, CIRP proposes discharging low risk parolees in three months after release, as well as implementing alternatives to return-to-custody of electronics monitoring, halfway houses and drug treatment programs. (See: [www.report-cpr.ca.gov/corr/reporthtm](http://www.report-cpr.ca.gov/corr/reporthtm).)

### The Governor Responds

In his January 5, 2005 State of the State address, Gov. Schwarzenegger announced he was recasting CDC, the BPT and the Youth Authority into a unitary Department of Correctional and Rehabilitative Services (DCRS), effective as early as July, 2005. “It’s a philosophy change,” Secretary Hickman explained, adding “there has been too much political influence, too much union control and too little management courage and accountability.”

Indeed, the “R” word (rehabilitation) hasn’t been seen in California since it was formally written out of the Penal Code (§ 1170) in 1977, when the Indeterminate Sentencing Law was replaced by the Determinate Sentencing Law. That same watershed change gave birth to the Board of Prison Terms (BPT), which was directed by the Legislature to “normally” fix lifer parole terms at the initial parole eligibility hearing. But under “political influence [and] union control,” the BPT did everything but fix terms - initially or later. Now, under the new DCRS, the BPT has been eliminated and its functions absorbed.

In fact, this change is consistent with a scathing January, 2003 report by the GIG (Review of the Board of Prison Terms) on the inefficiency of the BPT.

Then Inspector General Steve White ridiculed an earlier BPT request for 24 extra deputy commissioners on top of the existing 60 -- saying that the BPT was so inefficient, it could do its job with only 30 deputy commissioners, if they worked harder. Bluntly accusing them of regularly overstating how much time they spent in hearings “by as much as 150%,” White reported they worked less than seven hours per day.

The report also cited the BPT for having 7,000 prisoners backlogged awaiting parole revocation hearings -- many of whom were past their release dates by the time the hearing was held. (See: *Valdivia v. Davis*, 206 F.Supp.2d 1068 (E.D. Cal. 2002); PLN, Jan. 2003, p.16, Apr. 2004, p.24). And 2,000 lifer

parole hearings were two years in arrears -- a problem addressed by the Legislature (PC § 3041 (d)) to permit Board panels to use one instead of two full commissioners. But after catching up, the BPT has again fallen behind -- the subject of a class action petition certified November 30, 2004 by the Marin Superior Court (*In re Rutherford*, Case No. SC135399A).

### Parole Division Head Ousted

Upon reading the CIRP and its 239 change recommendations, Senator Gloria Romero critiqued, "This is about rearranging deck chairs on a Titanic that we are promised will be leak-proof."

But one chair has already been moved. The Chair of CDC's Parole Division, Rick Rimmer, was ousted from his job on December 1, 2004 for failure to reduce CDC's population via "reduced recidivism." In May, 2004, Secretary Hickman and Director Woodford had announced a new education-based reform of California's parole system, previously branded in 2003 by the Little Hoover Commission (an independent legislative investigative panel) as "a billion dollar failure" for its 70% three-year recidivism rate -- the highest in the country. But where the "new" program was projected to reduce CDC's population to 156,300 by December 2004, it instead rose to 164,966.

Guards' union spokesman Scott Johnson said, "They gave him an impossible task to do - without the tools to do it with." Even Director Woodford told Senator Speier that the new programs could never get off the ground "due to hiring and contract freezes." Nonetheless, the universally praised Rimmer was shifted to the Employment Law Unit, while from another deck chair, the equally respected Institutions Division's Jim L'Etoile took over paroles.

### Is Corrections Redeemable?

A government agency the size of CDC is by definition a bureaucracy--54,000 employees obviously need structure. But with influence coming from the CCPOA, the Legislature, grandstanding politicians, political special interest groups, the OIG, the Little Hoover Commission - not to mention the indefatigable press - CDC is a veritable pressure cooker.

Experts have expressed their reservations about CDC succeeding in reforming itself. Former Inspector General (now Judge) Steve White stated that within three months after changes were announced, it would

be "business as usual" again. Prison Law Office attorney Donald Specter remarked, "The prison system is too big and too impaired by the California bureaucracy to function properly." Joe Gunn, Executive Director of the CIRP, testified to the Senate on September 8, 2004 that without the proposed civilian oversight commission -- the "linchpin" of Reforming Corrections -- "meaningful prison reform in California just won't happen.... Unless corrections has a commission driving reform, I don't see them ultimately succeeding." Gov. Deukmejian himself -- eschewing any pure bureaucracy - exhorted Gov. Schwarzenegger, "It's extremely important that we have an independent commission."

As a start, in May, 2004, CDC announced a reform of the parole system. Aimed at successfully transitioning non-violent parolees back into the community, the program focused on alternative sanctions for violators, including electronic monitoring, halfway houses and residential drug treatment programs. Officials predicted a 15,000 prisoner drop in CDC's population over three years, allowing for closure of up to three prisons. Instead, former Parole's Chief Rimmer reported little progress, due to a "bureaucratic nightmare."

His real problem, however, was that "recidivism" in CDC is an artifact. Parole's distorted definition of "recidivism" is in reality the bed-vacancy-driven return-to-custody of "technical" parole violators determined daily at the sole discretion of its union parole agents. As a result, "The Inn" is always full.

### California Is Solving The Wrong Problem

The goal both of current programs and proposed reforms is to optimize the bureaucracy. This writer believes that California is solving the wrong problem. The problem needing repair is that every CDC employee is currently financially incentivized to keep prisoners in and then coming back. No CDC employee is financially incentivized to have prisoners successfully reintegrate into society. The present motivation is unswervingly to fill beds -- where more jobs, more promotions and more overtime are the reward. "Corrections" has been thus reduced to a cynical oxymoron.

It's no secret that the CCPOA has figured this out. Yet, it is the--Legislature's responsibility -- not the union's -- to set the agenda. But the sad truth is that California's legislators, elected with millions of dollars of CCPOA donations, have become as ad-

dicted to the status quo as the worst junkie is to heroin. A new paradigm is needed.

### The Solution: Incentify Successful Reintegration

The courage to break this vicious cycle may have to come from Governor Schwarzenegger, who takes money from everyone except unions. His task would be to order that every employee of California's corrections authority shall have their compensation tied to a specified goal of reducing the number of prison releasees who return to prison with a new crime - with one and three year

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## CA Corrections (Cont)

benchmarks.

First, "correctional" staff should be incentified to function in a counseling role to guide release-eligible prisoners towards "making it" on the outside - in contrast with the adversarial posture now. Thus, "corrections" should not be confused with the current objective of "warehousing."

Second, California should eliminate the concept of parole -- following the lead of the United States and most states, and adopt true determinate sentencing. It should instead provide Reintegration Counselors - who are by definition not peace officers - to receive releasees into the community, and to pay their rent, food and utilities until they become self-supporting. The counselors would help find jobs and otherwise be support persons. Prisoners have already mastered survival on the inside; what they need is guidance in achieving it on the outside. Reintegration counselors would receive substantial cash awards when their clients reach specified crime-free-life benchmarks. The cost of this program would come from the elimination of the misnomered "recidivists," i.e., "technical" parole violators. In 2000, one-half of all CDC prisoners were such technical violators --74,000 of them -- in prison not upon the verdict of a


jury or the order of a judge, but solely at the discretion of union parole agents.

The value of this approach is multifold. First, many prisons could be closed, aiding California's \$8 billion structural deficit. Second, and more importantly, a sizeable number of "violators," who for years have been caught in parole's revolving door, could gain a real opportunity to break the cycle. The misused term "recidivism" would thus be relegated to its original meaning - conviction of new crimes.

### Summary

The State Auditor, the OIG, the court's Special Master and the CIRP are unanimous: California's corrections system is "dysfunctional." It has no goal, and certainly no incentive, to "correct." Corrections is instead the puppet of competing political and financial special interests, one in which the prisoners and their family members are voiceless and powerless bystanders despite being the most obviously impacted and affected. California's bottomless bankrolling of its corrections system thus turns out to be the very wherewithal of the system's failure. Until there are financially incentified goals - measured by the successful reintegration of offenders - this writer believes that redemption of Corrections will remain doubtful.

Likewise, the absence of accountability by staff at all levels, for misconduct and crimes committed in the course of their prison employment ensures no significant change will occur. The lack of staff accountability erodes respect for the law when prisoners see people serving life sentences for shop-lifting while staff members who commit serious felonies, up to and including murder, walk scott free. It makes a mockery of the concept that all people are equal under the law and that no one is above the law.

The current crisis is no surprise. It has been brewing for almost 30 years when George Jackson and other activists complained of many of the same problems. In the 1970's significant changes were made to the California prison system: the enactment of the Inmate Bill of Rights (since repealed) and partial determinate sentencing being the most significant. Since that apex, things have gone downhill. Despite numerous commissions, reports, lawsuits and such in the past 25 years, the prison system has grown by over 500% and its problems have been magnified by size and scale accordingly. It remains to be seen if any meaningful change for the better occurs this time around. 

Sources: *Sacramento Bee*, *Los Angeles Times*, *San Francisco Daily Journal*, *Contra Costa Times*.

## New York Jail Settles Strip-Search Suit For \$2.7 Million

On March 10, 2004, the parties involved in a class action lawsuit over unlawful strip-searches performed during intake at the Rensselaer County (New York) Jail agreed to settle the case for \$2.7 million.

On various occasions between June 26, 1999 and July 1, 2002, the 11 named plain-


tiffs in this case were arrested for relatively minor charges including misdemeanors and probation and parole violations--none of which involved weapons or contraband possession. Upon arrival at the Rensselaer County Jail the plaintiffs, all men, claimed they were illegally strip-searched. Two of the men, Nathaniel Bruce and Paul Kahler, initiated a class action 42 U.S.C. § 1983 civil rights lawsuit on behalf of themselves and others similarly situated, against the sheriff and other jail and county officials.

Before the case went to trial in the U.S. District Court for the Northern District of New York, the parties reached a settlement that covered both the named plaintiffs and the class of persons who were strip-searched at the jail between June 26, 1999, and July 1, 2002, after being arrested for traffic infractions, parole or probation violations, misdemeanors, and civil commitments.

According to the agreement, the County would pay \$2.7 million into a settlement fund to cover a \$1,000 award to each qualifying class member who filed a claim and

\$580,000 in attorney fees.

The County also agreed to revise their strip-search policy and submit it to plaintiffs' counsel for review; incorporate the new policy into the jail's employee manual; post a copy the new policy conspicuously in the jail's booking area and training room; make a copy of the policy available to all jail employees; and train all current and new jailers on the policy. The County further agreed that the new policy would require, among other things, that strip-searches be performed either in private or in the presence of jailers of the same sex.

Plaintiffs were represented by Gary Mason and Charles Schneider of The Mason Law Firm in Washington, D.C.; Bruce Menken and Jason Rozger of the New York, New York, law firm Beranbaum, Menken, Ben-Asher, & Bierman; and Elmer Keach III of Albany, New York. See: *Bruce v. County of Rensselaer*, USDC ND NY, Case No. 02 Civ. 0847, and *Kahler v. County of Rensselaer*, USDC ND NY, Case No. 03 Civ. 1324. 

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# Five Florida Cases Remanded for Award of Jail or Prison Credits

Florida's Second and Fifth District Courts of Appeals have remanded five separate cases for the award of jail or prison credit. Each case was filed under Florida Rules of Criminal Procedure 3.800(a) alleging illegal sentences were imposed for failure to award jail or prison credits they were entitled to.

In the first case, Florida prisoner Connie C. Thomas claimed her sentence was illegal because she was entitled to credit for an additional 32 days spent in the Hillsborough County Jail and 135 days spent in the Pinellas and Hillsborough County jails. Thomas was sentenced to two years in prison after she violated her probation.

Florida's Second District Court of Appeals held Thomas was not entitled to the 32 days credit because this time was included in the thirty-five days of jail credit she had already received. Turning to the 135 days credit claim, the Court said that a defendant is not entitled to jail credit for time spent on detainer in another county's jail on unrelated charges. Thomas, however, was actually arrested in Pinellas County for violation of probation on a Hillsborough warrant. The matter was remanded to award credit or to attach records to prove Thomas was on a detainer. See: *Thomas v. Florida*, 863 So.2d 1277 (Fla. 2<sup>nd</sup> DCA 2004).

In another case, the Second District held that a trial court could not rescind jail credit previously awarded even if the initial award was improper. Enrique Lebron a/k/a/Ricky Sosa was awarded 344 days jail credit. One month later, the trial court sua sponte "amended" the judgment and sentence and issued a clerk's certificate showing only 96 days of jail credit. The Second District said the amendment was "patent[ly] illegal [ ]." The matter was remanded to award Lebron 344 days jail credit. See: *Lebron v. Florida*, 870 So.2d 165 (Fla. 2<sup>nd</sup> DCA 2004).

In the final jail credit case, Bobby Washington alleged he was entitled to 253 days jail credit, but was only awarded 137 days credit. Washington was sentenced to concurrent two-year prison sentences in three separate trial court cases, including the present case. In denying relief, the trial court held, correctly, that a defendant who is arrested for different offenses on different dates is not entitled to have jail credit applied equally to all prison sentences even though the sentences are run concurrently. The Second District reversed, however, because Washington's motion alleged court records, such as the sheriff's jail log, would show he was entitled to 253

days credit. See: *Washington v. Florida*, 873 So.2d 609 (Fla. 2<sup>nd</sup> DCA 2004).

The final two cases alleged illegal sentences for the failure to award credit for time previously served in prison. Bradley Newman and Michael Scott entered pleas for which they received prison sentences followed by probationary sentences. Upon release from prison, both violated probation and were resentenced to prison.

Newman alleged he was entitled to 797 days prison credit after the trial court failed to check off the appropriate box on the sentencing forms that awarded that credit. The trial court denied relief, holding Newman must exhaust available administrative remedies with the Florida Department of Corrections (FDOC) and then, if necessary, file a petition for writ of mandamus in circuit court. The Fifth District Court of Appeals held that ruling would be appropriate if the trial court had awarded prison credit. As that credit was not awarded, the matter was remanded to award prison credit. See: *Newman v. Florida*, 866 So.2d 751 (Fla. 5<sup>th</sup> DCA 2004).

Michael Scott was not awarded prison credit of 394 days. The Fifth Circuit said that

when a defendant is entitled to prison credit, the trial court does not have to calculate the number of days, but must direct FDOC to calculate and apply the prison credit. Scott's case was reversed for the trial court to award prison credit or attach record portions to refute Scott's claim that he was sentenced under a single score sheet to incarceration followed by probation. See: *Scott v. Florida*, 872 So.2d 1011 (Fla. 5<sup>th</sup> DCA 2004).

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# South Carolina Prison Officials Cheat Charity, Attempt Coverup

by Michael Rigby

Officials at South Carolina's Lieber Correctional Institution (LCI) were supposed to be supplying free prison labor to a charity that builds portable housing for the elderly. Instead, they were stealing building materials and trying to extort money from the charity's director, according to lawsuits filed by two former employees.

When the corruption was exposed, LCI officials apparently used intimidation and lies to hinder the investigations. An audit by the State Law Enforcement Division (SLED) supported the allegations, but two county solicitors still declined to prosecute. The FBI has now been asked to investigate.

From June 1999 until October 2001, prison officials assisted the United Methodist Relief Center, a Mount Pleasant-based charity, with its elderly housing program. LCI supplied prison labor to construct the wood houses on mobile home frames. The charity provided the materials. To speed things along, LCI officials were authorized to make the necessary purchases on the Relief Center's Lowe's account.

Soon after the program began, Roger Goodman, a carpentry and plumbing teacher at the prison, said his supervisor told him to order thousands of dollars worth of tools on the charity's account and to over-purchase building materials. (The names of prison officials are conspicuously absent in media accounts.) When he refused, said Goodman, another teacher was added to order the extra supplies.

Around that time, the same supervisor who asked Goodman to over-order supplies asked Pat Goss, executive director of the United Methodist Relief Center, for approximately \$7,000 to cover labor costs. Goss refused. "I felt like that if he got that," said Goss in a deposition in Goodman's lawsuit, "that he'd be back for more."

After that, say Goodman and Marguerite Tomasino--a former employee of the prison's internal affairs division and the plaintiff in a second lawsuit--other LCI officials illicitly purchased materials on the charity's tab. In her deposition, Goss said that when she complained, a senior LCI official requested a private meeting with her, alone, at the prison. Goss declined the invitation. Tomasino said she cautioned her not to go.

Goss later told investigators that a mysterious man claiming to be investigating

the issue for the Department of Corrections (DOC) had showed up at the charity. After handing her a business card with the logo marked out, the man said he was a former FBI agent and asked her to call him with information.

In an interview with the *Charleston Post and Courier* on August 16, 2004, Tomasino said her investigation revealed that of the three houses built by prisoners, the two overseen by Goodman came in close to budget but the one supervised by the other teacher cost an additional \$6,500. Goodman said he believes Tomasino's investigation supported the over-purchasing allegations. "Obviously, if they were ordering more than our policy, a crime was committed," he said.

Signs of a cover-up abound. Tomasino said she was later told by her supervisor that she couldn't interview ranking prison officials and was instructed to close her investigation. Around that time, said Goodman, prison officials abruptly cancelled the project.

What's more, Tomasino's internal affairs report was apparently doctored before it was given to SLED. According to attorney Chalmers Johnson of Charleston, who is working on the Goodman and Tomasino lawsuits as well as one brought by another internal affairs investigator, the report SLED received was missing the names of ranking LCI officials and the content had been altered.

Two versions of Tomasino's report have emerged. The first mentions a letter from Goss that said "there may be a conspiracy to cover up misappropriation of materials purchased" on the Relief Center's account.

The second--the version SLED received--included an additional statement that said, "When interviewed Goss stated that she did not personally believe there was any conspiracy to cover up a misappropriation of funds." Goss denied ever saying that in her deposition and in her interview with the *Post and Courier*, noting that even prisoners wrote to the charity apologizing for what happened. "We did have materials that were inappropriately ordered and used," Goss said. "I did report that to the authorities and expected them to investigate it."

Prison officials eventually reimbursed the charity with materials of comparable value to what was stolen, but Goss had to pick up the materials herself. Goss said

that a ranking LCI official implied that this squared their accounts--to which she replied, "If you rob a bank and you bring the money back, did you still rob the bank?"

In 2002, Goodman and Tomasino quit and filed lawsuits alleging constructive discharge. Goodman said he received a poor performance review after reporting the misconduct and was told he could be fired. Tomasino said too many of her investigations had been stopped or ignored. "This was the one that broke the camel's back," she said.

A subsequent 2003 SLED investigation supported the claims of Goodman, Tomasino, and Goss. One prisoner told SLED investigators that prisoners were ordered to use the charity's wood to build furniture for a prison official's personal use. Others alleged that prison officials ordered expensive materials for the charity's houses, then substituted cheaper supplies instead. And when a job called for 4 sheets of plywood, prison officials sometimes ordered 7 or 8. One prisoner told SLED agents that prison officials used some of the wood to make themselves furniture, gun racks, hutches, and cabinets.

SLED agents further found that then-DOC director William Catoe had originally told Goss that he would waive the normal 10% surcharge--which the prison typically added to a project's material costs to compensate the prison for its labor--since it was for charity. However, audits from Tomasino and the Relief Center found that in many instances over-ordering resulted in costs of 25% above what was required.

The SLED investigation uncovered numerous other examples of official malfeasance at LCI. SLED agents said they found that the same LCI official who had authorized the over-purchasing of supplies for the housing project had paid to have prisoners completely rebuild three of his cars--one of them a Porsche 914--at a cost of just \$50 per car. That same official said he also had prisoners build a wooden model of a World War I tank for his office. Prisoners told SLED agents that the man used prisoners to build Civil War chess pieces, chess boards, and boxes that he then sold.

Jon Ozmin, director of the DOC, said prison officials aren't allowed to take advantage of prisoner labor for profit. "To have an employee direct an inmate to make some-



thing and then him turn around and profit from it would be against policy," he said.

None of the three men investigated by SLED still work for the DOC. Two were laid off due to budget cuts. The other retired.

The SLED audit lasted six months and resulted in a report that was hundreds of pages thick, which the agency turned over to the Dorchester and Berkley County solicitors. They declined to prosecute.

Former Dorchester County Solicitor Walter Bailey said the allegations were not conclusive enough to warrant trial. "There was some smoke there, but I didn't see the substance to it," Bailey said. "If we could have found that someone had misappropriated money, we would have prosecuted. But it was too murky, and the case was filled with personality conflicts." Bailey didn't say if he also refused to prosecute other crimes because they were "murky" or contained personality conflicts.

Tomasino said the case was solid and that if Bailey chose not to prosecute it was only because evidence from her investigation disappeared after she left the DOC. "They quashed the report, just as they did all the sex and drugs cases I investigated," she said.

In the two years since filing his lawsuit, Goodman and Johnson have compiled nearly 600 pages of documentation related to the case. On August 16, 2004, they forwarded that information to Governor Mark Sanford, asking him to enforce the law. But rather than review the report, Sanford merely forwarded it to officials at SLED and the DOC.

Johnson said the decision illustrates a sorry pattern in state government. "This is a self-perpetuating system," said Johnson. "Every time someone with the capacity to do something about this comes along, it instead gets passed back to the people who should be investigated to decide for themselves if they've done something wrong."

Goodman was outraged by the Governor's action, saying it was like asking the fox to guard the henhouse. "If South Carolina won't enforce its own laws, the federal government has the authority to step in," he said. "Evidently the people in the governor's office didn't read my information." Four days later, Goodman filed a formal complaint with the FBI alleging public corruption.

Goodman and Tomasino say prosecutors might reevaluate their decision not to prosecute if allowed to view all the evidence. Still, Goodman thinks it will take FBI involvement to bring charges against prison officials. ■

Source: *Charleston Post and Courier*

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# Washington Guards Settle Lawsuits For \$7,270,000 And \$810,000, Lose Third

by Michael Rigby

When most people hear “prison lawsuit,” they think of prisoners as the initiators. But the truth is, guards and other disgruntled prison workers are prolific litigators as well. In 2004, for instance, Washington’s Pierce County Superior Court entertained three class-action lawsuits brought by Washington prison employees over unpaid work time. Two of the cases resulted in large settlements; the third was lost in a decision that was affirmed by the Washington Supreme Court.

## Guards Win \$7.270.000

In the first case, *Stamey v. State*, Pierce County Superior Court, Case No. 03-2-06201-0, guards sued the Washington Department of Corrections (WDOC) claiming they were not paid for time worked during shift changes. The WDOC requires guards to arrive for their shifts a few minutes early and stay a few minutes late for “pass down,” a procedure that involves verbal or written communication between guards to prepare for the upcoming shift, trading and checking out equipment, completing inventories, and other related tasks. Guards are not paid for pass down time, which they alleged amounted to an average of nine minutes per day.

On March 31, 2004, three-way me-

diation between the guards, the Teamsters Local 117 which represents them, and the State resulted in a settlement of \$7,270,000. “It worked out pretty well when all three parties got together,” said attorney Lewis Ellsworth, who represented the guards. “I think we came up with a responsible solution to an ongoing problem.” The settlement, which reflects payments of \$2.88 per shift over the previous four years, will result in a recovery of \$2,580 for each of the 1,850 guards involved.

## Guards Win \$810.000

Ellsworth brought a nearly identical lawsuit over unpaid pass down time involving the prison system’s approximately 600 sergeants and lieutenants. That case, *Arrasmith v. Department of Corrections*, Pierce County Superior Court, Case No. 04-2-07177-7, settled the last week of October, 2004 for \$810,000. The settlement covered the period from April 27, 2001 to November 1, 2004.

“When you have people show up to perform necessary activities before they can start their job, you gotta pay for that time as work time,” said Ellsworth. “If people are working for you, you gotta pay them.”

Both settlements are tentative and require approval by the state legislature when it reconvenes in early 2005. If they’re not approved, the cases will proceed to trial.

As a result of the lawsuits, the WDOC reorganized shift schedules beginning November 1, 2004. Guards, sergeants, and lieutenants now work overlapping shifts so that pass down duties can be taken care of without starting early or staying late.

## Guards Lose

In a third lawsuit brought by Ellsworth on behalf of employees of the WDOC and the state Department of Social and Health Services (DSHS)--*McGinnis v. State*, Pierce County Superior Court, Case No. 02-2-04513-3--the court held that requiring state employees to work straight 8-hour shifts without meal breaks did not violate state law. The ruling was affirmed in *McGinnis v. State*, 152 Wn.2d 639; 99 P.3d 1240 (Wash. 2004).

The Industrial Welfare Act (IWA), chapter 49.12 RCW, was enacted in 1913 to

“protect women and minors from inadequate wages and unsanitary labor conditions.” A 1976 amendment to the IWA required “all employees” to be given a rest period for each four hours worked and prohibited working them more than five hours without a meal break. In January 2002, WDOC and DSHS employees, who are required to work straight 8-hour shifts with no rest periods and no breaks, sued the State for back wages alleging their work schedules violated the IWA.

The trial court determined that the State was an “employer” for purposes of the IWA and granted the employees partial summary judgment. Immediately thereafter, the State legislature made an end run around the trial court’s decision and enacted a supposedly retroactive amendment to the IWA. The amendment specified that prior to May 2003, “only certain provisions of the IWA apply to public employers.” The State then moved for summary judgment, which the trial court granted on August 29, 2003.

On October 28, 2004, the en banc Washington Supreme Court unanimously affirmed the trial court’s ruling--but on different grounds. In 1988 and again in 1998, the legislature amended the IWA to address family care leave requirements and employee work apparel, respectively. In both amendments, lawmakers included language specifically denoting that the amendments applied to state workers.

Based on this and the fact that “the legislature is presumed not to include unnecessary language when it enacts legislation,” the Court reasoned that, “at least as of 1998 only those sections of the IWA specified by the legislature applied to the State.” After reaching this conclusion, the Court declined to examine the validity of the legislature’s purportedly retroactive amendment.

Interestingly, the issue has been indirectly resolved for WDOC employees. As a result of the settlements in the first two cases, prison employees now work 8 ½ hour shifts with an unpaid half-hour in the middle for meals. Plaintiffs in all three cases were represented by Lewis Ellsworth and Warren Martin of the Tacoma law firm Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, LLP. ■

Sources: *Tacoma News Tribune*, *National Jury Verdict Review & Analysis*

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# Ohio Lawyer Suspended for Promising Favor from Judge for Money

by Robert H. Woodman

Overruling a more lenient recommendation from the Board of Commissioners on Grievances and Discipline, the Ohio Supreme Court indefinitely suspended Dayton attorney Daniel L. O'Brien from the practice of law. O'Brien was found guilty by the Board of promising a client in a criminal case that he could obtain a favor from the trial judge in exchange for \$12,000.

Kurtis Wallace was O'Brien's client and had been represented by O'Brien on several matters. Charged with theft and forgery, Wallace agreed to plead to theft in exchange for a nolle prosequi on the forgery charge. O'Brien assured Wallace he would get no prison time. On the day of sentencing, however, Judge Michael T. Hall told O'Brien he intended to imprison Wallace. Shocked, Wallace fled the courthouse.

Wallace contacted O'Brien several days later and said that his brother would lend him \$12,000 to pursue withdrawal of the guilty plea. Two days later, Wallace again called O'Brien, this time secretly recording the conversation. O'Brien told Wallace that

for \$12,000 he would find someone to whom the judge owed a favor and get that person to call in the favor on the judge, permitting the guilty plea to be withdrawn.

Wallace did not pay O'Brien the money. He hired a different attorney and then turned the tape-recorded conversation, along with a formal grievance to the Dayton Bar Association (DBA), who passed it to the Board of Commissioners on Grievances and Discipline. Following a hearing, the Board determined that O'Brien had violated various ethical standards and disciplinary rules set forth by the Ohio Supreme Court. The Board recommended a six-month suspension from the practice of law, with the six months suspended if O'Brien got into no further trouble and if a mentor from the DBA monitored his caseload.

The Ohio Supreme Court, on review of the Board's recommendation, rejected the sentence. The Court cited several prior cases in which similar conduct by an attorney was punished by indefinite suspension from the practice of law. The Court stated,

"[W]e have repeatedly stressed our disdain for any statements by an attorney that imply the corruptibility of the judicial system or that the attorney can improperly influence a judicial officer. We have consistently imposed severe sanctions on attorneys who choose to engage in such misconduct. This case warrants a similar sanction."

The Court found that O'Brien's statements to Wallace "expressly suggested corruption in the court system, impugned the integrity of the judiciary, and maligned the reputation of Judge Hall." It was irrelevant to the Court that O'Brien neither collected money from Wallace nor acted on his statements. The statements themselves warranted "a severe sanction" because O'Brien "falsely represented the judicial process to be corrupt and thereby risked diminishing the public's perception of, and confidence in, the judiciary."

Daniel L. O'Brien was indefinitely suspended from the practice of law in Ohio. See: *Dayton Bar Assn. v. O'Brien*, 103 Ohio St.3d 1, 2004-Ohio-3939 (August 11, 2004).

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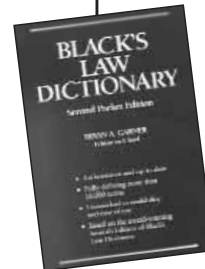
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## From the Editor

by Paul Wright

On February 1, 2005, the Ninth Circuit US court of appeals upheld the injunctions in *Prison Legal News v. Lehman*, 272 F. Supp.2d 1151 (WD WA 2003) which require that the Washington Department of Corrections deliver PLN's subscription renewal letters, book and subscription flyers and similar mailings to its prisoners regardless of the postage rate at which they are sent. The court held the Washington DOC's ban on "catalogs" was unconstitutional. We will report the full details of the ruling in next month's issue of *PLN*.

On January 31, 2005, we concluded our matching grant fundraiser and the results were very disappointing. An anonymous donor had agreed to match all donations made to PLN up to \$25,000.00. Unfortunately, PLN subscribers only donated \$8,371.05 for which PLN will receive \$13,010.87 in matching grant funds, which means we did not qualify for almost half of the potential funds available.

The last time PLN raised its subscription rates was in 1999 and in the meantime we have gone from 32 pages in size to our current 48 pages. In addition to bringing readers more news and information than ever before, at the same price, we have faced, and dealt with, rising postage and printing costs.

The cost of subscriptions and PLN's advertising revenue do not cover PLN's operating costs. The difference has always been made up by reader donations, especially during our end of year fund raiser. PLN receives little in the way of grant money and has historically had to rely on its readers for funding support because prisoner advocacy tends to be very unpopular with foundation funders.

One of our long time goals has been to keep *PLN* affordable so that people, especially prisoners, are not excluded from our news and information by price. When we started in 1990, and were ten pages long, a

yearly subscription was \$10. Considering our size has grown by almost 500% since then, our current rates are very low indeed. We may have to consider raising our subscription rates if this trend continues.

That said, I would like to thank everyone who did donate to the matching grant fundraiser. Especially the prisoners who sacrificed to do so. The donor who made the matching grant fundraiser possible also gets a deep-felt thank you. (So does Microsoft for making it all possible.)

This May will mark PLN's fifteenth anniversary of publishing and our 180<sup>th</sup> issue. We are planning a special issue to mark the occasion. This will make *PLN* the longest published independent, prisoner rights magazine whose content is mostly produced by prisoners and ex prisoners in American history.

Enjoy this issue of *PLN* and please let others know about us and encourage them to subscribe. ■

## Harsher Oregon Parole Statute Cannot Be Applied Retroactively

by John E. Dannenberg

A divided panel of the Ninth Circuit U.S. Court of Appeals ruled that Oregon's Revised Statute § 144.125(3)(a) (1993) was an ex post facto law as applied to denying parole to an Oregon prisoner whose crime predated the statute.

Gilbert Brown was convicted in 1982 of four aggravated sexual charges resulting in an indeterminate sentence of 60 years. His parolability, in turn, depended upon psychological evaluations presented to the Oregon State Board of Parole (Board). The Board relied upon Rev.Stat. § 144.125(3)(a)

as amended in 1993 to permit denying parole based upon a diagnosis that the prisoner had a psychological disorder "predisposing" him to commission of a dangerous crime, whereas the pre-1993 statute (§ 144.125) required a "diagnosis of present severe emotional disturbance such as to constitute a danger to society...." Although his actual psychological diagnosis found Brown did have "some signs of emotional disturbance of a passive-dependent nature," it concluded "he [does not have] a severe or extreme emotional disturbance ... [n]or is [he] a danger to ... others in the community." Nonetheless, the Board denied him parole using the 1993 formulation when they interpreted the psychological analysis to mean Brown was "predisposed" to commit another crime, even though not "currently a danger."

Brown petitioned the U.S. District Court in Oregon on habeas corpus complaining that applying the 1993 version of the statute to him disadvantaged him and increased his punishment, in violation of ex post facto protections of the federal constitution. Normally, a federal court is bound by state court interpretation of state law. In the Oregon state courts, his petition was denied without a rational decision that a higher court could review. Under this cir-

cumstance, the federal habeas courts "accord less deference than in standard habeas cases" (citing *Delgado v. Lewis*, 223 F.3d 976 982 (9th Cir. 2000)) and accepted jurisdiction to review the statute.

Analyzing pre- and post-1993 versions of the statute, the court found the principal difference to be that the earlier statute required "diagnosis of present severe emotional disturbance" whereas the latter deleted this express finding. Thus, as applied to Brown, if he were diagnosed to not have a "severe emotional disturbance," he previously had an expectation of parole release but under the new rule, he could be denied parole even if he did not have such a diagnosis. The latter was precisely his circumstance. This met the "significant risk" of disadvantage to Brown that was required by long-standing U.S. Supreme Court ex post facto case law.

Accordingly, the majority found retroactive application of the new law to Brown to be detrimental and reversed the lower court's denial of his writ petition.

A dissenting judge opined that the majority had tread where federal courts ought not offering an interpretation of state law that differed from other Oregon state court precedent. See: *Brown v. Palmateer*, 379 F.3d 1089 (9th Cir. 2004). ■

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# Problems Plague Illinois Jails And Prisons, Employees Watch Television for Pay

by Michael Rigby

While Illinois Governor Rod Blagojevich was using Department of Corrections (DOC) resources to monitor his image on television, sex, drugs, and violence reigned supreme in the state's jails and prisons.

In 2002 and 2003, Illinois was reeling from its worst financial crisis in decades. State prisons were staggered by staff shortages resulting from deficit-related layoffs. And DOC employees around the state were busy watching television rather than prisoners.

Under a practice implemented in 1991, prison employees videotape and review television newscasts, then pass on relevant segments to the governor's office through interoffice mail. Most state prisons are set up to record the newscasts, said DOC spokesman Sergio Molina. But the practice has been expanded under Blagojevich. According to Molina, more time is being spent on videotaping now than under previous administrations.

In light of the budget deficit and staff shortfalls, many state politicians voiced concerns about the blatant waste of resources. "With all of these problems facing Illinois, perhaps the governor should focus on those issues and not worry about how his hair looks on television," said Illinois GOP spokesman Jason Gerwig.

The criticism heated up after a May 14, 2003, memo surfaced. Written by former warden of the East Moline Correctional Center, Ian D. Oliver, the memo directed three DOC employees--one a prison psychologist--to watch daily newscasts and submit written reports. The memo was rescinded after the employees complained about the added work.

Ironically, less than a month before the memo was penned, Blagojevich had criticized a bloated DOC bureaucracy. The DOC contains 13 layers of management, Blagojevich said, 5 of which "arguably do little or nothing toward dealing with inmates or keeping our community safe."

## Cook County Jail

Unfortunately, it seems no one is concerned with keeping prisoners safe.

On August 18, 2003, 3 guards at Chicago's Cook County Jail were charged with having sex with 5 female prisoners.

In separate incidents, James Anthony III, Iyare Egonmwan, and Kenneth Swearnigen allegedly traded food, makeup, and money for sexual favors. All three guards were charged with custodial sexual misconduct, a felony.

Anthony, who is 28 and a married father of 5, faces 4 counts for allegedly having sexual relations with 4 prisoners in February and March 2003.

Egonmwan, 28, faces 2 counts for alleged sex acts involving 2 prisoners in November 2003. "He had sexual contact with them on one occasion, simultaneously," said prosecutor Lauren Freeman.

Swearnigen faces one count for an alleged sex act that occurred in a jail bathroom in the first half of 2003.

The sexual misconduct charges are just the latest in a series of incidents at the jail.

In 1999 a gang of 40 guards allegedly beat and terrorized a group of prisoners. But it wasn't until the *Chicago Tribune* reported the incident in 2003 that seven guards were disciplined and a high-ranking jail official demoted. The U.S. attorney's office is currently conducting a civil rights investigation into the incident.

In another incident, guards at the jail allegedly beat five shackled prisoners in July 2000. However, Cook County prosecutor Richard Devine, citing conflicting accounts of what happened, announced in August 2003 that none of the guards would be charged.

## Warrenville Prison

Prisoners were no safer in the state's prisons. On May 24, 2004, a DOC guard at the Warrenville Juvenile Detention Center was arrested for allegedly having sex with a 17-year-old female prisoner in December 2002. Charged with official misconduct, custodial sexual misconduct, and criminal sexual assault, Larry Johnson, 33, was being held in the DuPage County Jail in lieu of \$500,000 bail. He faces up to 15 years in prison if convicted.

## Statesville Prison

The Statesville prison near Joliet is another hotbed of official malfeasance. Four guards at the maximum-security prison have been indicted for providing prisoners every-



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## Problems Plague (Cont)

thing from drugs to cell-phones to sex.

One former guard, Robert Goodner, 28, was arrested for giving a cell phone to a known gang leader serving a life sentence. Goodner provided the phone in return for marijuana and an introduction to one of the leader's female friends. According to U.S. Attorney Scott Levine, the gang leader and other prisoners apparently used the phone every day from April to late September 2002. Prison officials provided no explanation as to how the prisoners were able to conceal the phone for six months.

Goodner, a gang member himself, also provided heroin and cocaine to at least eight other prisoners, most of whom were also gang members. Goodner ultimately pled guilty to the charges and was sentenced to 54 months in prison on December 19, 2003. Goodner had faced up to nine years in prison, but received the reduced sentence for turning in

another corrupt guard, Tanya Flowers.

Flowers, 32, was convicted of having sex with at least two Statesville prisoners and smuggling in marijuana for another prisoner. After pleading guilty to the charges, Flowers was sentenced on January 25, 2004, to 39 months in federal prison. Like Goodner, Flowers, too, gave up another guard in exchange for a reduced sentence. Flowers's fall guy was Steven King, whom she also had sex with.


King, 25, was arrested on November 19, 2003 and charged with helping to arrange for Flowers to buy crack cocaine. But the buy was a setup: Flowers by this time was working as an informant for prosecutors.

King's reputed drug dealer Pharaohah Spencer, 26, was also caught up in the sting and charged with drug conspiracy. But unlike the former guards, Spencer received no leniency, even though he too pled guilty. On March 4, 2004, a federal judge sentenced him to 70 months in prison.

A fourth former guard at the prison,

Keenan Martin, 27, was arrested on November 19, 2004, and charged with smuggling marijuana into the prison. Martin may have smuggled cocaine and heroin to prisoners as well, according to the criminal complaint.

Martin's case began on August 20, 2002, when a prisoner was caught with a package of marijuana. Another prisoner told prison officials that he saw Martin deliver the package and directed them to an empty cell where cocaine and five additional packages of marijuana were found. Confronted by investigators the same day, Martin immediately resigned. According to prosecutors, Martin admitted that he had smuggled marijuana to the same prisoner on several occasions because of financial problems.

*PLN* has reported extensively on Illinois jails, prisons; and related issues. See indexes for more. 

Sources: *Associated Press, Chicago Tribune, Chicago Sun Times, Quad-City Times*

## Connecticut Woman Gang-Raped In Sheriff's Van Settles Suit For \$480,000

The State of Connecticut has paid \$480,000 to settle a lawsuit brought by a female prisoner who was gang-raped by male prisoners in the back of a sheriff's van.

On August 18, 1999, S.C. was a prisoner being transported in a New Haven County sheriff's van with 13 male prisoners. Some of the men had serious felony records. Two were convicted sex offenders.

The van consisted of a cab portion and a rear box portion for transporting prisoners. In the box, S.C. and the male prisoners were separated by steel partitions. Two deputies, the driver and a passenger, rode in the cab.

On entering the van, some of the prisoners made salacious remarks to S.C. within earshot of the two transporting deputies--Jack Collake and Ronald Ciarleglio. As they drove, four of the male prisoners began making threats, demands, and sexual remarks to S.C. Then, working in concert, the attackers broke down a gate in the partition separating the compartments.

Once in S.C.'s section, they stripped

her naked and viciously sexually assaulted her. One of the men allegedly grabbed her in a headlock and raped her. The other three fondled her and masturbated. Although S.C. screamed and pleaded for help throughout the assault, Collake and Ciarleglio refused to stop the van or render any assistance.


The assailants all pleaded no contest to various sexual assault charges on January 25, 2002. Three of the men--including the lead attacker who was already serving a 100-year sentence for two prior rapes--received 15-year prison terms. The fourth was sentenced to 8 years. [See *PLN*, March 2003, p. 29].

On December 31, 2002, S.C. sued the two deputies and the state's High Sheriff, Frank Kinney, for failing to protect her. As to Collake and Ciarleglio, the complaint alleged they intentionally turned off the van's microphone and speaker system, perhaps in an attempt to avoid culpability. Even so, the complaint contended, the deputies were aware of the assault because S.C. was screaming and the van was shaking--yet they refused to help her. As for the High Sheriff, the complaint alleged he endangered S.C. through his policies of transporting female prisoners with males and prohibiting the prisoner transport box from being opened during transit.

The lawsuit against the deputies and the sheriff was eventually dropped, however, in exchange for the state's agreement to waive immunity and consent to be sued, said attorney Nicole Fournier in correspondence with *PLN*. "In such situations, a plaintiff is not entitled to a jury trial, but rather to a trial by judge only," she said.

In July 2004, attorneys Fournier and Steven Errante negotiated a \$480,000 settlement, which the State immediately paid. Richard Blumenthal, the State Attorney General, said the settlement ends one of the "most disgraceful incidents in the state's history." Still pending is a products liability lawsuit against the companies responsible for manufacturing and maintaining the prisoner transport boxes, said Fournier.

The settlement is likely a small comfort to the victim. "This was a terribly egregious, tragic case," said attorney Hugh F. Keefe, who also worked on S.C.'s case. "It is beyond awful that any woman has to endure what this woman endured on that day."

S.C. was represented by attorneys Fournier, Errante, and Keefe of the New Haven law firm Lynch, Traub, Keefe and Errante. See: *Caruso v. State*, New Haven Superior Court, Case No. CV 03-0473410 S. 

Additional Source: *New Haven Register*

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# Prison Population Still Rising in Mid-Year 2003

by Robert H. Woodman

In May, 2004, the Bureau of Justice Statistics (BJS) reported that as of June 30, 2003, the total State prison and jail population rose 2.6% from the same date in the previous year, while the Federal prison population rose 5.4% during the same period. The total number of prisoners in both State and Federal jurisdictions (including those held in jails) rose by 40,983 persons, the largest increase in the prisoner population since 1999. *PLN* has previously reported on BJS surveys of prisoner populations (for example, *PLN*, May 2003, page 33).

The United States now incarcerates 715 people per 100,000 residents in Federal and State prisons and in jails. This is up from 703 per 100,000 in June 2002, and 672 per 100,000 in 1999. Stated another way, on June 30, 2003, about one in every 140 U.S. residents was in prison or in jail. The figure is higher if only adults are included.

Since December 1995, the overall prisoner population has experienced a 3.7% annual growth rate, with the Federal Bureau of Prisons (BOP) population growing at 8.0% annually, all States combined growing at 2.9% annually, and local jail populations growing at 4.0% annually. Moreover, the BOP population of 159,275 prisoners on June 30, 2003, represented about 8.3% of America's total prisoner population. By contrast, all States combined held 1,221,501 prisoners, while local jails at midyear 2003 held 691,301 prisoners. The five states experiencing the largest percentage growth in

population from June 30, 2002, to June 30, 2003, were Vermont (up 12.2%), Minnesota (9.4%), Maine (9.1%), Mississippi (6.5%), and Arizona (5.6%). However, nine states lost population during this period — Rhode Island (-3.4%), Arkansas (-2.2%), Montana (-2.1%), New York (-1.8%), Delaware (-1.1%), Massachusetts (-1.0%), Michigan (-0.9%), Maryland (-0.6%), and Louisiana (-0.2%).

The BOP is the largest single prison system in the U.S. as of the report date, with 170,461 prisoners. It was followed in population by Texas (164,222), California (163,361), Florida (80,352), and New York (65,914). North Dakota had the smallest prison system in the country with only 1,168 prisoners.

By incarceration rates per 100,000 residents, the five largest systems were Louisiana (803 prisoners per 100,000 residents), Texas (692), Mississippi (688), Oklahoma (645), and Alabama (612). Maine had the lowest incarceration rate at 148 prisoners per 100,000 residents, or 2,009 prisoners, the fourth smallest prisoner population in the nation. By gender, the U.S. incarcerates 119 women per 100,000 female residents and 1,331 men per 100,000 male residents. Men are fifteen times more likely to be incarcerated in a State or Federal prison than women.

At report time, States held 3,006 prisoners who were under age 18 years (2,880 males and 126 females). Moreover, adult jails held 6,869 prisoners less than 18 years old. Furthermore, 12% of black males, 3.7% of Hispanic males, and 1.6% of white males

in their twenties were in prison or jail. In addition, the rate of incarceration of blacks and Hispanics in all age groups far outpaces the incarceration rate of whites in those same age groups.

State and Federal authorities held 90,700 non-citizens on June 30, 2003, up 2.3% from 88,677 the prior year. Over half these prisoners were held by the BOP. Non-citizen prisoners represented more than 20% of the Federal prison population. Also, non-citizen prisoners accounted for more than 10% of the prison populations of California, New York, Arizona, and Nevada. California (18,559 prisoners), Texas (8,702), New York (8,370), Florida (4,739), and Arizona (3,670) held nearly 80% of all non-citizen prisoners confined in State prisons at midyear 2003.

The report is titled *Prison and Jail Inmates at Midyear 2003*, by Paige M. Harrison and Jennifer C. Karberg. It is report number NCJ 203947, published May 2004. The report can be obtained by writing to NCJRS, Post Office Box 6000, Rockville, Maryland 20849-6000, or it can be downloaded from the BJS website at <http://www.ojp.usdoj.gov/bjs/>.

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# Wrongfully-Convicted Missouri Woman Receives \$7.5 Million After 16 Years in Prison

by Matthew T. Clarke

On September 14, 2004, the St. Louis suburb of Dellwood settled a suit by a woman wrongfully convicted of murder for \$7.5 million.

In January 1983, Ellen Maria Reasonover, a 5'-7", 120-pound mother of a two-year-old daughter named Charmelle pulled up to a Vickers gas station on West Florissant Avenue in Dellwood, Missouri, seeking change for the laundromat. What she witnessed changed her life.

Reasonover had arrived at a crime scene. In a back room of the station lay the body of James Buckley, 19, the station's attendant, who had been bludgeoned and shot seven times. Nearby was \$450. The safe still contained \$3,000 and a little pot. Reasonover saw a suspicious-looking, light-skinned black man in an Army jacket, also seen by other witnesses, and a man she knew as Willie Love. Unable to enter the locked station, she left.

Reasonover called the police when they publicized the crime and requested information. Initially, she used an assumed name, but later went to the police station and gave her real name. This started her 21-year nightmare.

Police decided that the petite woman had single-handedly overpowered and murdered the man for no reason. What evidence did they have? Only the initial use of an alias

and two jail house snitches who were willing to testify that Reasonover had confessed to them in exchange for sentencing deals the jury never heard about. Amazingly, a jury convicted Reasonover and came within one juror of sentencing her to death. She was sentenced to life without parole consideration for 50 years.

What the prosecutors didn't tell the jury, or Reasonover, was that they had wired her cell and recorded her conversations with her boyfriend who was in a nearby cell. Thus, the prosecutor had a 59-minute tape with the boyfriend and her denying involvement in the murder twenty times, discussing their shock and disgust at the murder of "that young boy," and attempting to determine why they were under arrest. The tape was made two hours before jail house snitch Rose Jolliff claimed Reasonover confessed to her. A suppressed tape of a ten-minute phone conversation between Reasonover and Jollif also supported Reasonover's innocence claims. Later, evidence surfaced showing Jolliff and the second jail house snitch, Mary Lyner, lied.

Through a combination of luck, media attention, and the efforts of Paul Henderson of Centurion Ministries, a non-profit group that helps wrongfully convicted prisoners, the tapes came to light. In 1999, U.S. District Judge Jean Hamilton ruled that Reasonover's trial was "fundamentally unfair" and the jurors would likely have acquitted her had they heard the suppressed tapes. She ordered Reasonover, who had served 16 years in prison, released. See: *Reasonover v. Washington*, 60 F.Supp.2d 937 (E.D.MO 1999). Now came part two of the nightmare—the search for compensation.

Out of the workforce for sixteen years, Reasonover had a hard time finding a job. She lived with relatives, in homeless shelters, in her car, and even with the one juror who prevented her receiving the death penalty. Johnny Cochran and Barry Scheck of O.J. Simpson trial fame joined Kansas City lawyers Richard Sindel, Cheryl Pilate, and Charles Rogers representing Reasonover in a 2001 federal lawsuit against former Dellwood major crimes detective Dan Chapman (now Dellwood police chief), the City of Dellwood, St. Louis County, former prosecutor (now county judge) Steven H. Goldman and other Dellwood police officers. In 2003, U.S. District Judge Carol Jackson dismissed St. Louis County, Goldman, and the police officers other than Chapman from the suit. Dellwood's insurance carrier then settled for \$7.5 million. Reasonover is appealing the dismissal of the other defendants. ■

Sources: *New York Times*, *St. Louis Post-Dispatch*.

## Exhaustion of Administrative Remedy Requirement May be Excused

The Second Circuit Court of Appeals has held that the failure to exhaust administrative remedies may be excused in limited circumstances and should be excused in this case. This civil rights action arose from events that occurred while Ivan Rodriguez was incarcerated in New York's Westchester County Jail (WCJ) from July 1997 to November 1998. Rodriguez's complaint alleged he was beat by jail personnel and that EMSA Correctional Care denied him proper medical treatment for his injuries.

The defendants moved for summary judgment based on Rodriguez's failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a) (2000). Rodriguez admitted he did not exhaust administrative remedies, but sought to excuse his omission primarily for two reasons. First, he contended that he did not think exhaustion

was required for a single episode of prisoner mistreatment, as distinguished from continuing prison conditions. Second, he contended that by time the Supreme Court ruled in *Porter v. Nussle*, 534 U.S. 516 (2002) [PLN June 2002, pg. 17], that all prisoner complaints required exhaustion, he had been transferred from WCJ, and administrative remedies were no longer available to him.

The district court granted the defendant's judgment, and Rodriguez appealed. The Second Circuit said it had previously held in *Berry v. Kerik*, 366 F.3d 85, 88 (2<sup>nd</sup> Cir. 2004) that a prisoner's complaint should be dismissed with prejudice where administrative remedies were available for a reasonable length of time and were not exhausted "in the absence of any justification." The Court held Rodriguez had shown

justification for not exhausting remedies.

That justification was the prisoner's belief that exhaustion was not required for a single episode of mistreatment, as a panel of the Court had deemed reasonable because it was so held in *Nussle v. Willette*, 224 F.3d 95 (2<sup>nd</sup> cir. 2000).

The Court said that exhaustion would be required after the ruling in *Porter*; but as Rodriguez had been transferred from the jurisdiction of WCJ officials, dismissal of the complaint was precluded because administrative remedies were no longer "available" to Rodriguez, a condition for exhaustion under §1997 e(a).

The matter was remanded for disposition of the merits of the complaint. See: *Rodriguez v. Westchester County Jail Correctional Department*, 372 F.3d 485 (2<sup>nd</sup> Cir. 2004). ■

## Judges Of Death

by Mumia Abu-Jamal

As the nation pondered the fate of a young California man being sentenced to death, the case of another man, one lesser-known, one without wealth or whiteness, comes back before the nation's highest court, after having been shunted through a series of killing courts in Texas.

Thomas Miller-El, 53, was just before the U.S. Supreme Court about 2 years ago, when 8 of the 9 justices determined that the "Court of Appeals erred in denying a certificate of appealability" (COA) on Miller-El's claim of racial discrimination in his jury selection.

Back before the Texas state and federal courts, Miller-El expected them to respect the decision of the U.S. Supreme Court. But, as the saying goes, he "had another thing coming."

Both the Texas Court of Criminal Appeals (sort of a Texas Supreme Court for criminal cases), and the 5th Circuit U.S. Court of Appeals, promptly denied Miller-El's claims, by virtually ignoring what the majority of the Supreme Court said, and glomming onto what was written by the lone dissenter in the case, Associate Justice Clarence Thomas, to support their denials.

In legal circles, this is almost unheard of. One former chief judge, John J. Gibbons, who sat on the 3rd Circuit Court of Appeals (in Philadelphia), said, "The idea that the system can tolerate open defiance by an inferior court just cannot stand" (*The New York Times*, 12/5/04).

We shall see.

A dissenting opinion, in legal opinions, have some, if limited value. They demonstrate that courts were split on various issues. They speak down through the pages of history of errors made by the present court, that will hopefully be seen later. But, in a strictly legal sense, they mean nothing. It is a fundamental legal principle that majority opinions carry the deciding weight of which way cases are decided. Dissenting opinions have, comparatively speaking, no weight.

So, if that is so, why did a majority of the Texas Criminal Court of Appeals, and the 5th Circuit Court of Appeals, essentially ignore the determination of the majority opinion, and deign to abide by the dissenting opinion? Why would learned, experienced judges dare do such a thing?

The answer (or at least part of it) may lie in the fact that 80% of the Texas appellate court are composed of ex-prosecutors,

who have learned, from their former jobs, to give short shrift to arguments by defendants. Many of them probably worked their way up onto the bench by doing the very things that the Supreme Court has criticized, so they simply don't want to agree that their own professional actions (like striking Blacks off juries) were unconstitutional. But, what of the 5th Circuit, where federal judges, not state judges, hold sway?

The answer may lie, not in the law, but in the realm of politics. For judges, though they wear black robes, are yet political creatures. Even in the federal system, they are appointed by, and in, the political system. Senators submit them, and presidents nominate them. And how do they come to the attention of national political figures? By demonstrating their "conservative" credentials. Judges, in the Miller-El case, dared to violate fundamental rules of judicial

procedure because they were "auditioning" for higher seats in the judicial hierarchy. Mr. Miller-El was nothing more than a Black, living stepping stone of the Stairway of Ambition.

Moreover, Texas is infamous for its taste for death, as amply demonstrated by the bloody reign of George W. Bush, who presided over the executions of over 150 men, and several women. While Texas Governor, Bush undoubtedly appointed at least some of the judges to the state's appeals court, and surely (as president) looked kindly to those nominations to the 5th Circuit federal bench of jurists who shared his penchant for cutting judicial corners when it came to the death penalty.

It is only in that fractured, political light that their actions begin to make sense.

Another saying: "Law is but politics, by other means." ■

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# U.S. v. Booker: The Left Wing Gives and the Right Wing Takes Away

by David Zuckerman

As federal prisoners are well aware, the facts found by a jury often bear little relation to the facts relied on at sentencing. Under the federal Guidelines, the sentencing judge determines a wide variety of factors – such as drug quantity, monetary loss, or role in the offense – that can increase the sentence astronomically. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d (2000), and *Blakely v. Washington*, 542 U.S. --, 124 S. Ct. 2531, 159 L. Ed. 2d 493 (2003), the Supreme Court invalidated state sentencing schemes under which a judge made findings that increased the maximum sentence authorized by the jury's verdict alone. In *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105, the defendants argued that the same principle should apply to the federal Guidelines.

On January 12, 2005, the U.S. Supreme Court issued its decision. *United States v. Booker*, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). By a vote of five to four, the Court held that the Guidelines were unconstitutional. Four of those five justices said the remedy for this problem was to present sentencing factors to a jury and require the government to prove them beyond a reasonable doubt. That would give defendants

some meaningful relief, since it would make it much more difficult for the government to enhance a sentence.

The four justices who believed the guidelines to be constitutional, however, found a way to take the teeth out of the majority's ruling. They said the Guidelines should still apply, but they would become only "advisory," that is, the judge must consider the Guidelines but need not follow them. Justice Ginsburg, who had voted with the majority finding the Guidelines unconstitutional, switched sides when it came to the remedy. That created a "remedial majority" of five justices in favor of advisory Guidelines. This majority also held that sentences could no longer be overturned on appeal simply because they deviated from the Guidelines, although they could be overturned if they were "unreasonable."

The practical effect of this complex decision is that business may go on as usual in many federal courts. For example, if a defendant is convicted of distributing one kilo of cocaine, the judge can hold an informal hearing at sentencing, decide that the defendant was really involved in distributing 1,000 kilos, and impose the Guideline sentence corresponding to the higher amount. That would be constitutional, according to the remedial majority of the Supreme Court, because the judge would not be *required* to impose the Guideline sentence. On the other hand, judges who believe the Guidelines to be too harsh can now impose more lenient sentences without jumping through the hoops of a downward departure. Their decisions should be upheld as long as they are "reasonable." Mandatory minimum sentences -- such as those for distributing more than 50 grams of crack cocaine or for brandishing a firearm during a robbery -- are not affected by *Booker*. Also unaffected, at least for now, are sentences increased because of prior convictions.

So far, federal district courts have come up with varying interpretations of what it means to "consider" the Guidelines. Some have announced that they will impose sentences within the Guidelines in all but the most exceptional cases. In my view, such an approach is unconstitutional because it is little different from a mandatory Guideline. Others judges have given notice that they will deviate freely from the Guidelines.

Defendants who have not yet been sentenced will be subject to the *Booker* decision. Defendants who completed the direct appeal process before *Booker* was decided may not be able to take advantage of it. So far, most courts have ruled that the *Apprendi/Blakely* line of cases does not apply retroactively to defendants whose convictions were final.

The trickiest question is what happens to defendants who were sentenced prior to *Booker*, but whose cases are still on appeal. The Ninth Circuit issued a helpful ruling on February 9, 2005, in *United States v. Ame-line*, No. 02-30326, 2005 U.S. App. LEXIS 2032. First, it held that the defendant could raise a *Booker* claim now even though he failed to do so in the trial court or, initially, on appeal. Second, the defendant was entitled to resentencing even though the trial court could have imposed the same sentence under *Booker's* "advisory" approach to the Guidelines. On remand, the district court would be required to correctly calculate the Guidelines and consider them, but also to consider the goals of the Sentencing Reform Act, as reflected in 18 U.S. C. § 3553(a). "To facilitate meaningful appellate review, the court must also provide a reasoned explanation for its sentencing decision." This may not be the last word from the Ninth Circuit, however, because the government has petitioned for rehearing.

Other circuits may analyze the issues differently. For example, they may hold that defendants are generally barred from raising *Booker* claims unless they objected on those grounds in the trial court. They may also hold that many *Booker* errors are harmless because the judge would have given the same sentence even if the Guidelines did not require it. The Circuits may also disagree about what it means for a sentence to be "unreasonable."

*Booker's* effect on new crimes may be short-lived, since Congress will likely pass new sentencing laws in response. It is not clear at this time what direction those laws may take. In the mean time, federal sentencing is in a period of turmoil, and some prisoners may emerge from the chaos with more reasonable sentences. ■

*David Zuckerman is a criminal defense attorney in Seattle who specializes in post conviction litigation.*

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# Delaware Prisoner's \$100,000 Damage Award For Retaliation Upheld

by Michael Rigby

A disabled Delaware prisoner's \$100,000 damage award for retaliation will stand, a federal district court in Delaware has held.

On August 20, 1999, Roger Atkinson, a blind prisoner with a host of medical problems, sued Delaware prison officials under 42 U.S.C. § 1983 after he was moved from a non-smoking section of the Multi-Purpose Criminal Justice Facility to a smoking section. After the suit was filed, Atkinson alleged that prison guard Fred Way and others retaliated against him.

In particular, Atkinson alleged that Way prevented him from calling his lawyer, withheld documents he requested from the law library, repeatedly read his personal mail over the prison's intercom, placed him in segregation during recreation periods, cursed him, made derogatory statements about his blindness, and stated that he would not have been placed in segregation if he had not filed a lawsuit. Atkinson further contended that Way and others physically assaulted him, threatened him, tampered with his food, and prevented him from receiving his medication. Atkinson amended his complaint to allege retaliation by Way and other prison officials.

Defendants asserted a qualified immunity defense and moved for summary judgment. The U.S. District Court for the District of Delaware denied the motion and defendants filed an interlocutory appeal. The Third Circuit affirmed holding that the defendants were not entitled to qualified immunity. *Atkinson v. Taylor*, 316 F.3d 257 (3rd Cir. 2003). [See *PLN*, August 2004, p. 26.] On remand, defendants moved for dismissal based on the Fugitive Disenfranchisement Doctrine claiming that Atkinson, who had been released on parole, was a fugitive from justice. The district court denied that motion as well. *Atkinson v. Taylor*, 277 F.Supp.2d 382 (USDC D DE 2003).

A trial ensued in which a jury found for Atkinson on his retaliation claim. The jury concluded Way had caused Atkinson injury by violating his constitutional rights and awarded Atkinson \$85,000 in compensatory damages and \$15,000 in punitive damages.

After the verdict, Way moved for "judgement as a matter of law, a set-aside of the compensatory damages award, or a new trial on damages." Specifically, Way


contended that he was entitled to judgment as a matter of law because no reasonable jury could have found, based on the evidence, that his harassment was in retaliation for Atkinson's lawsuit. As for the compensatory damages, Way contended they were barred by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e because Atkinson sustained no actual physical injury.

On July 19, 2004, the district court denied Way's motion. First, the court held that the jury heard "ample evidence" from which to conclude that Way's harassment of Atkinson stemmed from his lawsuit. Therefore, the evidence the jury used in reaching its decision was legally sufficient.

The court then held that the jury's award of compensatory damages should stand. Pursuant to the PLRA, a prisoner's claim for compensatory damages related to mental or emotional injury must also show an accompanying physical injury. The Third, Fifth, Ninth, and Eleventh Circuits have interpreted

the statute as requiring "less than significant but more than de minimis physical injury." In the instant case, the jury was instructed that it could award compensatory damages only if they found Way's retaliatory actions caused Atkinson physical harm and, "[i]t is presumed the jury followed this instruction."

Moreover, the jury had sufficient evidence from which to conclude that Atkinson's physical injury was more than de minimis, the court held. Evidence included testimony involving numerous instances of Way causing Atkinson physical pain by denying him medication and a medical expert's testimony that "a denial of medication would cause [Atkinson] to become 'severely sick' because his pituitary gland had been removed." The verdict was affirmed.

Atkinson was represented by Richard H. Morse of the Wilmington, Delaware, law firm Young, Conaway, Stargatt, & Taylor. See: *Atkinson v. Way*, USDC D DE, Case no. 99-562 JJE. 



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# Fulton County Jail under Federal Control

by David M. Reutter

For the second time since 1999, Georgia Federal District Judge Marvin H. Shoob has taken over supervision of the Fulton County Jail. Fulton County Jail Sheriff, Jacquelyn H. Barrett, told the court to go ahead, telling the court that appointing a receiver to oversee the jail, which holds over 3,000 prisoners, was a “positive step.”

The Court acted quickly after a lawsuit was filed in June 2004 on behalf of FCJ’s prisoners by Stephen Bright, Director of Southern Center for Human Rights. That complaint made FCJ sound like a dungeon that the Sheriff had no control of.

## A Modern Day Dungeon

Even before FCJ opened in the mid-1980’s, it was evident the jail and its systems would deteriorate sooner rather than later. While it was under construction, it was determined FCH was smaller than what the county required to house its prisoners. Instead of spending more money to expand the jail, officials decided to “pack ‘em in.” To make this happen the number of bunks were doubled even though the number of showers, toilets, and other utilities remained the same. A third bunk was recently added to each cell.

Dr. Robert B. Griefinger, a prison expert, visited FCJ on May 26 and May 27, 2004 with the goal to end two years of federal litigation focusing on FCJ’s medical care. Those visits caused Griefinger to conclude FCJ was in a “state of crisis.”

In a May 31 letter to the Fulton County attorney’s office, Griefinger detailed deplorable conditions. “It was dank, full of sweaty bodies,” he wrote of fifth floor cells. “The air was thick with the scent of underwear, rank, each zone the same. Wet laundry on railings, raised voices, noisy, crowded. Inmates being abused about, milling randomly; a few banging on the zone doors. Mattresses on the floor in the day room. No duty officers in sight,” he wrote.

He said the air conditioning had been broken “for days,” and water dripped from the ceiling into garbage pails. One area provided 12 showers for 326 prisoners. Another zone housed 59 prisoners – 18 of whom slept on the floor – with only two showers. “Extremely tense. Each of my senses raising an alarm. Scary. Almost two decades of visiting inmate’s housing units, it was the first time I declined to go in,” the doctor wrote.

FCJ was designed to hold 1,332 prisoners. When Bright filed the June complaint, FCJ housed 3,299 prisoners. “A full 500 inmates were housed in the facility without cells, sleeping on the floors in the dayroom,” Griefinger’s report said.

With over 1,300 work orders per month, the maintenance staff has no chance to keep up. The jail’s basic systems are failing. Locks on many cells do not work. The physical plant, and the plumbing, electric, ventilation, and laundry systems at FCJ are designed for use by the number of prisoners housed. The demands placed on these systems are causing them to fail.

“The air handling systems are overburdened; they break down. There are leaking pipes throughout the facility, broken or missing security cameras, damaged ceiling tile and overflowing toilets. On 5 North, body heat alone uses more than 50% of the air conditioning capacity. The plumbing problems persist, with toilet leaks and inoperable sinks. The electrical systems are so strained that power regularly goes out in the dental unit. It is almost impossible to work productively in this environment,” reported Griefinger.

Sewage regularly overflows from toilets, leaks from the bottom of others, and drips from pipes. The stench is so persistent in some units that prisoners have difficulty keeping down food and medicine. The leaking pipes create stagnant pools of water on the floor.

In one housing unit, Dr. Griefinger found; “wet clothing draped from the railings – hopeful to dry in humidity exceeding 90%. The temperature was well over 80 degrees. Hot, especially for patients on psychotropic medications that makes them vulnerable to heat injury such as heat stroke. Puddles outside the showers, mold inside, and mold like a fur carpet on the ceilings. Acrid. The air conditioning cannot keep up with the heat and moisture.”

Dr. Griefinger also found the laundry system had failed. “The laundry is in a crisis. On the days of my visit, all the dryers in the main jail had been broke for a week... The inmates are washing their own underwear, in their little sinks with hand soap, hanging them to dry on the railings. This is unsanitary. The wet air further humidifies the air, already wet with perspiration from the crowding and the inadequate air handling equipment.

## Shifting Blame

As the media and court have put the spotlight on the jail, Sheriff Barrett and the County Commission have played the blame game. Barrett has said that, among other things, a county hiring freeze and the Georgia Department of Corrections failure to take custody of 200 prisoners has contributed to FCJ’s dilapidated condition. The County Commission says the Sheriff mismanaged resources, both have a point.

As was widely reported, Barrett’s 1992 election to Sheriff made her the Country’s first black female to be elected Sheriff. She was very popular and faced no significant opposition in two re-election campaigns. Controversy has so diminished her star that she did not even run for re-election in November 2004.

*Ebony* magazine interviewed Barrett in her first term. At that time, she said she wanted to supplant the stereotype of the Southern Sheriff as a paunchy, white, good old boy. A June 2004 appearance before a federal grand jury, however, has placed her in the same place as those good old boys: in trouble with the law. Over the last 25 years, over two dozen Georgia Sheriff’s have been indicted and convicted. Many of them took payoffs from drug dealers in the early 1980’s.

Barrett is being investigated for investing \$7 million in excess money from tax auction liens. That money belongs to the original homeowner, but it often goes unclaimed.

While the \$5 million invested with MetLife has been recovered with interest, it is the \$2 million invested with Provident Capital that has caused scrutiny. That firm lent the money to several people who made about \$40,000 in campaign contributions to Barrett, which Barrett later returned but never reported. The \$2 million was never recovered. The grand jury is trying to determine if the investments were illegal and made in exchange for campaign contributions.

Fulton County Commission chairwoman, Karen Handel, argues Barrett has mismanaged resources and failed to take advantage of money the county has provided for hiring. “No amount of money or staffing is going to take care of gross mismanagement,” she said. Griefinger told Judge Shoob that “Jail staff appears to be doing everything they can with limited resources.”

## Understaffing Causes "Substantial Violence"

The fact a 20 year veteran of inspecting jails and prisons refuses to enter prisoner areas at FCJ attests to the dangerous situation that lies within its bowels. Outbreaks of violence are common, putting the lives and safety of prisoners and staff at risk of harm.

One prisoner, Anthony Wimbush, was assaulted by four other prisoners on FCJ's sixth floor. He was beaten so badly that he sustained serious head trauma and brain damage. He is in a coma and is not expected to recover. Another prisoner, whose ear was partially bitten off in a fight, did not get immediate medical attention because a guard had not seen the attack. Another prisoner committed suicide.

Exacerbating tension at the jail is the gross overcrowding. Amazingly, little is done to get those who do not belong at the jail on their way. For 19 months, FCJ held Hen Van Nguyen, a mentally ill Vietnamese man who speaks no English. Nguyen was found incompetent to stand trial on two counts of aggravated stalking. On February 3, 2003, a state judge ordered he be taken to the Georgia Regional Hospital. As of June 2004, he was still sitting in FCJ awaiting transfer.

Another prisoner, Willie Hill, was booked into FCJ on November 23, 2003, after being sentenced to time served for jaywalking. Seven months later, he was still in the jail despite not having seen a lawyer or gone to court. State prisoner, Timothy Grier was brought to FCJ on March 9, 2003, for a civil case that was resolved on March 11, 2003. He was still sitting in FCJ awaiting transfer to prison on June 11.

Even after a court orders release of a prisoner after first appearance, it is usually days before they are eventually released.

Because the County Commission imposed a hiring freeze, Sheriff Barrett has been unable to replace her dwindling troops. "It continues to be my hope that the Board of Commissioners will be able to provide the resources that we need. In the meantime, the entirety of the system...all of us is working to move people through the system," said Barrett.

### Changing of the Guard

The combination of the investment investigation and problems at FCJ have caused Barrett's once bright star to flameout. Events spiraled quickly after FCJ prisoner Cara Williams, 23, escaped on June 17, 2004, while a rap video was recorded at the jail.

Jailed rapper Clifford Harris, whose stage name is T-I, was being filmed while Williams slipped out as an employee dressed in medical scrubs. Barrett said she had no idea the video was being taped at FCJ. That event showed Barrett had no clue about what was happening at FCJ.

Judge Shoob decided on July 14, 2004, to appoint John Gibson as jail custodian. Gibson has authority to hire and fire jail staff, order improvements within the jails budget, and ask the Fulton County Commission for more money if needed. The county must pay him \$10,000 per month and provide him with a car equipped for emergency use. In January 2004, Gibson retired as prison administrator of the U.S. Penitentiary in Atlanta.

Days after Gibson's appointment, Barrett announced that she would take a leave of absence from August 1 to the end of her term, December 31. That caused Gov. Sonny Perdue to suspend Barrett for 60 days. Following that announcement, Fulton County Chief Superior Court Judge, Doris Downs, appointed Theodore Jackson, as the interim Sheriff.

Jackson is former head of the Atlanta FBI office. In that capacity, he helped in the investigation into the assassination of Dekalb County Sheriff-elect Derwin Brown. That investigation led to a life sentence for Brown's opponent: Sheriff Sidney Dorsey.

"There's a new Sheriff in town," said Gibson as he visited prisoners at FCJ. "This place is nasty," prisoner Corey Lee told Gibson. "We've got gnats flying around everywhere and it's dangerous."

The prisoners were assured by Gibson, FCJ would be cleaned up, but he made it apparent the prisoners would be doing the cleaning. "You have a responsibility, to do what you're supposed to do, keep it clean. You've got to live here, I get to go home."

Gibson's task now is to bring FCJ's conditions within constitutional norms. His first achievement came when he got the air conditioning working throughout the jail. "I have a lot of work to do in a short period of time," Gibson said. "If I need staff or money, I'll ask for


it. But I won't ask for what I don't need."

The need for money has already reached \$25 million to improve plumbing, heating, and other systems at the jail. Rather than devote more money to the Sheriff's Department, the County Commission wants that Department to better manage its \$80 million annual budget.

Fulton County freed up funds to fill 76 positions at the Sheriff's Department in September 2004. Dr. Griefinger says a lot of work remains at the jail. "There are ongoing safety violations and unsafe work practices that need to be addressed immediately," he said. "Other than the staffing issue, I believe the jail is in turnaround mode."

On November 18, 2004, Dr. Griefinger issued an updated report. He found the conditions at FCJ have shown "an improvement" since his September visit.

"Filling the vacancies that had been frozen is a welcome relief in the jail," Griefinger wrote about the County's decision in September to fund 54 security personnel. "This improves security and has provided better access to medical care" because prisoners don't have to wait so long for a guard escort to the infirmary.

Local citizens assured a new Sheriff will be in town on January 1, 2005, as they elected Myron Freeman to the post in November. Freeman will still not have control of FCJ until Judge Shoob determines it meets constitutional muster. *PLN* will report future developments at FCJ. See: *Harper v. Bennett*, USDC Northern District Georgia, Case No: 04-CV-1416. 

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# 9th Circuit Explains Habeas Jurisdiction Under 28 U.S.C. § 2254, Upholds Washington Transfer to Private Prison

The U.S. Court of Appeals for the Ninth Circuit has held that a state prisoner serving time on a state court judgment must seek habeas relief under 28 U.S.C. § 2254.

In October of 1999, Joel White was serving time in a Washington state prison as a result of a judgment issued by a Washington state court. White, along with several hundred other Washington state prisoners, was transferred to Crowley County Correction Facility (CCCF), a privately owned, for-profit prison in Colorado. The transfers were the result of an administrative decision made by the Washington Department of Corrections (DOC) in an attempt to alleviate overcrowding therein.

On January 18, 2000, White petitioned the Washington Supreme Court for a writ of habeas corpus. He argued that his transfer to CCCF was illegal; thus CCCF had no authority to detain him. On that basis, White sought his immediate release as a remedy. The Washington Supreme Court dismissed White's petition, along with several other similar petitions. That order became final on May 18, 2001.

On March 1, 2002, White petitioned the U.S. District Court for the Eastern District of Washington (district court) for a writ of habeas corpus. He filed his petition under 28 U.S.C. § 2241. The state argued for dismissal, claiming that 28 U.S.C. § 2254 was the proper jurisdictional statute for the petition. The district court rejected the state's jurisdictional argument but dismissed the petition on its merits. White appealed.

On appeal the main issue was whether White could challenge his transfer to CCCF under § 2241 without challenging his underlying criminal conviction. The Ninth Circuit

answered that question in the negative.

The court next considered the language of the two statutes. It recognized that § 2241 grants habeas jurisdiction to federal courts to issue writs of habeas corpus to state or federal prisoners who show that they are in custody for reasons other than a state court judgment (pre-trial detainees, those awaiting extradition, etc.) in violation of the "Constitution or laws or treaties of the United States[.]" citing § 2241.

The court also found the language of § 2254, as amended in 1996 by the Antiterrorism and Effective Death Penalty Act, (ADEPA) to grant habeas jurisdiction to federal courts in cases where a state prisoner is "in custody pursuant to a state court judgment[.]" and the custody violates federal law, citing § 2254.

Therefore, the court held that § 2254 governed White's petition. The court reached this conclusion because White was serving time on a state court judgment, rather than as a pre-trial detainee or as a prisoner awaiting extradition, which would be governed by § 2241.

The court also found that allowing prisoners to challenge their confinement under § 2241, as White had, would allow them an inappropriate end run on the ADEPA's one year time limit for filing a habeas challenge to their confinement in a state prison. See: 28 U.S.C. § 2244(d)(1). This is so because the one-year time limit does not apply to § 2241.

The court also provided a well-reasoned discussion of cases supporting its position and congressional intent in enacting the statutes. Ultimately, the court reversed the district court's rejection of the state's jurisdictional argument and affirmed the district court's dismissal of White's petition on the merits.

Additionally, the court found that a state prisoner who challenges an administrative decision regarding the execution of his sentence need not obtain a certificate of appealability in order to appeal a district court's dismissal of such an action. See: 28 U.S.C. § 2253(c)(1)(A). Although this ruling had no real affect on White's case, it is an important ruling for those who are federally challenging an administrative decision regarding the execution of their sentence.

Finally, the court noted that White's petition would fail because he had no right

to be housed in any particular, prison, citing the Due Process Clause of the 14th Amendment to the United States Constitution and *Olim v. Wakinecona*, 461 U.S. 238, 247-48 (1983). See: *White v. Lambert*, 370 F.3d 1002 (9th Cir. 2004).

In 2003 the Washington DOC again transported hundreds of prisoners to the same private prison in Crowley, Colorado, now operated by Corrections Corporation of America. The Washington supreme court held that it is permissible to send prisoners to out of state prisons, see: *In re Personal. Restraint of Matteson*, 142 Wn.2d 298; 12 P.3d 585 (Wash. 2000), and such transfers were permissible under the due process clause of the state and federal constitutions.

A more favorable outcome might be obtained if Washington prisoners transported to such private prisons were to challenge their transfer in state court under the Washington Constitution, Article II, § 29 which holds: "After the first day of January eighteen hundred and ninety the labor of convicts of this state shall not be let out by contract to any person, co-partnership, company or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state." The Washington supreme court recently construed this to hold that it was impermissible for the state to allow private companies to employ Washington prisoners. See: *Washington Water Jet Workers Association v. Yarbrough*, 151 Wn.2d 470; 90 P.3d 42 (Wash. 2004)[PLN. Dec. 2004]. By terms of the contract, Washington prisoners in the CCA prison are required to work and their housing in a private prison would appear to be the "letting out" that the state's founders intended to prohibit. ■

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## NO FTCA or IIED Claims Stated in Oregon Testicular Radiation Case

The Ninth Circuit Court of Appeals held that a prisoner who voluntarily participated in testicular radiation experiments while in prison did not establish a Federal Tort Claims Act (FTCA) violation. The court also held that the prisoner did not establish a prima facie claim for intentional infliction of emotional distress (IIED) against the United States.

Harold Bibeau, a former prisoner of the Oregon Department of Corrections (ODOC) participated in government funded research experiments which exposed his testes to high levels of radiation while incarcerated from 1963-1969. "These experiments, known as the 'Heller Experiments,' were designed to produce information regarding the effects of radiation on the male reproductive system. For voluntarily participating in the Heller Experiments, Bibeau was paid \$5 per month for agreeing to radiation exposure, \$10 per biopsy, and \$100 for undergoing a vasectomy."


Bibeau and his wife brought suit against the United States and researchers, alleging conspiracy to fraudulently induce his participation in the experiments, fraud, battery, breach of fiduciary duty, strict liability for ultra-hazardous activity and the intentional infliction of emotional distress. The action was certified as a class action.

A federal court in Oregon granted summary judgment to the Defendants, see: *Bibeau v. Pacific Northwest Research Foundation*, 980 F.Supp.349 (D.Or. 1997). On appeal, the Ninth Circuit affirmed in part and reversed and remanded in part. See: *Bibeau v. Pacific Northwest Research Foundation, Inc.*, 188 F.3d 1105 (9th Cir. 1999), Modified 208 F.3d 831 (9th Cir. 2000)[PLN, Nov. 2000].

After the initial remand, the private defendants settled with the plaintiff class for a total of \$1.5 million in damages and attorney fees. See [PLN, December 2001]. During the settlement claims process, Class Representative Bibeau testified falsely against at least four other prisoner-experimentees in an attempt to have their claims denied, leaving a greater portion of the settlement fund for himself. Initially, Bibeau was successful, in that the district court denied the claims of those claimants. Subsequently, however, in the face of overwhelming evidence of deception by Bibeau and class counsel, the court reversed itself, granting at least three of the four claims that it had denied on the basis of Bibeau's testimony.

On remand, the government "moved to dismiss the case for lack of subject matter jurisdiction on the basis that the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), barred the Bibeau's suit." The district court granted the motion, holding that the negligent supervision claims were barred by the that exception. "On subsequent motion, the district court held that the IIED claim... was only partially barred by the discretionary function exception. The court ultimately dismissed this claim on... summary judgment in October 2001, holding that the Bibeaus failed to establish two essential elements of their IIED claim: (1) an intent to inflict severe emotional distress on Mr. Bibeau, and (2) the causation of Mr. Bibeau's alleged emotional distress."

On appeal, the Ninth Circuit upheld the district court's dismissal of Bibeaus' claims of negligent supervision against the United States for lack of jurisdiction under the FTCA, finding that the discretionary function exception applied. Additionally, the court held that "[i]n the absence of evidence of the Government's intent to inflict emotional distress or substantial belief that the experiments would cause Mr. Bibeau severe emotional distress, Plaintiffs fail to establish a prima facie claim for intentional infliction of emotional distress." See: *Bibeau v. Pacific Northwest Research Foundation*, 339 F.3d 942 (9th Cir. 2003).

The Heller Experiments are among the prison abuses featured in *Acres of Skin: Human Experiments at Holmesburg Prison* (297 pages) by Allen Hornblum, and available through PLN for \$16. Similar suits against government agencies over the widespread use of prisoners for medical experiments have also been dismissed for various reasons. PLN has reported extensively on both the history of prisoner experimentation and subsequent litigation. 

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# Uprising by Vermont Prisoners Damages CCA Prison in Kentucky

by Matthew T. Clarke

On September 14, 2004, a prisoner uprising rocked the 816-bed, 88-acre Lee Adjustment Center (LAC), a private prison owned and operated by Corrections Corporation of America (CCA) in Lee County, Kentucky.

## The Prison

LAC was built in 1990 as a 400-bed, minimum-security prison by a private company under contract with the Kentucky Department of Corrections (KDOC). In 1999 CCA bought the prison and converted it into an 816-bed medium security prison used to house both KDOC and out-of-state prisoners. Apparently CCA cut costs during the conversion because during the uprising prisoners were able to move freely about the prison by pulling up the interior fences. At the time of the rebellion, it held 376 Kentucky DOC prisoners and 427 prisoners from the Vermont Department of Corrections (VDOC). Kentucky pays CCA \$38.44 per prisoner per day while Vermont paid \$42.50 per prisoner per day under a 29-month contract involving up to 700 prisoners and up to \$29.5 million.

## The Uprising

The rebellion began when nine prisoners, five from Kentucky and four from Vermont, attacked a round wooden guard tower in the center of the recreation yard after about 150 prisoners were let out on the yard for recreation at 7:15 p.m. The nine used large concrete ash trays to dislodge wood from the tower's frame. Guards agreed to give prisoners control of the recreation yard and not to fire tear gas onto the yard in exchange for the release of the tower guard. Rioters used wood from the tower to attack the maintenance building, presumably to get at the ladders, wire cutters, axes and other tools stored there to get out of the yard. They also set fire to two dormitories and the administration building while smashing windows, office furnishings, sinks, toilets, furniture and ripping out electrical wiring.

Official timelines differ, but it is clear that the melee lasted from three to four hours and involved up to 100 prisoners. After guards retreated from the central compound, Assistant Warden Donna Stivers paged the 20-man response team CCA is supposed to keep available at all times. Three responded.

Six others drifted in over the course of the night.

Meanwhile, the rioters broke into the commissary and distributed food and tobacco to other prisoners. Other prisoners were approaching the perimeter fence. Stivers realized that, with or without the response team, she had to do something. The arrival of 22 members of the state prison riot squad at 10:30 p.m. helped. By then, Stivers had rallied LAC staff to secure about 400 non-rioting prisoners. Pepper spray was used on the unruly prisoners in the yard and, by 11:30 p.m., the rebellion had been quelled. However, by then one 350-man dormitory was damaged beyond immediate use and a great deal of serious damage had occurred in the other buildings. Fortunately, only eight prisoners were injured. The two most seriously injured prisoners had severe cuts to the fingers. No staff was injured.

During the riot's aftermath, it was discovered that two prisoners, Matthew Bennett and James Davis had secured the maintenance building to protect their supervisor, Kris Goldey, and keep the rioters from the tools. Davis explained that Goldey had been an inspiration to the prisoners, shared the Bible with them, and taken an interest in them.

"He's more than just a maintenance guy," Davis said. "He's somebody that's had a positive influence on me."

Evidently that positive influence was all it took to make Davis and Bennett willing to arm themselves with pipes and prepare to battle rioting prisoners to protect Goldey and the tools.

## The Causes

Every prison uprising has many causes. This one was no exception. Every prison rebellion signals a failure of prison administration. Again, this one was no exception. Vermont Commissioner of Corrections Steve Gold was clear about who he believes was "largely responsible" for the riot: mismanagement by former LAC Warden Randy Eckman.

"The apparent cause of the riot was a somewhat arbitrary and restrictive change in the rules and privileges at the facility," according to Vermont Defender General Matthew Valerio. "These included changes in and reductions in the use of the commis-

sary, changes in food quality and increased punishment for minor infractions. That really ratcheted up the tension in the facility."

Vermont State Senator James Leddy, D-Chittenden, described the riot as what happens when you have a "rogue warden whose actions are only known about after the riot."

CCA must agree: they fired Eckman. However, there was plenty of blame to go around.

Three months prior to the riot, LAC almost doubled in population when the Vermont prisoners arrived. Although technically not overcrowded, it went from being sparsely populated to crowded in a brief period. Eckman believed it necessary to reduce privileges, such as recreation, and freedom of movement to accommodate the increased population. Simultaneously, he began a zero-tolerance disciplinary crackdown that gave guards the ability to discipline prisoners without proof of misconduct and even put them in solitary confinement for 60 days without disciplinary charges. Thus, many prisoners spent many days of unjustified punishment "in the hole."

Eckman also instituted group punishment. For instance, when some prisoners were caught gambling on pool, he removed the pool tables, revoking that privilege for all prisoners due to the misconduct of a few.

Prisoners interviewed after the riot also reported that the food rations were very small and of poor quality. Some indigent prisoners felt as if they were starving. Additionally, guards were becoming increasingly violent, beating and harassing prisoners without cause. Prisoners' complaints went unanswered. Some were singled out for retaliation because they complained.

205 of the Vermont prisoners were transferred from the only other CCA-run prison in Kentucky, Marion Adjustment Center (MAC) in St. Mary. According to CCA, they were transferred because MAC couldn't provide the proper facilities for that many prisoners (overcrowding, in other words). In fact, the Vermont prisoners' complaints about overcrowding, lack of proper facilities, guard brutality and lack of programs were repeatedly ignored until J.N., a 19-year-old prisoner in administrative segregation, complained about having been repeatedly raped by guard Joel Becks. This allegation was also dismissed until a surveillance video turned up showing Becks, who was not assigned to the segregation unit and had no legitimate business there,



entering the victim's cell and later leaving it. J.N. has since filed suit against CCA., On May 2, 2004, Becks was fired, not for raping Naglack, but for violating company policy by entering the segregation cell alone, without backup. A second prisoner has since complained of having been raped by Becks. Both suits have since been settled by CCA for confidential amounts. Becks has been criminally charged with the assaults.

VDOC officials had been putting the gloss on MAC for months. In April, 2004, VDOC officials claimed Vermont prisoners preferred to be incarcerated far from their families at MAC. Bill Bryan, superintendent of the Bennington VDOC office, gave a phone interview following his tour of MAC and LAC from March 25 to April 2, 2004. He responded to critics of MAC by saying that it was a work in progress that would be completed in a few months. "It will be the promised land," said Bryan.

He said that Vermont prisoners would prefer MAC to LAC because, at LAC they are housed in dormitories, whereas in MAC prisoners are housed in two man cells. Bryan also said the MAC guards spoke highly of Vermont prisoners, calling them industrious and well-behaved. Bryan didn't vocalize what Vermont prisoners thought of MAC guards and facilities. Probably because he never asked them. Likewise, the mass media merely quoted Bryan without checking with the prisoners to see if any of his statements reflected their reality. He merely claimed that some of the prisoners preferred their MAC incarceration because, unlike in Vermont prisons, they could smoke there and the corporate media gobbled it up.

Meanwhile, Vermont MAC prisoners were complaining to Seth Lipschutz of the Prisoners' Rights Office of the Vermont Defender General that they were being fed on the floor of hallways, not given sufficient recreation, overcrowded into tiny facilities when given recreation, not given programs--including basics required in the CCA contract, such as a GED program--and brutalized by guards who considered them to be "Yankee hillbillies" and openly used racial and ethnic slurs to bait them and label them as racists from an all-white state.

These simmering MAC prisoners were thrown into the LAC cauldron in June, 2004, after the two Vermont MAC prisoners accused a MAC guard of having raped them. There they got better recreation, but had to deal with insufficient food, bogus disciplinary actions, brutality by the guards, ever tightening rules, poor communication by the administration, ignored grievances, 200-bed

dorms with seating for only 32 in the day room, and still no GED program. It is little wonder the cauldron boiled over.

Several LAC prisoners claimed that the riot was planned solely as a method of calling attention to their grievances. They claim that the plan called for no one to be injured, regardless of whether prisoner or CCA employee.

### **The Consequences**

Before the riot, neither VDOC nor KDOC had private prison monitors at MAC or LAC. In an effort to close the door of the empty barn, VDOC placed a monitor at LAC. CCA at first relieved, then fired Eckman.

A Lee County grand jury indicted 23 prisoners. The indicted Kentucky prisoners are Alan Lee Carter, Michael Joseph Collins, Kevin Howard, Joel Hurst, Samuel Moore, Damon Talbert, and Bobby Taylor. They have been returned to KDOC prisons. Indicted Vermont prisoners include Grant G. Bentley, Daniel J. Boivin, Eddie Dewayne Estep, Randy S. Francis, Paul Gracey, Eric T. Grant, David Harrison, Jesse James Howard, Jeremy Jennings, Jamey Victor King, Eric Marallo, Dan Paquette, Jason James Russin, Chancy Ben Smith, Jeffery Stratton, and Steven Touzin.

A KDOC report released November 23, 2004, said that the riot "was created by a lack of communication up and down the chain of command" and "too many changes within a short period of time." It recommended that CCA be fined \$10,000 for failing to have a sufficient response team to put down the riot.

CCA immediately expressed a willingness to pay the fine. KDOC Corrections Commissioner John D. Rees, a former CCA vice-president, had previously declined to fine CCA when numerous and repeated contract violations at MAC and LAC were discovered.

Meanwhile, questions have arisen regarding CCA's contributions to Vermont politicians. CCA apparently made donations to numerous politicians, including Republican Governor James Douglas, and picked up \$5,000 of the tab for the governor's inaugural ball. CCA also donated the maximum allowed by state law to Douglas's campaign and the Vermont Republican Victory Committee. CCA failed to report the donation to the inaugural ball. It should come as no surprise that when you contract out core government functions to private businesses, conflicts of public interest will occur with

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## Uprising (Cont)

every campaign donation by the business. Incarcerating prisoners in private prisons a long way from home begets corruption and other problems. It is a bad idea whose time has gone.

Vermont finally seems poised to address its prison overcrowding problem. Noting the 300% increase in pre-trial detainees within ten years and the 243% increase in state prisoners within 19 years, the Vermont Legislative Corrections Oversight Committee made suggestions to control prison overcrowding. Chief among the suggestions was to release to house arrest, monitored by GPS tracking, 400 "non-dangerous" prisoners. This would free up enough prison space to bring all of Vermont's out-of-state prisoners back home. GPS monitoring costs \$3,000 per prisoner per year. Using it on the 400 prisoners would save Vermont around \$5 million a year compared with paying CCA to house 400 prisoners. The committee also suggested building a 400-bed facility to house pre-trial detainees separate from con-

victed prisoners. It also suggested easing some of the restrictions on prisoners awaiting release to allow some of them to reside with family members, noting that 132 prisoners are in jail awaiting housing, but no suitable, affordable housing is available under the current rules. The report warned that if the growth in prisoners continued, Vermont would have to build three new prisons at a cost of \$32 million each.

### The Aftermath

Kentucky officials are not disappointed by CCA's performance during the riot. According to KDOC spokeswoman Lisa Lamb, "It won't necessarily be a negative. If we determine they reacted to this quickly and properly, it could go to their credit." Thus, KDOC's plans to privatize the 961-bed Little Sandy Correctional Complex are continuing unabated and CCA is still considered a top potential contractor. Detractors of Ree's prison privatization plan point to the riot, a nine-hour riot at the CCA-run Otter Creek Correctional Facility in Floyd County, Kentucky, nine years

ago, and recent riots at CCA-run prisons in Colorado and Mississippi, [See *PLN*, Jan. 2005] noting that there hasn't been a riot at a state-run prison in many, many years.

On October 29, 2004, a fight broke out among ten LCA prisoners. At least two prisoners were injured. One had to be taken to the hospital for treatment for injuries he received when hit on the head with a fire extinguisher. Maybe this will improve CCA's chances of receiving the Otter Creek contract even more.

Meanwhile, Desmond O. Spalding, a former MAC recreational coordinator, has filed suit against CCA, alleging racial discrimination and race-based harassment while he was employed at MAC. This includes an allegation that CCA officials falsely swore out an arrest warrant against him. CCA denies the allegations. ■

Sources: *Argus Times*, *Associated Press*, *Barton Chronicle*, *Bennington Banner*, *Burlington Free Press*, *Champlain Channel*, *Courier-Journal*, *Lebanon Enterprise*, *Lexington Herald Leader*, *Rutland Herald*, *Vermont Guardian*.

## Destruction of Exculpatory Disciplinary Evidence May Violate Due Process Clause

The U.S. Court of Appeals for the Second Circuit has affirmed the U.S. District Court for the Southern District of New York's order denying prison officials' motion for summary judgment on qualified immunity grounds in a prison discipline case.

In 2003 Anthony Palmer was incarcerated at New York's Sing Sing Correctional Facility, where, he was involved in an altercation with a guard named Ronald Goss. Goss charged Palmer with several rule infractions, including violent conduct. Deputy Superintendent Paul Richards presided over Palmer's disciplinary hearing. Palmer was convicted and sanctioned 90 days solitary confinement, loss of commissary and telephone privileges, and expulsion from the Family Reunion Program (FRP), in which prisoners are allowed extended visits with their wives and children in a trailer on the prison grounds. Palmer was also transferred to another prison where he served 77 days in a Special Housing Unit (SHU).

During Palmer's appeal of Richards' decision, Palmer discovered that a segment of the tape recorded hearing had been erased. On that portion of the tape a guard named

Wyllie provided testimony that would have exonerated Palmer in the disciplinary proceeding. Palmer contended that Richards erased the tape to undermine his defense. Consequently, Palmer initiated a civil rights lawsuit against Richards and Goss under 42 U.S.C. § 1983, contending that he was not afforded the process due him in the disciplinary hearing. Richards and Goss moved for summary judgment, claiming qualified immunity. The District Court denied that motion, and Richards and Goss appealed.

On appeal the Second Circuit found that for Palmer to have been denied due process, he would first have to show that he had a liberty interest in not receiving the punishment imposed. Relying on *Sandin v. Conner*, 515 U.S. 472, 484 (1995), the court found that if his sanction imposed an "atypical and significant hardship ... in relationship to the ordinary incidents of [his] prison life," Palmer was entitled to due process of law before the sanction could be imposed. The Second Circuit found that 77 days in the SHU, combined with Palmer's expulsion from the FRP might amount to such an atypical hard-

ship. Thus, court found that the District Court correctly denied Richards' and Goss' motion for summary judgment, since genuine issues remained for trial.

The Court next considered whether, under existing law, Richards and Goss should have known that imposing the above stated punishment would violate Palmer's due process rights under the Fourteenth Amendment to the U.S. Constitution. The Court first surveyed its past cases on the subject. It concluded that, based on those cases, Richards and Goss should have been aware that subjecting Palmer to the above discussed sanctions without a fair hearing might deprive him of his due process rights. Therefore, the Court held that qualified immunity provided Richards and Goss no shelter.

The court held that Richards and Goss may have deprived Palmer of his due process rights under the 14<sup>th</sup> Amendment, but that, on the current record, it could not say for certain if that was the case. Therefore, the Second Circuit affirmed the District Court's denial of motion for summary judgment, and remanded the case to the District Court for further proceedings. See: *Palmer v. Richards*, 364 F.3d 60 (2nd Cir. 2004). ■

# New York Jail's Strip Search Policy Permanently Enjoined

A federal court in New York held that the Orange County Correctional Facility's (OCCF) strip search policy violated the Fourth Amendment by authorizing strip searches without individualized reasonable suspicion that a detainee possessed contraband. The court found that the balance of hardships tipped in favor of plaintiffs and warranted the issuance of a permanent injunction against the policy's unconstitutional aspects.

In January 2002, a class of pre-trial detainees charged with misdemeanors and admitted to OCCF from January 1, 1999 forward, brought suit alleging that they were subjected to strip searches upon admission to OCCF which violated the Fourth Amendment. See: *Dodge v. County of Orange*, 280 FRD 79 (S.D.N.Y. 2002). In October 2002, a group of pretrial detainees charged with felonies and admitted to OCCF from January 1, 1999, forward, filed suit alleging that they were strip searched in violation of the Fourth Amendment. See: *Rango v. County of Orange*, Case No. 02Civ-8451 (S.D.N.Y. 2002). Subsequently, the cases were consolidated for a single trial on plaintiffs' requests for permanent injunctive relief in both cases.

Prior to August 2001, OCCF employed a blanket strip search policy whereby every new arrival at OCCF was strip searched, regardless of reasonable suspicion. As such, from January 1, 1999 to August of 2001, strip searches were mandatory for everyone. In August, 2001, the County promulgated a new strip search policy that was to be followed at OCCF's new facility that opened September 1, 2001. The August 2001 policy still authorized strip searches of newly admitted detainees without individualized reasonable suspicion, in violation of the Second Circuit's decision in *Shain v. Ellison*, 273 F.3d 56 (2nd Cir. 2001).

On July 26, 2002, the court entered a preliminary injunction in *Dodge*, directing OCCF to comply with *Shain*. Within days of the entry of the *Dodge* injunction, OCCF adopted an August 2002 strip search policy.

The court rejected OCCF's claim that "massive amounts of additional contraband were introduced into the facility" following the 2002 injunction. Rather, the court found "that there were significantly more incidents involving contraband during the time period when the County was strip searching everyone, and the number of incidents has gone down significantly since the new jail opened and the county's written policy began to reflect the reality of *Shain*."

The court found that "[t]he inescapable inference is that OCCF policy regarding what to report and what not to report [concerning detected contraband] changed at about the time OCCF had a motive to argue that reducing on-arrival strip searched led to 'a direct, observable negative impact on security at the Facility.'"

The court also found that "it is not possible to infer from the statistics . . . that any significant amount of additional contraband was being smuggled in by newly arrested and arraigned inmates."

The court rejected OCCF's attempt to revert to the pre-August 2001 blanket strip search policy holding that "*Shain* is controlling law in this Circuit, and the pre-August 2001 Policy to which defendants wish to revert clearly violates *Shain*." The court also concluded "that the two policies followed since August 2001 are also unconstitutional, but to a much more limited degree."

The court found that "[t]he August 2001 Policy, which was in effect until August 2002, is unconstitutional because it does not call for an officer to have individualized suspicion

that a detainee is secreting contraband on his person in order to strip search the detainee." Additionally, the court relied upon its decision, issued approximately two months after the *Dodge* injunction, in *Murcia v. County of Orange*, 226 F.Supp.2d 489 (S.D.N.Y. 2002) to find that the "August 2001 policy was unconstitutional insofar as it called for strip searching all newly-admitted detainees arrested on suspicion of a felony."

The court then concluded "that the August 2002 Policy is unconstitutional to the extent that it calls for an on-arrival strip search of every felony detainee without individualized reasonable suspicion that the detainee is carrying contraband."

The court then "enjoin[ed] defendants from strip searching . . . newly-arrived pre-trial detainees upon their initial admission to OCCF unless officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest." See: *Dodge v. County of Orange*, 282 F.Supp.2d 41 (S.D.N.Y. 2003). ■

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# Oregon Ban On Sexually Explicit Mail, Fantasy Games Upheld, State Law Claims Remanded

The Ninth Circuit federal Court of Appeals held that Oregon prison officials did not violate a prisoner's rights to freedom of speech and due process by refusing to deliver publications purportedly containing sexually explicit and role-playing or similar fantasy games or materials. The court also upheld a grant of qualified immunity for the censorship of a comic book mailed via standard rate mail, aka "bulk mail." However, the court ordered the district court to address the prisoner's supplemental state constitutional claims.

Oregon prisoner Afshin Bahrapour "subscribed to the *Green Lantern* comic book, and purchased issues of *Muscle Elegance* magazine and *White Dwarf* magazine." Prison officials "refused to deliver the *Green Lantern* comic book because prison regulations prohibited the receipt of bulk mail." Once the bulk mail regulation was declared unconstitutional in *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001), prison officials purchased a subscription to *Green Lantern* comic book for Bahrapour.

Prison officials rejected "issue number eight of *Muscle Elegance* magazine due to sexual context." The basis of the rejection was "[a]dvertisements - portrayal of actual

or simulated sexual acts or behaviors[.]" Prison officials also rejected three issues of *White Dwarf* magazine because of their role-playing content." Bahrapour sought administrative review but the rejection decisions were upheld.

Bahrapour filed a complaint alleging that the restrictions on prisoner mail violated his first and Fourteenth Amendment rights. He also alleged a supplemental state law claim under Article I, section 8, of the Oregon Constitution. The district court denied Bahrapour's motions for partial summary judgment and a preliminary injunction. It granted the state's motion for summary judgment, which was supported by an affidavit of Dr. Neil M. Malamuth, an expert regarding the effect of sexually explicit materials on prisoners. Prison officials also produced an affidavit from Superintendent Robert Lampert in which he explained "that the role-playing prohibition is intended to prevent inmates from placing themselves in fantasy roles that reduce accountability and substitute raw power for legitimate authority. He also noted that role-playing games often contain dice, which are prohibited gambling paraphernalia." The district court dismissed the action without explicitly disposing of the supplemental state law claim.

Applying the "Reasonable Relationship Test" of *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987), the Ninth Circuit found that the "evidence adequately demonstrates that the regulations support[] legitimate penological interests[.]"

In evaluating *White Dwarf*, the court noted that "[a] role-playing game is not defined in the regulations. It is defined in the dictionary. Applying that definition, the court was "persuaded that *White Dwarf* magazine fits the definition of role-playing material prohibited by subsection (2)(k) because it simulates violent battles in an imaginary fantasy world in which the roll of dice determines which leaders have the power to crush their enemies."

Turning to *Muscle Elegance* the court found the "magazine includes advertisements for videos" depicting actual or simulated sexual activity falling within the prohibition. Thus, the court concluded, "there is no genuine material fact in dispute to whether the regulations prohibit the receipt of *Muscle Elegance* magazine and *White Dwarf* magazine because of their sexually explicit or role-playing content."

The court found that "[a]ll four of the *Turner* factors weigh in favor of [prison officials]. Mr. Bahrapour has not demonstrated that the regulations are irrational or unreasonable, or that there are alternative solutions that are easy, obvious, and of 'de minimis cost to valid penological interests.' *Turner*, 482 U.S. at 90-91." Therefore, the court rejected Bahrapour's argument that the rules were vague and overbroad.

The court also rejected Bahrapour's claim that prison officials were not entitled to qualified immunity regarding their rejection of the *Green Lantern* comic book subscription. The court noted that *Morrison* was decided 18 months after prison officials rejected the *Green Lantern*. The court determined that at the time of the rejection reasonable prison officials would have no basis for assuming that regulations prohibiting bulk mail were unconstitutional.

Finally, the court held that "[b]ecause the district court did not indicate the basis for declining to exercise its jurisdiction over Mr. Bahrapour's state law claim, we must vacate and remand this matter for a ruling on the merits, or an order consistent with the requirements of [28 U.S.C.] § 1367(c)." See: *Bahrapour v. Lampert*, 356 F.3d 969 (9th Cir. 2004). ■

## Washington Community Custody Sanctions Upheld

The Washington State Court of Appeals for Division 2 has affirmed a trial court's imposition of sanctions for community custody violations, for which the State Department of Corrections (DOC) had previously sanctioned Michael David Collins.

In January 2002, Collins was convicted of assault with sexual motivation and failure to register as a sex offender. He was sentenced to one year in jail and community custody to be served concurrently. In November 2003, Collins was again arrested for failure to register as a sex offender and other charges. The DOC found the new charges to amount to a violation of the terms of his community custody and imposed a sanction of 180-days incarceration.

In January 2003, the DOC found Collins to have committed new community custody violations. This time the trial court modified Collins' judgments and sentences to require Collins to serve 150-days for the new violations. Collins appealed, contending that double jeopardy barred his again being jailed for violations of his community custody on the first two convictions.

On appeal, Division 2 found that RCW 9.94A.737 authorized the modification of Collins' first two sentences for violations of community custody. Division 2 also found that the more recent incarceration was a continuation of Collins' original sentences, rather than new, multiple punishments therefore. Thus, such punishment did not violate principles of double jeopardy. On that basis, the court affirmed the sanctions imposed by the trial court on modification of Collins' judgments and sentences. See: *State v. Collins*, 121 Wn. App. 16; 88 P.3d 408 (Wa. Ct. App. Div. 2, 2004). ■

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# Delaware Prisoner Killed In Hostage Standoff, Counselor Raped

On July 12, 2004, Scott A. Miller, a Delaware prisoner serving a 699-year sentence for rape, assault and kidnapping, was shot to death by a prison guard at the Delaware Correctional Center. The shooting ended a 6 ½ hour standoff in which Miller had taken 27-year-old counselor Cassandra Arnold hostage in her office. Though the Department denies it, poor security and inadequate staffing likely contributed to the standoff.

The episode began shortly after 10 a.m. as Miller, 45, was leaving a counseling session in the prison's medium-high security unit, according to Delaware Department of Correction (DOC) Commissioner Stan Taylor. Supposedly, Miller requested additional counseling and passed through two security doors with or a few steps behind Arnold. As they neared her office, said Taylor, Miller grabbed Arnold and put an 8-inch nail-like shank to her throat. No guards were present. Miller then dragged Arnold into her office, turned off the lights, covered the windows with paper, and pushed all the furniture against the door, said Taylor. Miller then raped Arnold and threatened to kill her.

Armed guards quickly took up positions in the ceiling while negotiators talked to Miller. When Miller quit talking, the guards became nervous and moved aside a ceiling tile to peek in. Miller heard the movement and started toward one of the guards, then spun around and threatened to kill Arnold. High on adrenaline, one of the guards fired into the darkened room with a .40 caliber automatic pistol, hitting Miller twice in the chest. Miller died at the scene.

At least part of Taylor's account, however, is disputed by Arnold, who has since sued the DOC for failing to provide her with a safe workplace, and may have been constructed to downplay security lapses at the prison.

According to Arnold, she did not walk with Miller or have additional counseling planned with him, and that she was shocked to find Miller lurking in a nearby bathroom 15 minutes after the group session ended.

Not surprisingly, Taylor, who is overseeing an internal investigation, has rejected calls by Arnold's attorneys and family for an independent review of the standoff. However, a special task force appointed by Governor Ruth Ann Miner is examining the incident and will provide a review of it. As this issue of *PLN* goes to press, the report

has not been released.

After the incident, the guard who was controlling the two security doors that Miller passed through resigned, said DOC spokeswoman Noreen Renard, who declined to identify the guard. In addition, four other female guards quit after the standoff, "because of what happened," said David Knight, senior vice president for the Correctional Officers Association of Delaware, which represents the guards.

Taylor also claimed that staffing was not an issue, but the evidence suggests otherwise.

Turnover has plagued the state since 1998, when Delaware began a 2,500-bed expansion of the prison system that was completed in 2002. Taylor conceded that in recent months the DOC has lost nearly twice as many guards as it has hired. In February, 2005, the DOC was short 332 guards out of a total of 1,830. Low pay may be a factor. At \$26,230, the base pay in Delaware is less than that of surrounding states, which is \$39,888 in New Jersey, \$27,019 in Pennsylvania and \$27,710 in Maryland. At least 47 Delaware guards are currently deployed with the National Guard or Army reserves.

Whatever the reason, the staff shortages have resulted in decreased security, according to Knight. "People are doing so much overtime, they end up calling in sick themselves. They're getting burned out," he said. "It's dangerous whenever you can have someone tired. Alertness is reduced. And morale gets killed to the point where they think, 'I don't want to see that place anymore.'"

Sergeant Lisa David, a guard at the medium-high security unit where Miller was housed, said the guards she supervises

are often exhausted from working 16-hour shifts, the result of forced overtime.

David and other union members believe staff shortages may have contributed to the Miller incident and other recent security lapses in Delaware. A few examples: A prisoner at the Delaware Correctional Center received 26 stitches after another prisoner cut him with a razor. A prisoner serving time for burglary swallowed a handcuff key as part of a failed escape plan while being taken to court. A prisoner escaped from the Kent County Courthouse after he was taken there from the Sussex Correctional Institution to face armed robbery charges--he remained at large for three weeks. And, a man who was on trial for raping a 91-year-old woman slit his own throat with a disposable razor, causing the judge to declare a mistrial.

Experts note that staff shortages, which are a nationwide problem, have contributed to recent episodes of prison violence in other states as well, including the 2004 assault of a kitchen worker and 2 guards during a 15-day standoff--the longest in U.S. history--by 2 prisoners at a state prison in Arizona [see *PLN*, July 2004, p. 16].

Taylor said the use of deadly force against Miller was appropriate, but negotiators apparently made few efforts to end the standoff peacefully. Miller's sister, Sharon Harrison, said she and Miller's mother learned about his death from TV news reports. "No one notified his family of any of this," she said. "It would have been nice if we would have been able to talk to him and try and calm him down, just something."

Source: [www.delawareonline.com](http://www.delawareonline.com)



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# Harsh Pre-trial Conditions of Confinement Justify Reduced Federal Sentence

by Matthew T. Clarke

A New York federal court has held that harsh pre-trial conditions of confinement justify a downward departure in the Federal Sentencing Guidelines. Jubelequis Mateo, a New York federal prisoner, filed a motion for downward departure under the sentencing guidelines, alleging she was a minor participant in the drug conspiracy and that harsh pre-trial conditions of confinement and family hardship justified downward departure.

Mateo, who was having financial problems after having become pregnant following a rape, met a drug dealer. The dealer set her up as a cushion between him and his potential customers. Mateo was arrested for providing heroin samples on behalf of the

dealer in an attempt to broker drug deals involving two kilograms of heroin with people who called her.

Mateo was pregnant when incarcerated in MDC Brooklyn. She was examined by MDC medical staff who set her due date at November 25, 2002. On October 30, 2002, she complained of contractions and was examined by medical staff who found no signs of labor. On November 5, 2002, she awoke at around 3:00 a.m. with labor pains. Other prisoners notified the guard, who told them Mateo would have to wait until around 6:00 a.m. when a physician's assistant (PA) would come on duty. Mateo continued in labor and repeated appeals to guards for help were ignored. Sometime between 10:00 and

11:00 a.m., the PA appeared, but left without fully examining Mateo, apparently having concluded that she couldn't be in labor since her due date was November 25th. Mateo continued in labor. Finally, between 4:00 and 5:00 p.m., she was taken to the MDC's medical unit. At 6:30 p.m., the PA finally called for an ambulance. The paramedics who arrived with the ambulance noted that the baby's head had begun to emerge even though Mateo still had her underwear on. She gave birth to a baby boy at 6:58 p.m. still at MDC, after sixteen hours of labor without any pain medication.

The boy was given to Mateo's sister for care. However, the sister's husband objected to the sister's assumption of custody and abandoned her and the baby. The sister was having great difficulty caring for the baby.

Mateo temporarily left her daughter behind with her mother when she arrived from the Dominican Republic in 2001. The mother has health problems causing her difficulty raising the child.

On February 28, 2003, a guard accused Mateo and her cellmate of smoking and threatened to write a disciplinary report on them if they did not undress in front of him. They complied. He returned the next day and again told them to undress in front of him. They refused and filed a formal complaint.

Mateo is suffering from post-traumatic stress disorder, anxiety, low self-esteem, insomnia, and substance abuse. Soon after the sexual harassment by the guard, she was placed on suicide watch for a brief period.

The Court allowed a two-point downward departure after ruling that Mateo was a minor (not minimal) participant in the crime under U.S.S.G. § 3B1.2(b). The court also ruled that the pre-trial conditions of confinement, specifically the extended labor and birthing in the MDC and the sexual harassment, justified a nine-point downward departure. Independently, the family hardship in which Mateo's two children were being raised without the presence of their fathers by two care givers who were having a difficult time raising the children also justified the nine-point downward departure. Alternatively, the combination of harsh pre-trial conditions and family hardships combined justified the nine-point downward departure. Therefore, the court ordered Mateo's offense level reduced to level 16. See: *United States v. Mateo*, 299 F.Supp.2d 201 (S.D.N.Y. 2004).

## Fourth Circuit Reinstates Federal Prisoner's FTCA Claim

In an unpublished decision involving a prisoner's lawsuit under the Federal Tort Claims Act (FTCA), the U.S. Fourth Circuit Court of Appeals held that genuine issues of material fact precluded summary judgment of the prisoner's claim.

Dwayne Manning, a federal prisoner, alleged that during a search of his prison cell, guards confiscated and failed to return a photo album. Manning also alleged that after completing the search, the guards failed to lock his storage box which resulted in the loss of various items. Manning responded by filing a pro se complaint against the Department of Justice, the Bureau of Prisons, and the warden (collectively defendants) under the FTCA, 28 U.S.C. §§ 1346(b) et seq. "The FTCA 'permits the United States to be held liable in tort in the same respect as a private person would be liable under the law of the place where the act occurred.'"

The U.S. District Court for the District of Maryland granted summary judgment to the Defendants, reasoning that Manning's photo album had been returned and that he had failed to prove that the other items had been taken or establish their value. Manning appealed.

The Fourth Circuit vacated and remanded. As to the photo album, the Court observed that although the district court

had based its decision on the fact that the photo album had been returned, Manning made clear in his claim that he was alleging the confiscation (or loss) of a second photo album. Manning supported this claim with declarations from other prisoners, his own affidavit taken under penalty of perjury, and a personal property report provided by the defendants showing that Manning had two photo albums.

Regarding the other items, Manning provided statements from other prisoners who asserted that on the day in question their property boxes were also left open after a search and that "a lot of property was missing." Manning also provided an affidavit alleging his property box was left open.

In addition, to negate the defendants' assertion that he did not own the items in question because they had not been recorded the last time his property was inventoried, Manning presented receipts showing that he had since purchased a photo album (\$2.35), Tide (\$4.60), a shirt (\$8.15), a sweatshirt (\$13.65), headphones (\$33.80), and Nikes (\$62.50).

Based on the above, the Fourth Circuit held that genuine issues of material fact precluded summary judgment of Manning's claims. Readers should note that at present the Circuits are divided as to whether the FTCA applies to property claims against the BOP [PLN, May 2004, p. 27]. See: *Manning v. Department Of Justice*, 104 Fed. Appx. 907 (4th Cir. 2004).

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# Summary Judgment Reversed In Los Angeles Jail Over-Detention

In a suit for damages against Los Angeles County Sheriff Leroy Baca for over detention of jail prisoners court-ordered for release, the Ninth Circuit U.S. Court of Appeals held that summary judgment for Baca was not available where the facts showed a practice of deliberate indifference to the constitutional rights of the affected prisoners.

Rodney Berry was arrested on October 5, 2000 and held for a trial that ended in early February, 2001 with a hung jury. The Superior Court ordered the charges dropped and authorized Berry's release on February 1, 2001 at 11:30 a.m. On February 2, at 2:02 p.m., Berry was released 26 ½ hours after the court's order and 16 ½ hours after his release order was entered into the computerized Automated Justice Information System. Two other prisoners, Anthony Hart and Roger Mortimer, had similar court-ordered releases from the Los Angeles County Jail but were delayed for over 29 hours each. All three sued Baca in U.S. District Court (C.D. Cal.) under 42 U.S.C. § 1983 for violation of their civil rights.

The district court granted summary judgment to Baca, relying on *Brass v. County of Los Angeles*, 328 F.3d 1192 (9th Cir. 2003) as "virtually indistinguishable" from the case at bar. In *Brass*, the court found that Baca's policy of late releases was the result of the large number of cases the jail processes, not upon some policy or custom of deliberately violating prisoners' rights. But in the case at bar, Berry challenged the implementation of the policies not the policies themselves. While this may seem like a subtle difference, it has a crucial distinction requiring a different result.

Berry made the critically different claim of "deliberate indifference" to his rights resulting from the effect that the non-intentionally harmful processing delay actually had. Thus, where *Brass* challenged Baca's plan to keep prisoners over detained, Berry only charged that the result was constitutionally proscribed. Stated another way, *Brass* challenged the affirmative policies of the county whereas Berry challenged only Baca's deliberate inaction.

The court noted that the role of summary judgment is to pretermitt trials where there is no disputed factual determination to be made. But the effect of the district court's grant of summary judgment was to insulate Baca from having the cause of his over detentions factually determined,

i.e., were they the result of unpreventable processing mechanics or from simply not caring about the liberty interests of citizens? This left the question of reasonableness to be determined when the court held that presumptive reasonableness, as pled by Baca, had no basis in law.

Rather, the court relied upon precedent set in *Oviatt v. Pearce*, 954 F.2d 1470,

1474 (9th Cir. 1992) to require an ultimate determination of whether Baca had made a conscious or deliberate choice among various alternatives. Accordingly, the Ninth Circuit reversed and remanded to the district court to permit a jury to make a determination of the reasonableness, vel non, of the over detentions. See: *Berry v. Baca*, 379 F.3d 764 (9th Cir. 2004). ■

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# Pennsylvania Statute Banning Sex Between Staff and Prisoners Upheld

In a unanimous decision, the Pennsylvania Supreme Court reversed a trial court ruling that had found a Pennsylvania statute prohibiting sex between prisoners and prison staff unconstitutional. The court remanded the case to the lower court for trial.

Eileen Mayfield was a guard at the Montgomery County Correctional Facility (MCCF) "when she allegedly engaged in sexual acts with three inmates, including performing oral sex on an inmate, rubbing her buttocks on an inmate's groin area, and grabbing an inmate's buttocks." She "was charged with three counts of institutional sexual assault," as defined by 18 Pa.C.S. § 3124.2. "She moved to quash the bills of information and have the charges dismissed. The trial court granted the motion after finding § 3124.2 unconstitutionally vague, overbroad, and violative of due process for lacking an express mens rea requirement."

The trial court opinion infuriated Montgomery County District Attorney Bruce Castor, who appealed the decision to the

Supreme Court. "You can't have the prison guards having sex with the inmates," Carter said. "Consent can't be an issue, or you'd have sex in all the prisons all over Pennsylvania." Other District Attorneys often teased Castor about Montgomery County's "exception" when he traveled around the state, he said.

The Supreme Court first rejected the trial court's finding that § 3124.2 is unconstitutionally vague because the terms "inmate" and "employee" are not defined, holding that "[a]ppplied to appellee's conduct, the statute could not be clearer." The court found that "[t]he statute provides reasonable standards for correctional personnel to gauge their conduct - namely, sexual contact with inmates is forbidden. Whatever latent ambiguities may lurk in the terms 'inmate' or 'employee' are not implicated here. Appellee was a county corrections officer; she was unquestionably an 'employee' of a county correctional facility. The persons with whom she allegedly had sexual contact were indisputably 'inmates' at that facility. Appellee's alleged conduct is precisely what the General Assembly intended to proscribe when it enacted § 3124.2, which is not unconstitutionally vague."

The court then rejected the trial court's conclusion that "§ 3124.2 was unconstitutionally overbroad because it punishes conduct protected by the First Amendment." In doing so, the court explained that "sexual contact between correctional staff and inmates cannot plausibly be categorized as expressive conduct warranting First Amendment protection. We can conceive of no set of circumstances in which § 3124.2 would infringe on constitutionally protected expression." The court found that "Appellee's alleged actions amount to pure conduct, not expressive activity protected by the First Amendment."


Additionally, the court explained "[s]exual contact between correctional staff and inmates is obviously rife with the possibility of coercion, both subtle and overt, given the extensive power guards exercise over inmates . . . While the state interest in regulating private consensual sex between

adults is low, . . . in the setting of a correctional institution the calculus of interests is fundamentally different."

The Court also rejected the trial court's conclusion that "§ 3124.2 violates due process because it lacks an express mens rea requirement." The court found that "evidence of the General Assembly's intent as to the mens rea of § 3124.2 is clear. Although the statute is silent as to mens rea, 18 Pa.C.S. § 302 provides for such situations[.]" That statute provides that conduct must be intentional, knowing or reckless. "Once the trial court determined the General Assembly did not intend § 3124.2 to be a strict liability crime, it need have done nothing more than advert to § 302(c) and require the Commonwealth to prove at least recklessness." The court indicated that "[h]ad the trial court done this, its concern -- which pervades its opinion -- about the conviction of hapless corrections officers for having consensual sex with persons who unbeknown to them are inmates, would be alleviated." The court held that "applying 18 Pa.C.S. § 302(c) to require at least recklessness renders the statute perfectly constitutional. Section 3124.2 is not unconstitutional for lacking an express mens rea requirement." See: *Commonwealth of Pennsylvania v. Mayfield*, 574 Pa. 460, 832 A.2d 41.8 (Pa.S.Ct. 2003).

On remand, on June 21, 2004, Montgomery county judge Bernard Moore dismissed one sex charge against Mayfield, 45, that she had sex with jail prisoner Gene White, in 1999, in exchange for commissary items, because the sex acts occurred before the law criminalizing sex between staff and prisoners took effect.

On October 15, 2004, a jury hung 10-2 voting for acquittal, on the remaining two charges against Mayfield, that she traded snacks in exchange for indecently touching prisoners Jasper DiSantos and Jason Mascione. A mistrial was declared and a new trial scheduled.

The protection of women prisoners from predatory male staff has generally been the main impetus behind the enactment of laws banning sex between prisoners and staff around the nation. However, some of the most vigorous prosecutions have been pursued against female staff who have sexual contact with male prisoners, which has generally not been perceived as a widespread problem. 

Source: *The Philadelphia Inquirer*

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# **\$78,435 in Attorney Fees for Successful Challenge to Pennsylvania's Megan's Law**

*by Matthew T. Clarke*

A federal court in Pennsylvania has awarded the plaintiff's attorneys \$78,435 in attorney fees and costs in an action that challenged the application of the community notification provision of Pennsylvania's Registration of Sex Offenders Act ("Megan's Law"), 42 Pa. Cons. Stat. § 9791-9799.6, to a man with an out-of-state conviction for a sex offense without first giving him the process the Act guarantees persons convicted of in-state sex offenses.

Doe, the pseudonym of a Pennsylvania resident who was on parole for an out-of-state sex offense conviction, filed a civil-rights suit under 42 U.S.C. § 1983, after he was required to register as a sex offender and give community notification without first being given some process. On its own accord, the court raised the issue of whether Pennsylvania had also violated the Pennsylvania Interstate Compact Concerning Parole, 61 Pa. Stat. Ann. § 321, in its handling of Doe's case. Both sides were ordered to brief the issue and the court ultimately ruled in Doe's favor based upon those briefs. Without ruling on the constitutional claims, the court ordered that Doe receive the same process given in-state sex offenders before subjecting him to the community notification requirement. This was all the relief Doe had requested. The state appealed, but then withdrew the appeal. Doe filed for attorney fees under 42 U.S.C. § 1988.

The state objected to the requested attorney fees and costs of \$79,379. The court used the lodestar--the number of reasonably expended hours multiplied by the reasonable hourly-rate--to determine a reasonable fee. The court noted that it is very difficult to determine what a particular attorney's reasonable fee value is. This is because there are few studies on attorneys' fees in specific areas and practices. Those that do exist are hearsay. This leaves the court attempting to determine the current market rate for attorneys dependent on the affidavits of attorneys submitted to support or oppose the motion

for attorney fees and previous court decisions written by courts which suffered from the same lack of reliable sources of information on reasonable attorney fees.

The court held that a reasonable method of determining the local market rate would be for each side to submit evidence from several local attorneys providing at least the following information: "1. What they charge; 2. Under what conditions, if any, are there variations between charges and receipts; 3. How the testifying lawyer matches up with the requesting lawyer's qualifications; 4. How the type of legal work which has produced these fees compares with the legal work at issue." Since neither side requested an evidentiary hearing on attorney fees, the court proceeded to determine the reasonable fees based upon the affidavits of attorneys submitted by each side.

The court determined that the \$250 per hour requested for lead attorney Witold J. Walczak, had been conceded as reasonable by the state. \$250 per hour was also reasonable for attorney Karl Baker, who had thirty years of experience, half as a supervising attorney, and had received \$225 per hour for a civil rights case he had litigated eight years earlier. A \$175 rate was reasonable for Kirk J. Hendrickson, an attorney with nine years of experience. The court held that a 1996 Allegheny County Bar publication submitted in opposition to the fee rate actually supported the requested fees as it was several years-

old and the requested fees were close to or within the publication's fee ranges.

The court held that the 331.20 billable hours spent on the case as calculated by plaintiff were reasonable except for three instances totaling 0.3 hours in which Walczak mailed the court or faxed documents, duties which could have been performed by a clerk. Thus, the requested amount was reduced by 0.3 x \$250 or \$75. Otherwise, the total number of hours was easily justified by the difficulty of the case of first impression which required the attorneys to familiarize themselves with out-of-state criminal law.

The fact that the constitutional law issues originally brought in the complaint were not ruled on is of no consequence. The plaintiff received 100% of the requested relief and it is public policy not to rule on constitutional claims when the case can be resolved based on statutory law. Furthermore, the constitutional claims were entangled with the state law claims. Since the extent of a plaintiff's success is a crucial factor in the award of attorney fees, had plaintiff been, less than 100% successful in receiving the requested relief or had the state and constitutional law claims been totally separate, a reduction would have been appropriate. In this case, he received 100% of the relief requested and the claims were inseparable. Therefore, court ordered the state to pay \$78,435.00 in attorney fees and \$713.50 in costs. See: *Doe v. Ward*, 282 F.Supp.2d 323 (W.D.PA 2003). ■

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# PHS and Florida Sheriff Fight Over Liability in Jail Beating Death Suit

Florida's Second District Court of Appeals has reversed the grant of summary judgment to the Florida Association of Counties Trust (FACT) and the Sheriff of Polk County in a lawsuit seeking indemnification by Prison Health Services (PHS).

On April 17, 1994, while a prisoner at Florida's Polk County Jail, Michael Cullaton sustained serious head injuries after guards used excessive force upon him. After being injured, Cullaton was taken to the jail's nurses' station, which was staffed by nurses employed by PHS, the provider of medical services at the jail. Not appreciating the extent of his injuries, the nurses kept Cullaton at the jail under observation until he lapsed into a coma. He was then transported to a hospital where he died several weeks later.

An investigation resulted in two guards being charged with and convicted of aggravated battery and making false official reports concerning this event.

After Cullaton's death, his estate notified the Sheriff and FACT, as the insurer of the Sheriff's employees and notified PHS of its intent to sue for medical malpractice. On November 15, 1994, before any lawsuit was filed, the estate agreed to settle with the Sheriff, FACT, and the four guards

who were involved in the incident for \$1 million in return for a general release of all claims, except those against PHS. Six days later, again before suit was filed, the estate settled with PHS, its employees, and its insurers for a lump sum of \$300,000 and a structured payment plan yielding \$3.6 million over time.

Pursuant to an indemnification provision contained in the Health Services Agreement between PHS and the Sheriff, the Sheriff and FACT separately demanded indemnification from PHS for the settlement paid to the Cullaton estate. The Sheriff claims to have paid \$100,000 of the \$1 million settlement. The Agreement, by which PHS contracted to provide medical services at the Polk County Jail, contained language requiring PHS to indemnify the Sheriff for claims resulting from the performance of work and services described in the Agreement.

PHS refused to pay the Sheriff and FACT because the claim was not covered by the indemnification clause. FACT filed suit, and the Polk County Circuit Court granted final judgment in favor of FACT. PHS appealed.

In order to find PHS was obligated to indemnify the Sheriff and FACT, the Second District said two issues must be resolved: (1) whether the claim was subject to indem-

nification as a matter of public policy; and (2) whether the claim was covered by the indemnification provision of the Agreement. The circuit court addressed only the second of the questions, holding that the Cullaton estate's claim against the Sheriff involved acts that are subject to indemnification as a matter of law.

The Second District said that indemnification as a matter of public policy depends on the nature of the claim. The Cullaton estate had potential claims based on both the intentional acts and the negligent acts of the Sheriff and the guards. Some of those claims include, but are not limited to, the intentional torts of the guards, the Sheriff's negligence in hiring and supervising the guards, the negligent provision of medical services, and the guards' negligence in transporting Cullaton to PHS for treatment. As there was never a lawsuit filed, the Court could not determine the nature of the claim or claims from the record. Accordingly, the judgment was reversed and remanded for determination of the factual issues. These facts will determine if the indemnification clause required PHS to indemnify the Sheriff or if the Sheriff had to indemnify PHS. See: *Prison Health Services, Inc. v. Florida Association of Counties Trust*, 858 So. 2d 1119 (Fla. 2<sup>nd</sup> Dist. 2003). ■

## Mailbox Rule Applies to Texas Prisoners Civil Filings

The Texas Supreme Court has held that the mailbox rule applies to civil litigation filed by Texas prisoners in Texas state courts, overruling at least two previous court of appeals decisions.

Charles Clay Warner, Jr., a Texas state prisoner, brought suit against a prison employee in Texas state district court. Warner had to file the suit within 31-days following the decision in the second step of the prison system's grievance procedure or risk

dismissal due to the statute of limitations for prisoner litigation, Texas Civil Practices and Remedies Code, § 14.005(b). He turned over the suit to prison officials, properly addressed and with sufficient postage, on the 30th day after the step two grievance was decided. Not shown in the record is the postmark date or the date the clerk actually received the suit; however, the clerk filed the suit seven days after Warner turned it over to the prison officials. The district court dismissed the suit as being filed after the 31-day limitations period had run out. Warner appealed. The court of appeals affirmed the dismissal. 96 S.W.3d 640. Warner petitioned the Texas Supreme Court for a writ of error.

The Texas Supreme Court reasoned that "neither the general rule protecting litigants from clerical errors in the courthouse nor Rule 5's mailbox rule addresses the position of the party who, because he is incarcerated and proceeding pro se, does not have direct

access to either the clerk's office or a United States mailbox for first-class mail. Just as we have declined to punish parties for failing to obtain a file stamp when they have timely placed the document in the constructive custody of a court clerk, we decline to penalize a pro se litigant for failing to obtain a postmark or a file stamp when the litigant has timely placed the document in the prison mail system, the only delivery system to which he or she has access."

Therefore, the court held the following: "Consistent with the Inmate Litigation Act [Chapter 14, Texas Civil Practice and Remedies Code] and Rule 5 of the Texas Rules of Civil Procedure, we hold that a pro se inmate's petition that is placed in a properly addressed and stamped envelope or wrapper is deemed filed at the moment prison authorities receive the document for mailing." See: *Warner v. Glass*, 135 S.W.3d 681 (Tex. 2004). ■

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# Civil Punitive Damages On Top Of Criminal Punishment Is Not Double Punishment

by John E. Dannenberg

The California Court of Appeals held that a drunk driver convicted of vehicular manslaughter was not constitutionally immune from the second punishment of punitive damages obtained in a subsequent civil suit by the decedent's family.

Deborah Gurnett, while driving under the influence, struck and killed James Shore, an American Airlines pilot, while he was riding his bicycle in a designated lane. She was convicted of gross vehicular manslaughter while intoxicated (California Penal Code § 191.5) and sentenced to ten years in state prison. Shore's wife sued for wrongful death on behalf of herself and their two children. A civil jury awarded them \$7.5 million in compensatory damages and \$35,000 in punitive damages. The gravamen of Gurnett's appeal was that the \$35,000 amounted to a second punishment obtained in violation of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution. The Court of Appeals disagreed.

Under her Fifth Amendment claim, Gurnett argued that some courts had expressly denied such added punitive damages. The court rejected this, noting that the precedent cited was for preventing the government from seeking second punishment, citing the U.S. Supreme Court: "Nothing ... precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the [double jeopardy] clause are not triggered by litigation between private parties." (*United States v. Halper*, 490 U.S. 435, 440, (1989).


As to Gurnett's Eighth Amendment Excessive Fines Clause argument, the court found this in essence to be another double jeopardy claim that must fail because "the excessive fines clause is simply unavailable to litigants resisting civil jury awards of punitive damages in lawsuits between private parties."

Finally, Gurnett's Fourteenth Amendment Substantive Due Process Clause claim was unavailing. Although it is true that California law precludes recovery of two penalties by a single plaintiff against a single defendant in one case for the same misconduct, no case on point ever held that "substantive due process" so precluded such a result. But in the case at bar, the Shore family did not recover more than one penalty. Rather, the state exacted its penalty and the civil suit gained another. Thus, a "multiple

penalty" argument was meritless.

Gurnett's "mass tort" claim was also rejected because there was no mass plaintiff action only the claim of one grieving wife and her children. Finally, Gurnett's claim alleging that such a "policy" permitted multiple criminal/civil punishments in violation of substantive due process principles was rejected because it would lead ineluctably

to the absurd result that a defendant who had first been subjected to civil punitive damages would thereby be immune from subsequent criminal prosecution.

Accordingly, the court affirmed the award of punitive damages and awarded attorney fees on appeal to the decedent's family. See: *Shore v. Gurnett*, 122 Cal. App.4th 166 (2004). 

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## Arizona Appellate Court Vacates Restitution Order In Escape Case

The Arizona Court of Appeals (COA), Division II, has vacated a trial court's restitution order requiring a state prisoner to reimburse the Arizona Department of Corrections (ADOC) for costs allegedly incurred as the result of a prison escape.

On September 29, 2000, Clayton Guilliams, an ADOC prisoner assigned to a maintenance crew, allegedly helped another prisoner, Steven Hummert, escape by driving him off the prison grounds concealed in an air conditioner box. Hummert was recaptured nearly two months later in Oregon. For his involvement, Guilliams pled guilty to attempted escape and was placed on 3-years' probation. Guilliams was also ordered, over his objection, to pay \$47,626.55 to the ADOC in restitution. The restitution order included \$25,283.94 for prison operations costs, including salaries, wages, overtime, and incidentals such as gasoline and sack lunches incurred the day of Hummert's escape; \$1,455.11 for hotel and airfare costs for an investigator's trip to Oregon; and \$20,887.50 to the ADOC's Criminal Investigation Bureau (CIB) for wages paid to personnel investigating the incident from the time of Hummert's escape until

several days after his capture.

Through a petition for post-conviction relief, Guilliams challenged the restitution order on two grounds: that the ADOC was not a victim under state law, and that "the costs of investigating an escape and recapturing the escapee were consequential damages and therefore not appropriate restitution...." Guilliams's petition was summarily denied and he appealed.

The COA granted Guilliams partial relief. Although the COA affirmed the rejection of Guilliams's claim that the ADOC could not be considered a victim entitled to restitution, it vacated the restitution order.

In deciding the restitution issue, the COA relied primarily on two cases. In *State v. Wilkinson*, 202 Ariz. 27, 39 P.3d 1131 (AZ 2002) the Arizona Supreme Court held that "restitution must be (1) based on economic loss that (2) would not have occurred but for the criminal act." The *Wilkinson* court added that the economic loss must stem directly from the criminal conduct and if it does not, the loss is "indirect and consequential and cannot qualify for restitution under Arizona's statutes'...." In *United States v. Vaknin*, 112 F.3d 579 (1st Cir. 1997) this concept was expanded. The *Vaknin* court concluded that to justify a restitution claim

under the Victim Witness and Protection Act, the government must show not only that a loss is the direct result of the criminal conduct, but also that the connection between the conduct and the loss is not too factually or temporally tenuous.

Relying on the *Vaknin* standard, the COA concluded that the state's restitution laws did not "encompass costs incurred to governmental entities that are performing routine functions, regardless of whether those costs can be traced back to a criminal act." Based on this, the COA reasoned that the costs incurred by the ADOC on the day of the escape were probably justifiable since they represented costs "above and beyond the normal costs of operating the prison," but that the costs claimed by the CIB for time spent investigating the escape were probably not.

Noting that an incomplete factual record prevented it from determining "the extent to which the restitution order accurately reflects the ADOC's direct economic losses and those justifiably attributed to Guilliams's criminal conduct," the COA vacated the restitution order and remanded for reconsideration in light of this decision. See: *State v. Guilliams*, 90 P.3d. 785 (AZ 2004). ■

## Idaho Prisoner States Valid Retaliation Claim Against Parole Commission

The Idaho Court of Appeals held that material fact issues regarding a prisoner's claim that he was retaliated against because of his litigious activities precluded summary judgment of his lawsuit against the parole commission.

Richard Drennon, a prisoner at the Idaho Maximum Security Institution, was denied parole in July 1999. Drennon subsequently filed a pro se habeas corpus petition alleging that the parole commission violated his constitutional and other rights by: denying him access to the materials used in reaching their decision; not affording him full consideration of the favorable material he presented; basing their decision on false and inaccurate information; and denying his parole in retaliation for his activities as a prison litigator. As to the retaliation claim, Drennon alleged that during his parole hearing the commissioners focused on his legal activities and berated him for filing

lawsuits and for helping others to do so. In a memorandum decision, the District Court of the Fourth Judicial District summarily dismissed Drennon's habeas petition and denied his motion for appointment of counsel. Drennon appealed.

The Court of Appeals (COA) affirmed in part, reversed in part, and remanded.

The COA first noted that because Idaho prisoners have no liberty interest in parole, there is no constitutionally protected right to due process in parole hearings. The court then held that Drennon failed to show that the parole commission violated Idaho Code § 20-223 (Idaho's parole statute) or its own rules by denying him access to the materials used in reaching their decision, or by refusing to consider materials he submitted on the day of the hearing. Likewise, Drennon failed to present any evidence showing that the parole commission in fact relied on false or inaccurate information. Thus, the COA held,

these claims were properly denied. The COA further affirmed the denial of Drennon's motion for appointment of counsel.

However, the appellate court reversed as to Drennon's retaliation claim holding that he had met the criteria for stating a valid First Amendment claim. First, Drennon rightly alleged that his litigious activities were protected under the First Amendment. Second, he claimed that the parole commission infringed on his right to engage in this protected activity by denying his parole "at least partly because of his legal actions against state officials and the legal assistance he gave other inmates." Third, Drennon sufficiently alleged and provided evidence that "the commission's alleged retaliatory parole denial was not reasonably related to legitimate penological interest" but rather may have been due to his litigious activities. See: *Drennon v. Craven*, 2004 Ida. App. LEXIS 78. ■



# Lucasville: The Untold Story of a Prison Uprising

By Staughton Lynd; Temple University Press, 2004; soft cover, 244 pages. \$16.95

Reviewed by Karen G. Thimmes

Death Row in Ohio is located at Mansfield Correctional Institution, a stone's throw from the fabled Mansfield Penitentiary, where much of the *Shawshank Redemption* was filmed. But for four men, conveniently categorized as "worst of the worst," Death Row is a tiny cell with a solid steel door and 23-hour-a-day lockdown. They are housed in Ohio's SuperMax prison in Youngstown and, together with George Skatzes (kept at Mansfield for attention to his medical problems), are known as The Lucasville Five.

Ohio has branded them "riot leaders" in the Lucasville prison uprising of 1993.

Retired attorney, prisoner advocate and former labor activist Staughton Lynd describes conditions in his book, *Lucasville: The Untold Story of a Prison Uprising* at Lucasville (actually SOCF, Southern Ohio Correctional Facility), a maximum security facility and one of the most violent prisons in the country, in the late 1980's. It had its factions—the Muslims, the Aryan Brotherhood, the Black Gangster Disciples—but each kept pretty much to itself, and there was little conflict. Men were mostly single celled. [Editor's Note: Lucasville was the prison at issue in *Rhodes v. Chapman*, 101 S. Ct. 2392 (1981) where the supreme court held that it was not unconstitutional to double cell prisoners so long as the "totality of conditions" did not violate constitutional norms.]

Along came a new warden in 1990, Arthur Tate, who wanted to impress Luke's population with what a tough, no-nonsense guy he was, especially after a prison teacher was murdered by a mentally unstable prisoner. He ordered double celling, and in particular, forced celling of blacks and whites. [Editor's Note: prisoners had previously filed suit and won relief requiring integrated cell assignments.] He encouraged snitching. He forbade prisoners to open their windows, even though the air circulation system malfunctioned. Prisoners were permitted only one five-minute phone call a year and had to march to meals in formation. "King Arthur" Tate ruled with an absolute, iron hand, and the repercussions of his "edicts" were bound to cause friction, discontent and fights.

Tate raised the ire of Muslim prisoners by calling for a mandatory TB test which would inject a tiny quantity of alcohol under the skin. Lucasville's Muslim com-

munity strongly objected, for introduction of alcohol in any form or amount into the body was forbidden by their dictates. Tate and his administration got a "second opinion" from Muslim leaders at two mosques in Ohio and told the SOCF Muslim leaders that those imams had no objections to the intradermal method. "But we are followers of the Hanafi Math-hab of South Africa," SOCF imam Siddique Hasan countered, "and they do not condone this method." Tate called in Hasan and his lieutenants for a courtesy conference at which he told them that skin tests were going to be administered and all prisoners would take them without exception. "Do you have anything to say?" Tate asked Hasan, who responded, "This is not a meeting where what we say makes a difference. It is a meeting where you are being a dictator and have adopted a hardline approach. You are not being understanding and sensitive toward our leadership position on the test."

And so the stage was set for an uprising, with the Muslims highly inflamed over the TB testing method, and the majority of the prison population disgruntled and discontent. Mr. Lynd relates in a detailed event chronology how the uprising started and spread. The eleven day uprising and prison siege is one of the longest in U.S. history. Ultimately, one guard and nine prisoners were killed by the rebels before they surrendered.

He also examines in great detail the farce of the post-riot trials. The state relied highly on snitch testimony, going so far as to intimidate and coerce prisoners to "say the right thing" in return for parole consideration. Anthony Lavelle, the chief snitch, testified at three different defendants' trials that he was present at a meeting where the murder of a guard (Vallandingham) was discussed, but no final decision was reached—suggesting that the actual killing was a rogue action by other prisoners, rather than a planned action.

The state had at its command the resources of the State Highway Patrol and great sums of money, while the defense was hampered by a smaller budget, thus restricting how much expert testimony, ballistics and forensic experts and research they could hire.

Prosecutors went to considerable lengths to portray a conspiracy, and conspirators are guilty even if commission of the planned action was impossible. However,

conspiracy cannot be punished by death in Ohio, so prosecutors substituted the charge of "complicity," a capital crime. This charge includes aiding and abetting as well as "soliciting another to commit a crime," and anyone complicit "shall be prosecuted and punished as if he were a principle offender." Prosecutors argued as well that the "course of conduct" involved "purposeful killing or attempt to kill two or more persons." This language may have been instrumental in the prosecution's indictment of each of the Five for two or more murders. Snitch Roger Snodgrass testified at trial to the existence of a "pact" between Muslims and the Aryan Brotherhood, but was vague about how he knew this as a fact. Thus his testimony is hearsay and certainly should not have been presented as a substantial factor in a capital trial!

In Ohio, the most famous name arising from the Lucasville riot is not one of the Five, but guard Robert Vallandingham, who became a martyr through his death allegedly

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## Lucasville (Cont)

at the hands of the Five plus other prisoners. Little is ever said about the nine prisoners who died in the riot.

A hostile venue may have contributed to the outcome of the Five's trials. Their juries included few African-Americans (2 of the Five are white). Heavy and sympathetic media coverage of Vallandingham's death and his mother's visibility and calls for vengeance contributed to bias. The "decision" to kill Vallandingham was at the heart of the theory of group guilt.

Other factors in the trial process of the Five were: carelessness, sloppiness, inaccuracies, and misstatements; withholding exculpatory evidence and not permitting certain witnesses to testify; judicial overreaching; admission of tapes, some barely audible, made by the FBI in the tunnel below L-Block during prisoner meetings during the riot—a violation of Ohio wiretap law (but permitted by the Ohio Supreme Court, who opined, "...the idea that rioting prisoners are entitled to privacy in plotting the deaths

of guards and other prisoners is absurd"); inconsistencies and perjury in snitch testimony; and overriding of one juror's reservations.

In Hasan's trial, the judge repeatedly barred testimony and witnesses explaining the causes of the riot, insisting, "This case is not a case concerning a riot. The riot occurred incidentally.... This is a murder case, a felonious assault case, a kidnapping case...."

Lynd includes portraits of the Five, all of whom he came to know personally, and adds his own important impressions of the men, the circumstances, and the riot. Men of differing races and ideologies found themselves united against the administration and came together for a short time as a brotherhood, a "convict race." The leadership roles into which the Five were forced during the uprising, and the subsequent retaliation against them, cemented their solidarity with one another. Given the bias and flaws in the trials, Mr. Lynd speaks strongly in favor of an amnesty, citing the amnesty following the infamous riot at Attica.

The state's zeal to convict the "riot leaders" illustrates its need to identify scape-

goats for the murder of Vallandingham and destruction of property, gives the *appearance* of serving justice, and reveals a dual hidden agenda: justifying the need for a "SuperMax" prison surpassing Lucasville in security and deprivation, and bringing perpetrators to justice, regardless of whether they are really innocent. And once again we see that, despite the platitudes about rehabilitation offered by prison administrators, the real goal of prisons is revenge, punishment, and profit.

This book has been banned by the Ohio prison system. Initially the decision was left up to individual prison mailrooms, and the book was permitted at SOCF. But officials decided that a map of L-Block was "incendiary" and forbade Ohio prisoners to possess the book...and the truth.

Prisoners outside Ohio may obtain a copy of this book free—thanks to an arrangement with the publisher by Mr. Lynd—by writing Barry Adams, Business Manager, Temple University Press, 1601 N. Broad St, Philadelphia, PA 19122. 📧

*Karen G. Thimmes is a long time Ohio prisoner rights activist.*

## Missouri Post-Conviction Proceedings Not Encompassed By PLRA Payment Scheme

The Missouri court of appeals has held that because a Missouri Supreme Court Rule 29.15 motion is not a civil action encompassed by the state's Prison Litigation Reform Act (PLRA), Mo. Rev. Stat. § 506.360 to 506.390 (2000), a Rule 29.15 movant cannot be required to pay costs associated with the proceedings.

After being convicted of forcible rape

and having his sentence upheld on appeal, James Roberson filed a pro se Rule 29.15 motion in the Circuit Court of Cole County and was granted leave to proceed in forma pauperis. The court appointed counsel to Roberson's case, who filed an amended motion. The court dismissed the amended motion without an evidentiary hearing and assessed costs of \$92 against Roberson pursuant to the PLRA. Roberson appealed arguing that "the PLRA does not encompass Rule 29.15 as a civil action requiring the payment of costs."

The Missouri Court Of Appeals, Western District, agreed. The appellate court noted that when a prisoner files a motion to proceed as an indigent in a civil action pursuant to

§ 506.366, § 506.369 provides a mechanism for the court to order partial payment of the court costs. However, § 506.366 is not implicated in a Rule 29.15 motion because Rule 29.15(a) specifically states that "rule 29.15 provides the exclusive procedure by which [a person convicted of a felony after trial] may seek relief in the sentencing court...." Moreover, Rule 29.15(b) stipulates that "no cost deposit shall be required."

Continuing, the appellate court examined Mo. Rev. Stat. § 514.040, which "provides that when the plaintiff in a civil case is permitted to sue as a poor person, 'such poor person shall have all necessary process and proceedings as in other cases, without fees, tax or charge as the court determines the person cannot pay[.]'" The appellate court concluded that read in conjunction with Rule 29.15, "an indigent Rule 29.15 movant is not only not required to pay a cost deposit, but is also not required to pay costs at any other stage of the proceedings."

The decision of the trial court was reversed and the case remanded with orders to reimburse Roberson for any costs paid. See: *Roberson v. State*, 140 S.W.3d 634 (Mo. Ct. App. 2004). 📧

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# Massachusetts Court Imposes Time Limits For Unrepresented Criminal Defendants

The Supreme Judicial Court of Massachusetts held that if an attorney is unavailable to represent an indigent criminal defendant, the defendant must be released within 7 days and the case against that defendant dismissed within 45 days.

This consolidated case arose from separate actions brought by the Committee for Public Counsel Services (CPCS) and the American Civil Liberties Union of Massachusetts (ACLU) on behalf of indigent criminal defendants who were being detained without representation due to a shortage of attorneys in the Hampden County bar advocates program.

The CPCS action, filed on May 6, 2004, involved Nathaniel Lavalley and 18 other indigent criminal defendants who were being held in lieu of bail or under preventive detention by orders of judges in the Springfield District Court. CPCS claimed that its public counsel division was unable to provide the defendants with representation due to underfunding and staffing limitations. The ACLU pursued its action on behalf of five similarly situated defendants being held by order of judges in the Holyoke District Court.

The CPCS and the ACLU both filed petitions in the Supreme Judicial Court one day after the respective district courts (Springfield and Holyoke) denied their motions to compensate assigned counsel at a higher rate than had been authorized by the state legislature. Both petitions alleged that the current compensation rates--the lowest in the country--had caused the CPCS staff shortage. The authorized per hour rates for private counsel in fiscal year 2004 were \$30 for a District Court case, \$39 for a non-homicide Superior Court case, and \$54 for a homicide case.

On review, the Supreme Judicial Court held that the petitioners were being denied their right to counsel under article 12 of the Massachusetts Declaration of Rights and granted relief--though not the precise relief petitioners had requested.

The Court held that because a defendant's liberty is at stake in a bail or preventive detention hearing, the "principles of procedural due process [under article 12] are implicated." These principles include the right to be heard, "which necessarily includes the right to be heard by counsel."

Moreover, defendants have an undisputed right to counsel at trial--counsel that is active and not merely appointed--under both the Constitution and the MDR. Under article

12 the right to trial counsel "attaches at least by the time of arraignment" because certain of counsel's duties--including conducting interviews, preserving physical evidence, and locating witnesses--must be performed long before trial begins so as not to be negatively affected by the passage of time.

The Court further held that the petitioners were not required to make a specific showing of harm because petitioners had no counsel and could not properly be expected to assess for themselves the seriousness or degree of any harm; "it is enough that they have shown a violation of [their fundamental constitutional right] that may likely result in irreparable harm if not corrected."

After considering the above, and noting that it was the Legislature's duty to make

provisions for the representation of indigent defendants, the court held that proceedings in which a defendant was unable to meaningfully participate could not be allowed to proceed. Specifically, in regard to all current and future criminal defendants with cases pending in Hampden County, the Court ruled that if, "despite the good faith efforts of CPCS, no attorney has filed an appearance on behalf of an indigent defendant within forty-five days of arraignment, the criminal case against such a defendant must be dismissed without prejudice.... Similarly, an indigent defendant who is held in lieu of bail or under an order of preventive detention may not be held for more than seven days without counsel." See: *Lavalley v. Justices in the Hampden Superior Court*, 442 Mass. 228; 812 N.E.2d 895 (Mass. 2004).

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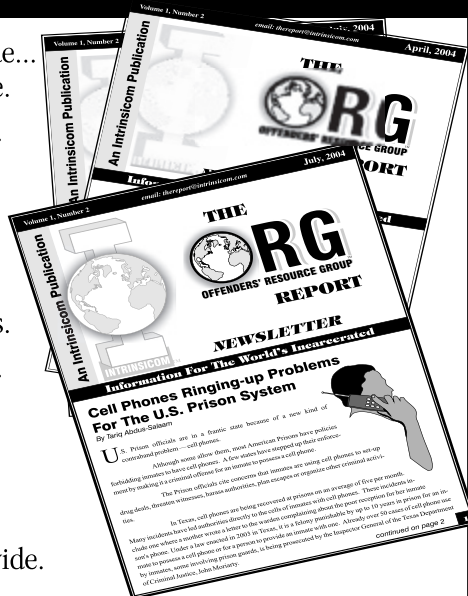
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## News in Brief:

**Alaska:** On February 5, 2005, Alaska attorney general Gregg Renkes (R) resigned after it came to light that while promoting a trade deal with a Taiwanese energy company he held some \$100,000 worth of stock in the company and had served as its lobbyist and adviser before becoming attorney general.

**Argentina:** Some 2,000 prisoners rebelled on February 10, 2005, in the maximum-security San Martin prison in Cordoba, taking 24 guards and the prison director hostage. The revolt apparently erupted after a prison guard pushed the wife of a prisoner. On February 11, some 1,000 police and National Guard troops arrived and surrounded the prison as concerned family members gathered outside. When the conflict ended with the prisoners' surrender later that day, five prisoners, two guards and a police agent had been killed and dozens of people were wounded. The prison was built a century ago for 900 prisoners; relatives say the prisoners are treated "like animals."

**California:** On December 30, 2004, the California Youth Authority (CYA) suspended all work and public service crews after two of its prisoners, Thao Lor, 22, and Yatau Her, 21, escaped from the Cal Expo, annual state fair site, where they were sorting winter coats for a charity group. Both men are Hmong. Lor was imprisoned for second degree murder and Her for assault with a deadly weapon. CYA officials were unable to say why, if the men were so dangerous, they had been placed in an outside work position.

**California:** On January 5, 2005, Michael Overton, 42, a vocational instructor at the Sierra Conservation Center in Tuolumne, pleaded guilty to nine counts of child molestation stemming from his attacks on two girls aged between 12 and 16 whom he plied

with drugs and alcohol before fondling and groping them.

**California:** On May 20, 2004, Julio Vega, 41, a guard at the US Penitentiary in Lompoc pleaded guilty in federal court to attempting to smuggle heroin into the prison. Vega was arrested in an FBI sting operation where he accepted 3 grams of heroin and \$3,000 from an undercover FBI agent posing as a prisoner's girlfriend and agreed to deliver it to a prisoner at the penitentiary. In other cases, Vega would accept heroin as payment and then sell it to prisoners himself. In return for the plea, prosecutors dropped bribery and drug possession with intent to distribute charges against Vega.

**Colorado:** On February 8, 2005, former Conejos county sheriff Isaac Gallegos and his wife Mary were indicted by a grand jury with embezzling public property, criminal extortion and witness intimidation. The charges stem from forcing jail prisoners to build an addition to their home and punishing prisoners who refused to do so and stealing money from the county. Mary was the Conejos county jail administrator and victims advocate coordinator. The couple is also accused of stealing guns, a washing machine and a computer system from the jail. When jail prisoner Timmy Salazar reported he was threatened with a transfer to a distant jail if he refused to work on the Gallegos' home, the Colorado Bureau of Investigation investigated the claim leading to the indictment.

**Colorado:** On September 16, 2004, Arapahoe county prosecutors charged Paul Pratt, 23, Clarence Churchill, 29, John McGhee, 30, Jeanene McGhee, 26 and Rochelle Horton, 39, with numerous weapons, solicitation of murder and attempted escape charges. The five accused purchased weapons and explosives from an undercover cop at the behest of Khadasi Horton, an Arapahoe county jail prisoner awaiting trial on robbery charges, with the intention of murdering witnesses against him and then launching an attack, led by his mother, on the jail to free him. Lacking the money to pay for the weapons and explosives, Horton gave the undercover cop he made the deal with a written contract promising to pay later.

**Colorado:** On September 30, 2004, two teenagers escaped from the Cornell Southern Peaks Treatment Center in Colorado Springs and made it to Canon City before being recaptured. The private, for profit Cornell prison had been open less than two months when the escape occurred.

**Georgia:** In August, 2004, officials at

the Georgia Diagnostic and Classification Prison in Jackson claimed to have foiled an escape plot by death row prisoners David Franks, Andrew Deyoung and Michael Nance. The prisoners had allegedly cut through the wall air vents in their cells and were working on cutting through a door that would have let them out of the prison's death row cell house. Guards found hacksaw blades, cash, welding materials, 25 feet of bed sheets fashioned into ropes, ski masks and long johns, knives, duct tape, a flashlight and a map of Georgia. An unidentified guard was suspended by prison officials and investigated for allegedly supplying the items to the prisoners. Since death row has no air conditioning, the fans in the unit make enough noise to cover up the sound of hacksaws. Prison officials discovered the plot after receiving a tip from a prisoner snitch. All three prisoners are facing execution for murder.

**Latvia:** Each weekend tourists pay \$9.20 to spend the night in the former Nazi and Soviet era prison in Liepaja. \$3.70 buys a tour of the prison. The overnight deal buys a faux "interrogation" by mock prison guards, a staged execution and much more.

**New Mexico:** In February, 2005, officials at the Socorro County jail in Albuquerque found a brick sized quantity of marijuana on prisoner Joseph Padilla. They were trying to determine how he obtained the drug.

**New Mexico:** On September 2, 2004, former Bernalillo state district court judge John Brennan pleaded guilty to possessing cocaine and aggravated drunk driving. He was sentenced to one year of unsupervised probation. Brennan told sentencing judge George Perez he felt "embarrassed and humiliated as a result of my actions." But, at least he didn't go to jail or prison.

**Ohio:** On February 3, 2005, death row prisoners Richard Cooley, 37, and Maxwell White, 39, attempted to escape from the Mansfield Correctional Institution by climbing out of a fenced recreation cage. The men were unable to get over razor wire before being recaptured by guards.

**Ohio:** On February 7, 2005, Ohio Supreme Court justice Alice Resnick pleaded guilty to drunk driving in Bowling Green. Her attorney, Sheldon Wittenberg, said Resnick "For the better part of her adult life, has been fighting alcoholism." He called the drunken driving incident a relapse and noted Resnick had no intention of resigning from the bench. No comments were made as to the effect, if any, her alcoholism had on

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her ability to serve as a judge. Resnick was sentenced to a six month driver's license suspension and was ordered to complete a three day alcohol rehabilitation program.

**Ohio:** On June 28, 2004, Kyle Rice, 34, a guard at the London Correctional Institution was charged in Madison county municipal court with rape and domestic violence for allegedly assaulting an unidentified woman.

**Ohio:** On June 8, 2004, Kimberly Butkovich, 40, was arrested for smuggling balloons of marijuana to a prisoner at the London Correctional Institution for his birthday. Butkovich was arrested during the visit. Prison investigators learned of the drug smuggling plot while monitoring the unidentified prisoner's phone calls.

**Oklahoma:** On December 30, 2004, 8 prisoners in the Washington County Detention Center were charged with possessing marijuana in the jail. The men were charged after an unidentified prisoner informant told jail officials the illegal weed was being smoked inside the jail.

**Oklahoma:** While searching the yard of the Talawanda Heights unit of the Oklahoma State Penitentiary in McAlester on September 1, 2004, guards found a basketball containing nearly two pounds of marijuana inside. The basketball contained 30 one ounce packets of marijuana and prison officials, who acted on a tip from local police, claimed not to know how it got there.

**Peru:** At least five prisoners were killed and 23 others wounded by bullets on February 8, 2005, at Lurigancho prison, located in the San Juan de Lurigancho district of Lima. The violence reportedly erupted in a clash among different groups of prisoners for control of lucrative illegal businesses in the jail. The facility was built to hold 2,000 prisoners and currently holds 8,300. All injuries were inflicted by prisoners.

**Tennessee:** On December 29, 2004, two guards at the Northwest Correctional Complex in Tiptonville were injured when a prisoner kicked one guard in the face and others intervened when other guards rushed to attack the prisoner. Prisoners called family members to report a riot. DOC media flack Roland Colson said the incident involved "less than a handful" of prisoners and that the uprising was subdued with tear gas within three hours. He denied that a riot occurred. "Inmates like to create stories and get their names in the press." One guard was treated for missing teeth and another suffered minor injuries.

**Texas:** On September 15, 2004, Houston criminal defense lawyer C. Tom.


Zaratti, 60, was convicted of possessing child pornography on his home computer and sentenced to 10 years in prison. When he took his computer to a repair shop, a technician found 61 movies and more than 90 photos of teenagers and young children having sex. At trial Zaratti disclaimed knowledge of the materials and argued a computer virus had infected his machine and placed the photos and movies there. While free on bail awaiting trial he was arrested and police again found child pornography on his computer. Zaratti practiced law from his home and was usually court appointed to represent indigent defendants.

**Texas:** On September 30, 2004, Torrence Henry, 28, Austin Davis, 18, and Jason Lee, 22, escaped from the Bi State Justice Building Jail in Texarkana by tearing a hole in the ceiling of their units shower and escaping through the ventilation system. Henry was charged with murder and was awaiting trial. Davis and Lee were arrested shortly after the escape was discovered. The jail is operated under contract by the private, for profit company Civigenics.

**Texas:** On September 30, 2004, two unidentified 16 year old children at the Ector County Youth Center prison in Odessa escaped from the prison by shocking a cook with electricity, stealing her car and eluding jail guards. The children left a note saying "This is our day."

**Venezuela:** On December 25 and 26, 2004, riots in five separate Venezuelan prisons claimed the lives of four prisoners and seriously injured six others. All the injuries were by gunshots inflicted by other prisoners.

**Washington:** On December 24, 2004, Lisa Jones, 33, a prisoner at the Washington Corrections Center for Women in Gig Harbor, hanged herself in her cell. She had been in prison for approximately one year and was due to be released in June, 2005.

**Washington:** On September 12, 2004, the state Department of Social and Health Services moved its lone civilly committed "sex predator," Laura McCollum, 46, to its McNeil Island facility to be housed with the 190 male detainees. One of three women in the nation civilly committed as a "sex predator," McCollum is not happy at being housed and treated with male sex offenders. Experts in sex offender treatment say that it is generally not a good idea to mix sex offenders by gender. DSHS officials glossed over such concerns noting McCollum had nothing to fear and she would be treated with pedophiles that have no interest in adult women. McCollum had been convicted of sexually assaulting a number of small children. 

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# Washington Absconding Does Not Toll LFO Collection Statute

The Washington State Court of Appeals for Division 1 has held that

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See page 34 for details

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RCW 9.94A.753 affords the state 10 years from a prisoner's release from total confinement in which to collect Legal Financial Obligations (LFOs) from prisoners. The court also held that a probationer's absconding does not toll that period of time.

Gordon Adams was convicted of possession of stolen property and forgery 1988, and was convicted of similar charges in 1990. Both cases were in Washington courts, and both ordered Adams to pay court costs. Adams paid neither debt.

Pursuant to the 1990 conviction Adams was sentenced to prison, where he was released to Oregon authorities in 1993. He did a short stint in an Oregon prison and was again released in 1994. In 1995 Adams absconded without paying his LFOs. He was jailed on new charges in Spokane, Washington in 2002, and the DOC attempted to collect the old LFO debt, but the trial court refused to so order, asserting that the time for collecting

those debts had run. The DOC appealed.

On appeal the court recognized that LFO debt collection was governed by RCW 9.94A.753, which allows the state to collect LFOs from prisoners for 10 years following their release from total confinement or 10 years after entry of the judgment and sentence, which ever later occurs, but does not allow for tolling of the time period because a probationer absconds from supervision. The court also recognized that the statute allows the DOC one 10-year extension for collecting LFOs. However, since the DOC did not petition for an extension in Adams' case, the 10-year period for collection of his LFOs had run, thus the court held that they could no longer be forcibly collected.

The court ruled that since the time for collecting Adams' LFOs had run, the debt must be quashed. See: *Washington v. Adams*, 121 Wn. App. 438; 88 P.3d 1012 (Wash. Ct. App. Div. 1, 2004). ■

## Other Resources

### ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

### Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

### CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

### FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

### Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rulings, administrative developments and news about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

### Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 881, Coquille, OR 97423.

### Hepatitis C Awareness News

Hepatitis C and HIV/HCV newsletter free on request. Write: National Hepatitis C Prison Coalition, PO Box 41803, Eugene, OR 97404.

### November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 795 South Cedar, Colville, WA 99114.

### Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

### Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.



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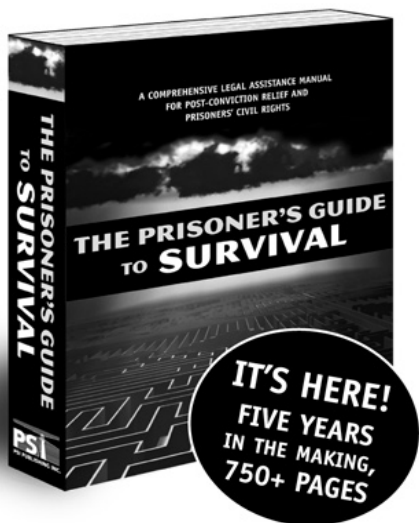
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# PRISON

## Legal News

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*Dedicated to Protecting Human Rights*

April 2005

### Abu Ghraib's Stain on Military Medicine

*by Steven H. Miles, MD*

This article examines the relationship of military medical personnel to abuses of detainees at Abu Ghraib and other detention centers in Iraq, Afghanistan, and Guantanamo Bay. It is based on testimony before the US Senate and House,<sup>1,2</sup> US government policy documents,<sup>3-7</sup> US armed forces' policies,<sup>8-12</sup> US Army investigations of abuses,<sup>13-17</sup> trial documents,<sup>18-23</sup> human rights groups' investigations,<sup>24-26</sup> and news media accounts. These documents suggest that the military medical system and its personnel failed to protect the human rights of detainees, sometimes collaborated with interrogators or abusive guards, and failed to properly report injuries or deaths caused by torture. The emerging evidence of the relationship of military medicine to these

abuses deserves a full investigation and has profound implications.

#### The Policies

As the Bush administration planned to retaliate against Al Queda for the terrorist attacks on the US, it was reluctant to accept that the Geneva Convention Relative to the Treatment of Prisoners of War would apply to Al Queda detainees at Guantanamo and Afghanistan.<sup>24</sup> Policy documents shed light on their reasoning. A January 2002 Department of Justice memorandum to the Department of Defense concluded that international treaties and laws did not apply to Al Queda detainees because it was not a national signatory to those conventions.<sup>4</sup> It also concluded that the Convention did not apply to Taliban detainees because of Al Queda influence over the government of Afghanistan and the country was a "failed state" that could not function as a party to treaties. In February 2002, the US president signed an executive order stating that although the Geneva Conventions did not apply to Al Queda or Taliban detainees, "Our Nation ... will continue to be a strong supporter of Geneva and its principles. . . . The United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity* [emphasis added] in a manner consistent with the principles of Geneva."<sup>25</sup> This phrasing subordinates US compliance to the Geneva Convention to undefined "military necessity."

An August 2002 Justice Department memorandum to the President and a March 2003 Defense Department Working Group distinguished cruel, inhumane, or degrading treatment, which could be permitted in US military detention centers, from torture,

which was ordinarily banned except when the President set aside the US commitment to the Convention in exercising his discretionary war-making powers.<sup>3,7</sup> Those memoranda semantically analyzed words "severe," "harm," or "profound disruption of the personality" in legal definitions of torture without grounding those terms on any references to research showing the prevalence, severity, or duration of harm from abusing detainees.<sup>27-32</sup>

In late 2002, the Secretary of Defense approved "Counter Resistance Techniques" including nudity, isolation, and exploiting "fear of dogs," for interrogating Al Queda suspects at Guantanamo Bay.<sup>6</sup> On April 16, 2003, he approved a revised list of techniques, again subordinating the Geneva Convention to "military necessity," and adding, "Nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees."<sup>26</sup> That directive states that persons devising interrogation plans should give "consideration" to the "view" by other countries that some of the authorized techniques such as threats, insults, or intimidation violate the Geneva Convention. Interrogation policies for detainees in Iraq and Afghanistan remain unavailable as of this writing.

In announcing its investigation of human rights abuses at Abu Ghraib in January 2004, US Central Command (CENTCOM) stated that the "Coalition is committed to treating all persons under its control with dignity, respect and humanity."<sup>33</sup> That description of CENTCOM policy, and a similar memorandum by Abu Ghraib's commanding officer,<sup>12</sup> do not acknowledge Geneva obligations to detainees but do reject a distinction between torture and inhumane treatment with regard to interrogating Abu Ghraib detainees who

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PUBLISHER  
**Rollin Wright**

EDITOR  
**Paul Wright**

EXECUTIVE DIRECTOR  
**Donald W. Miniken Jr.**  
CIRCULATION MANAGER  
**Jennifer Umbecker**

COLUMNISTS  
**Mumia Abu Jamal, Denise Johnston, Daniel E. Manville, Kent Russell**

CONTRIBUTING WRITERS  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams, Mark Wilson & Robert Woodman**

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## **Military Medicine (Contd)**

were suspected of Al-Qaida ties. The *Interrogation Rules of Engagement* posted at Abu Ghraib stated, "[Interrogation] Approaches must always be humane . . . Detainees will NEVER be touched in a malicious or unwanted manner. . . The Geneva Conventions apply."<sup>11</sup> However, local commanding officers were unfamiliar with the Geneva Convention or Army Regulations regarding abuses.<sup>13-15</sup> Although US military personnel receive at least a 36 minutes of basic training film on respecting human rights, military personnel at Abu Ghraib did not receive additional human rights training and did not give such training to civilian interrogators working there.<sup>1,15,17</sup>

Military medical personnel in charge of detainees in Iraq and Afghanistan denied being trained in Army human rights policies.<sup>17</sup> Arab language synopses of Geneva protections were not posted in the cellblocks in Iraq and Afghanistan as required by Army regulation.<sup>2,10,13,17</sup>

The public record contains little on US policy for the role of health personnel in interrogating detainees in Iraq, Afghanistan, and Guantanamo Bay. The August 2002 Department of Justice and the March 2003 Defense Department Working Group memoranda do not distinguish between coercive interrogation involving soldiers from those employing medical personnel or expertise. For example, both documents excuse the use of drugs during interrogation.<sup>3,7</sup> Neither document mentions medical ethics codes or the history of medical or psychiatric complicity with torture or inhumane treatment.<sup>27,28,34,35</sup>

The Secretary of Defense authorized two practices at Guantanamo Bay that undermined the medical care for Al Qaida suspects. In November 2002, he directed, that for "selected detainees" [of those being interrogated by being kept in isolation], the Officer in Charge of Interrogation "will approve all contacts with the detainee, to include medical visits of a non emergent nature."<sup>6</sup> This provision empowers an interrogator to deny and thus abridge a detainee's Geneva right to request a medical evaluation. The potential adverse effect of such a policy may be illustrated by the allegation that analgesia was withheld during the interrogation of Abu Zubaida, an Al Qaida operative, who suffered a gunshot wound during his arrest.<sup>36</sup> In April 2003, the Secretary directed Guantanamo Bay interrogators to ensure that detainees are "medically

and operationally evaluated as suitable (considering all techniques to be used in combination)."<sup>6</sup> That provision, as discussed below, risks engaging medical personnel in setting the harshness of the interrogation. The *Interrogation Rules of Engagement* posted at Abu Ghraib were imported from the US operation in Afghanistan and echoed the April 2003 memo by the Secretary of Defense. They stated, "Wounded or medically burdened detainees must be medically cleared prior to interrogation" and also approved "Dietary manipulation (monitored by med)" for interrogation.<sup>11</sup> Although Defense Department memoranda define the latter as dietary substitution (e.g., from hot meals to cold field rations) rather than food deprivation or compulsory violation of Islamic dietary rules, there are credible allegations of food deprivation.<sup>6,19,25</sup>

### **The Offenses**

The list of confirmed or reliably reported abuses of detainees in Iraq and Afghanistan include beatings, burns, shocks, bodily suspensions, asphyxia, threats against detainees and their relatives, sexual humiliation, isolation, prolonged hooding and shackling, and exposure to heat, cold, and loud noise.<sup>1,14,19,24-26</sup> They include deprivation of sleep, food, clothing, and materiel for personal hygiene. They include denigration of Islam and forced violation of its rites.<sup>19</sup> Detainees were forced to work in areas that were not de-mined and seriously injured.<sup>26</sup> [Editor's Note: It should also be noted that among the detainees at both Abu Ghraib and Guantanamo Bay are children as young as 11 who are presumably also being subjected to the torture and abuse described above.] Abuses of women detainees are less well documented but include credible allegations of sexual humiliation and rape.<sup>13,14,37</sup>

US Army' investigators concluded that Abu Ghraib's medical system for detainees was inadequately staffed and equipped.<sup>8,11,13,16,17</sup> The ICRC found that the medical system failed to maintain "internment cards" with medical information necessary to protect the detainees' health as required by the Geneva Convention; this appears to have been due to a policy decision to not process new detainees.<sup>16,26</sup> Few units in Iraq and Afghanistan complied with the Geneva obligation to provide monthly health inspections.<sup>17</sup> The medical system also failed to assure that prisoners could request proper medical care as required by Geneva Convention. For example, an Abu Ghraib detainee described how a purulent hand injury caused by torture went untreated and that an Iraqi



physician tending to detainees at the behest of the US military treated him in a cellblock hallway after saying that he could not treat the detainee's ear that was bleeding after a beating in a clinic.<sup>20</sup> The medical system failed to establish procedures, as called for by Article 30 of the Geneva Convention, to ensure proper treatment of prisoners with disabilities. For example, an Abu Ghraib detainee's deposition reports the crutch that he used because of a broken leg was taken from him and his leg was beaten as he was ordered to renounce Islam. That detainee told a guard that the prison "doctor" had told him to immobilize a badly injured shoulder; the guard then suspended him from the shoulder.<sup>21</sup>

The medical system collaborated with designing and implementing psychologically and physically coercive interrogations. Army officials stated that a physician and a psychiatrist helped design, approve, and monitor interrogations at Abu Ghraib.<sup>15</sup> In one example of the compromised medical supervision of such work, a detainee collapsed and was apparently unconscious after being beaten by a guard, medical staff revived the detainee with an inhaler and left and the abuse continued.<sup>22</sup> Guantanamo Bay's Commanding General said that the medical records of detainees were routinely shared with interrogators despite objections by the International Committee of the Red Cross.<sup>38</sup> Such records may have contained information about phobias and family names that would have been important to interrogation techniques such as "Fear Up Harsh."

There are isolated reports that medical personnel directly abused detainees. Two detainees' depositions describe an incident where a "Doctor" came to a cellblock to treat a prisoner who was lacerated during a beating. The medic gave suture materials to the guard to suture the laceration.<sup>22,23</sup> Another medic told a reporter that he had hit a detainee out of anger.<sup>39</sup>

The military medical system in Iraq and Afghanistan failed to accurately report illnesses and injuries.<sup>26</sup> Abu Ghraib's authorities did not notify families of deaths, sicknesses, or transfers to other medical facilities as required by Conventions.<sup>26,50</sup> Trial testimony tells of a medic placing a fake intravenous catheter into the arm of a detainee who died under torture in order to create evidence that he was alive at the hospital.<sup>40</sup> In another case, an Iraqi man, taken into custody by US soldiers was found months later by his family in an Iraqi hospital. He was obtunded or comatose, had three skull fractures, a severe thumb fracture and burns on the bottoms of his feet. A US medical report at the hospital

stated that heat stroke had triggered a heart attack that put him in a coma; it did not mention the injuries.<sup>41</sup> In another instance, a US soldier at Guantanamo Bay was ordered to simulate a resisting prisoner.<sup>42</sup> Guards, unaware of the deception, beat him and caused a traumatic brain injury and seizures that remain refractory to treatment. Military authorities initially maintained that medical personnel had informed them that the soldier's medical discharge was unrelated to the beating. Two weeks later, in response to news media inquiries, an amended medical report was released.

Death certificates of detainees in Afghanistan and Iraq were falsified or their release or completion was delayed for months.<sup>24,43</sup> Medical investigators either failed to investigate unexpected deaths of detainees in Iraq and Afghanistan or performed cursory evaluations and physicians routinely attributed detainee deaths on death certificates to "heart attacks," "heat stroke," or "natural causes" without noting the unnatural etiology of the death.<sup>44,47</sup> In one example, soldiers tied a beaten detainee to the top of his cell door and gagged him. The death certificate indicated that he died of "natural causes . . . during his sleep." After news media coverage, the Pentagon revised the certificate to say that the death was a "homicide" caused by "blunt force injuries, and asphyxia."<sup>24</sup> In November 2003, Iraqi Major General Abed Mowhoush's head was pushed into a sleeping bag while interrogators sat on his chest. He died; CPR by medics was unsuccessful and a surgeon at the scene said he died of natural causes. Six months later, the Pentagon released a death certificate calling the death a homicide by asphyxia.<sup>45</sup> Medical authorities allowed misleading information released by military authorities to go unchallenged. For example, for more than a year, military spokespeople said that a 22-year-old Afghan detainee had died of a "heart attack" until news media released a military autopsy report indicating that he died of "blunt force injuries to lower extremities complicating coronary artery disease."<sup>24</sup> In June 2004, the US Secretary of Defense issued a more stringent policy for death investigations.<sup>46</sup>

Finally, although knowledge of torture and degrading treatment was widespread at Abu Ghraib, and was known to medical personnel,<sup>13,39,47</sup> there is no report prior to the January 2004 Taguba investigation of military health personnel reporting abuse, degradation, or signs of torture up or outside the chain of command to stop those practices.

## The Legacy

Pentagon officials offer many reasons for the human rights abuses including poor training, understaffing, overcrowding of detainees and military personnel, anti-Islamic prejudice, racism, pressure to procure intelligence, a few criminally-inclined guards, and the stress of war and uncertain lengths of deployment.<sup>1,2,13,16,17</sup> Fundamentally however, the stage for these offenses was set by policies that were lax or permissive with regard to human rights abuses and a military command that was inattentive to human rights. *[Editor's Note: A simpler explanation is that every documented abuse that has come to light is merely the expected culmination of explicit policy decisions. That no ranking or commanding officer has been disciplined, reprimanded or in anyway held responsible for the abuses indicates they are indeed de facto policy.]*

Legal arguments as to whether Iraqi, Afghan, or Guantanamo' detainees were prisoners of war, soldiers, "enemy combatants," terrorists, citizens of a failed state, insurgents, or common criminals miss an essential point. The US has signed or enacted numerous instruments including the UN's Universal Declaration of Human Rights,<sup>48</sup> the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>49</sup> UN Standard Minimum Rules for the Treatment of Prisoners,<sup>50</sup> the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,<sup>51</sup> and US military internment and interrogation policies,<sup>8-10</sup> that collectively contain mandatory and voluntary standards barring US armed forces from practicing torture or degrading treatments of all persons. For example, the United Nations' Universal Declaration of Human Rights states, "No one shall be subjected to torture or to cruel, inhuman or

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## Military Medicine (Contd)

degrading treatment or punishment.”<sup>48</sup> The Geneva Convention states “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction . . . The following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . Outrages upon personal dignity, in particular, humiliating and degrading treatment. . . . No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”<sup>52</sup> Furthermore, the US War Crimes Act says that US forces will comply with the Annex to the Hague Convention Respecting the Laws and Customs of War on Land and the Geneva Convention Relative to the Treatment of Prisoners of War both of which bar torture or inhumane treatment.<sup>52-54</sup>

Pentagon leaders testified that military officials did not investigate or act on reports by Amnesty International and the International Committee of the Red Cross (ICRC) of abuses at Abu Ghraib and other coalition detention facilities throughout 2002 and 2003.<sup>1,24-26</sup> The command at Abu Ghraib and in Iraq was inattentive to human rights organizations’ and to soldiers’ oral and written reports of abuses.<sup>55</sup> After the ICRC criticized the treatment of Abu Ghraib detainees, its access to the facility was curtailed.<sup>1</sup>

The relationship of military medicine with regard to these abuses merits special attention because of the moral obligations of medical professionals with regard to torture and because of horror at health professionals who are complicit by deed or silence with torture. Active medical complicity with

torture has occurred in South America, Europe, Africa, and Asia. Iraqi physicians collaborated with torture under Saddam Hussein’s regime.<sup>56</sup> In response, physicians’ and nurses’ professional organizations have created codes forswearing participation in torture.<sup>27,28,29,34,57,58</sup> Physicians in Chile, Egypt, Turkey and other nations have taken great personal risk to expose and stop the practice of state-sponsored torture.<sup>27,28,59</sup> Health professionals have created organizations including Physicians for Human Rights and Amnesty International’s Health Professionals Network. Over the last fifty years, non-medical groups have asserted that healers must be advocates for persons at risk of torture.<sup>27,28,34,35,60</sup>

Military personnel treating prisoners of war, the enemy, face a particular “dual loyalty conflict.”<sup>61</sup> The Geneva Convention addresses this ethical dilemma squarely: “Although [medical personnel] shall be subject to the internal discipline of the camp . . . , such personnel may not be compelled to carry out any work other than that concerned with their medical . . . duties.”<sup>52</sup> By this standard, the moral advocacy of military medicine for the detainees of the war on terror broke down.

If Abu Ghraib is to leave a legacy of reform, it will be important to clarify how the breakdown occurred. The emerging evidence points to policy and operational failures. High-level Defense Department policies were inattentive to human rights and to the ethical obligations of medical care for detainees.<sup>6</sup> One policy empowered interrogators to evaluate and refuse the request of a person under interrogation for medical evaluation. Another directed clinicians to medically clear and monitor interrogations. Although proposed as a “Safeguard,” that role threatens clinicians’ advocacy for detainee’s well-being by positioning clinicians to use medical judgments to set the harshness of interrogation.<sup>61</sup> It will be important to determine whether and how senior military medical officials reviewed, challenged, or tempered those policies.

At the operational level, medical personnel assumed the role, assigned by policy, of evaluating persons for interrogation and monitoring coercive interrogations and interrogators used medical records to develop interrogation approaches. Medical records and death certificates were falsified to conceal torture, a form of complicity in torture.<sup>62,63</sup> Furthermore, the military medical service failed to assure that health care for detainees met minimal staffing, equipment and performance standards that

were designed to promote humane care of detainees.<sup>13,17,26</sup> Medical personnel who knew about abuses condoned torture by failing to put their status and credibility in service of halting the abuses in violation of their duty to detainees.<sup>34,47,61</sup>

Which medical professionals were responsible for this misconduct? The US Armed Forces deploy physicians, physicians’ assistants, nurses, medics (with several months of training) and various command and administrative staff. International statements assert that every health care worker has an ethical duty to oppose torture. For example, the UN Principles of Medical Ethics Relevant to the Protection of Prisoners Against Torture refers to “health personnel,” “particularly physicians” but it also names physician assistants, paramedics, physical therapists and nurse practitioners.<sup>35</sup> Likewise, the Geneva Convention refers to the obligations of “medical personnel,” defined as including physicians, surgeons, dentists, nurses or medical orderlies.<sup>52</sup> Furthermore, the US Armed Forces medical services are under physician commanders and each medic, as with civilian physician’s assistants, is personally accountable to a physician. Thus, physicians are responsible for the policies of the medical system; military medical personnel are accountable to ethics of medicine regarding torture.<sup>47</sup>

Abu Ghraib will leave a substantial legacy. Some detainees died and others will suffer long-term effects. As the prison milieu became brutalized, alcohol abuse and sexual misconduct by soldiers increased. To address this morbidity and misconduct among US soldiers, medical personnel prescribed anti-depressants and supported an Alcoholics Anonymous group instead of challenging torture as a critical piece of psychologically destructive prison milieu.<sup>39</sup> The mission in Iraq was damaged. The reputation of military medicine, the US Armed Forces, and the United States was tarnished. Careers ended with criminal or administrative sanctions or courts martial. The eroded status of international law has increased the risk to persons who become detainees of war in a post Abu Ghraib world as it has decreased the credibility of international appeals on their behalf.

It is true, but beside the point, that the US Armed Forces’ medical services are overwhelmingly staffed by humane and skilled personnel. The offenses described in this article do not merely fall short of medical ideals; some may constitute grave breaches of international or United States law. Various voices call for courts martial, a special prosecutor, or compensation. Such measures will be inadequate if unaccompanied by even

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more ardently pursued reform.

Such reform must begin with a comprehensive investigation. At this time, it is not possible to know the absolute or relative prevalence of the various abuses or fully assess the performance of military medical personnel with regard to human rights abuses in Iraq, Afghanistan, and Guantanamo Bay. Army investigations have looked at a limited set of human rights abuses, have not investigated reports from human rights organizations, have not focused on the role of medical personnel, and have not examined detention centers not operated by the Army.<sup>13-17</sup> Six more investigations are underway.<sup>64</sup> The Army's Miller and Ryder Investigations remain classified.<sup>17</sup> Several thousand pages of the Taguba report's appendices are unavailable. There are a number of secret detention centers which remain unmonitored. At some future date, the US military medical services, human rights groups, legal and medical scholars, and health professional associations should jointly and comprehensively review this material in light of US and international law, medical ethics, the military code of justice, military training, the system for handling reports of human rights abuses, and standards for the treatment of detainees. Reforms stemming from such an inquiry could yet create a valuable legacy from the ruins of Abu Ghraib.

*[Editor's Note: The role of doctors in the American prison system has all too often been extremely negative. Doctors presided over the massive use of prisoner guinea pigs in medical experiments from which many doctors profited personally and professionally. Many of the doctors employed in American prisons and jails are professionally barred from practicing medicine in any other environment, have histories of sexually assaulting their patients and have also performed the same cover ups of torture and brutality carried out by US prison guards as those described in the article above. In addition, as recently reported in PLN, some doctors also preside over executions. The medical profession as a whole has remained largely silent about these abuses and tacitly condones them by issuing doctors medical licenses that are suspended for practice anywhere but a detention facility, not revoking the medical licenses of health care professionals who condone or facilitate torture or murder, etc. Professionals can and should be held to a higher standard than they currently are. Surely asking them to comply with international law banning murder and torture is not too much to ask for.]* 

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*[This article originally appeared in The Lancet. It is reprinted with permission. The author is a professor of bio ethics at the University of Minnesota.]*

## New Jersey County Settles With Imprisoned Deaf Man For \$175,000

On November 20, 2003, Mercer County, New Jersey, agreed to pay \$175,000 to a deaf man who was imprisoned at the Mercer County Detention Center (MCDC) without appropriate accommodations and appeared before a county court without an interpreter. The County also agreed to provide injunctive relief.

On September 10, 1994, Ronald Chisolm, a deaf man who reads and writes English poorly, has limited lip-reading skills, and communicates primarily in American Sign Language (ASL), was driving in Mercer County with his roommate, Kenneth Knight, when he was pulled over and arrested by local police on an outstanding warrant. Knight, who knew only a little sign language, tried to explain what was going on but Chisolm did not understand. At MCDC, Chisolm and Knight requested a TDD (telecommunication device for the deaf), but none was provided. Jailers then misclassified Chisolm as a vagrant and a nurse labeled him a suicide risk because he cried and flailed his arms in frustration when he could not communicate. As a result, Chisolm was placed in solitary confinement where he remained for four days.

In the meantime, Knight contacted Clara R. Smit, an attorney who specializes in deaf issues and is fluent in ASL. Smit called MCDC and tried to arrange for an interpreter and for a TDD. Jail officials, however, told Smit that they were unable to provide those services.

On September 14, Chisolm was arraigned before the Mercer County Vicinage without Smit's knowledge. (A vicinage is a locally-funded county court separate from the state system). With no interpreter available, the hearing was adjourned for six days. When Smit found out Chisolm had been to court without an interpreter and that the hearing had been postponed, she took action. Smit located an interpreter herself, arranged for a hearing the following morning, and got the warrant quashed. Chisolm was released the next day.

Chisolm sued MCDC and the Vicinage in federal district court alleging their failure to provide him with interpreters, closed captioning equipment and TDDs violated the Americans With Disabilities Act, the Rehabilitation Act, 42 D.S.C. § 1983, and the New Jersey Law Against Discrimination. Chisolm's claim against the Vicinage was dismissed in 1997 and summary judgment

was granted to the jail in 2000. Chisolm appealed. The Third Circuit, holding that the Vicinage was not entitled to Eleventh Amendment immunity and that fact issues precluded summary judgment in favor of MCDC, reversed and remanded the case for trial. *Chisolm v. McManimon*, 275 F.3d 315 (3rd Cir. 2001) [See: *PLN*, May 2003, p. 26].

On November 20, 2003, after the jury was selected, but before the trial began, Mercer County finally settled, agreeing to pay Chisolm \$175,000 plus attorney fees and to provide injunctive relief to all future

deaf prisoners at MCDC. The injunctive relief includes providing interpreters, posting signs notifying deaf prisoners and staff that closed captioning equipment and TDDs are available, ensuring that every attempt is made to locate an interpreter whenever required--day or night--and making training and policy changes to implement the settlement agreement.

Chisolm was represented by Clara R. Smit of East Brunswick and Marc Charmatz, an attorney for the National Association for the Deaf. See: *Chisolm v. McManimon*, USDC D NJ, Case No. CV95-991(GEB). ■

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# From the Editor

by Paul Wright

With last month's issue of *PLN* we reached an all time circulation high of 4,051 subscribers. This is the most subscribers *PLN* has ever had. Considering we started with 75 subscribers in 1990, that is a lot of growth. But considering there are over 2.2 million people locked up in American prisons, jails, civil commitment centers, juvenile and immigration detention facilities and military prisons, this is a small number indeed.

Increasing our circulation has been an ongoing project since we started. With increased circulation comes lower per issue printing and postage costs. More importantly comes greater impact and a wider dissemination of the vital information we distribute. A lack of funds has prevented us from doing sample mailings and other measures that would boost our readership.

A key component to *PLN*'s goal of public education around prison and jail issues is and has been the internet. In recent months we have revamped our website with

the professional assistance of our web designer, Carlos Batista. We are adding many new features on an ongoing basis that will both serve our existing readers and bring our message to many more people.

Within the next few weeks all 180 back issues of *PLN* will be online on our website, indexed and in a searchable format. We will also have the text of all court cases we have reported as well several thousand more prison and jail cases we have not reported in *PLN*, either because they were issued before *PLN* began publishing or we lacked the room to publish them when they were issued. We will also have a brief bank with pleadings and briefs on a wide variety of topics related to detention facility litigation. Other features will include a list serv, guest book and forum. The website can be viewed at [www.prisonlegalnews.org](http://www.prisonlegalnews.org). People can order books, subscriptions and make changes of address online.

As we add new features we will let internet users know as well as make periodic announcements here in *PLN* to inform our


readers of new developments. Our goal is to become the best prison and jail related website and to provide a significant tool for the advocates of prisoners and lawyers representing prisoners to use. In our fifteen years of publishing we have reported an amazing treasure trove of information, the bulk of which has stood up well with time. By bringing this information online we will make it available to more people than ever before.

Next month will mark the 15<sup>th</sup> anniversary of publishing *PLN*. If anyone would like to advertise in our special anniversary issue the ad and payment must be received in our Seattle office no later than April 15, 2005.

This issue reports on developments in two lawsuits filed by *PLN* to ensure prisoners in Washington and the Bureau of Prisons ADX facility can receive *PLN* and the books we distribute. We are grateful to Jesse Wing and Tim Ford at McDonald, Hogue and Bayless for their excellent and tenacious representation of *PLN* in *PLN v. Lehman* and to Mickey Gendler of Gendler and Mann and Bill Trine

of Trine and Metcalf for their skilled and dedicated counsel in *PLN v. Hood*. We will report the final outcome in both cases. As these censorship lawsuits illustrate, there is a lot more to publishing *PLN* than just writing stories and putting a magazine together and mailing it. We are the only publisher in the United States that consistently fights for the rights of our readers to read and receive *PLN*.

Donations and ad revenue makes up only a portion of the funds *PLN* needs to publish each month. If you can afford an additional donation, we welcome your support. It is much needed and goes to the essentials of publishing *PLN* each month and ensuring readers receive it, even if we have to get an injunction to ensure delivery.

Enjoy this issue of *PLN* and please encourage others to subscribe. 

## ATTENTION CALIFORNIA READERS!

*Prison Legal News* (*PLN*) is collecting information about the censorship of books, magazines, and newspapers in California prisons within the last two years.

- Do you know of any California Department of Corrections (CDC) facilities that prohibit prisoners in administrative segregation or reception centers from receiving books, magazines or newspapers sent by the publisher?
- Have you or anyone you know failed to receive copies of *PLN* or books shipped from *PLN* while in a CDC prison?
- Do you have any information about CDC prisons that require book vendors to be "approved vendors" before being permitted to deliver books to that facility?
- Do you have any information about CDC prisons that require books to be shipped with a special mailing label?

**If you answered yes to any of these questions, we would like to hear from you.**

Be specific as possible, and include the following information: your name and contact information, the CDC prison where the incident occurred, name of the censored publication, the date it was ordered, the date it was rejected, the reason it was rejected, and any other pertinent information. Please also send copies of the rules or policies at issue, as well as any grievances, appeals, rejection notices, or other documentation you may have. Thank you for your assistance.

**Send info to:**

**PLN, Attn: CA Censorship, 2400 NW 80<sup>th</sup> St. PMB 148, Seattle, WA 98117.**



# PLN's ADX Censorship Suit Partially Survives Motion to Dismiss

by Bob Williams

On November 12, 2004, Colorado Federal District Court Judge Wiley Daniel dismissed all official capacity claims, one defendant, and one substantive claim in PLN's suit over ADX censorship of *PLN*. The court allowed PLN to proceed on one individual capacity claim against the remaining defendants.

In 2003 Prison Legal News (PLN) filed a *Bivens* suit against the former (Michael Pugh) and current (Robert Hood) wardens of the Administrative Maximum (ADX) facility in Florence, Colorado, and the current (Harley Lappin) and former (Kathleen Hawk Sawyer) directors of the Bureau of Prisoners (BOP), each in their official and individual capacities. The two claims raised were the unconstitutional censorship of ten monthly issues of *PLN* as (1) promoting violence and (2) being "inmate to inmate" correspondence. Injunctive and declaratory relief as well as monetary damages were sought. [See: *PLN*, Feb. 2004, p. 15]

On March 15, 2004, the defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), claiming sovereign immunity, mootness, lack of personal participation, qualified immunity and statute of limitations.

**Sovereign Immunity.** Suing government officials in their official capacity is tantamount to suing the government. Finding that PLN cited no statutory provision that expressly creates a cause of action and that the federal government has not waived its sovereign immunity, the court dismissed all claims brought in the defendants' official capacity. PLN argued that sovereign immunity does not extend to officials who act beyond their authority in violation of the constitution. The court found this is a *Bivens* claim and not an official capacity claim.

**Mootness.** PLN's second substantive claim that issues of *PLN* were rejected as "inmate to inmate" correspondence was held to be moot by the court. PLN's claim was based on ADX Institutional Supplement FLM 5265.11C which read in part:

"Due to the possibility of unauthorized messages or information being passed, the following will be defined as inmate to inmate correspondence, thereby requiring advance approval: (1) Any article, publication, advertisement, etc., that contains specific information written by or about an inmate or inmates and their causes. (2) Any correspondence or publication from or to a third

party that references a particular inmate or inmates. (3) Any photograph that contains an inmate or a group of inmates, regardless of the background setting or relationship of the subject to the intended receiver."


"Effective June 20, 2003, ADX Institutional Supplement FLM 5265.11D was instituted with this objectionable paragraph" removed. PLN did not challenge mootness and the court found the change in language rendered all of claim two moot.

**Personal Participation.** Liability for damages under *Bivens* requires personal participation in any alleged unconstitutional conduct. While PLN did allege that defendant Lappin was responsible for overseeing all BOP institutions, including ADX, there was no allegation that defendant Lappin had any personal involvement in the application of the policy, to *PLN*. The court found at best PLN was alleging only Lappin's approval of the BOP-wide Program Statements (5266.09 and 5266.10) upon which some issues of *PLN* were censored. Since the Program Statements are being challenged as applied to *PLN* and not on their face, defendant Lappin had no personal involvement and was dismissed from the suit. The ADX is the only BOP facility that interprets its policy to ban *PLN*.

**Qualified Immunity.** Under the doctrine of qualified immunity, government defendants are immune from personal liability for damages if their actions do not violate clearly established statutory or constitutional right. The court applied the standard of "whether a reasonable person would have known that his or her actions violated the statutory or constitutional rights at issue." Relying on two United States Supreme Court cases, *Thornburgh v. Abbott*, 109 S.Ct. 1874 (1989) (prison officials may refuse magazines based on a legitimate penological interest) and *Turner v. Safley*, 107 S.Ct. 2254 (1987) (broad restrictions on inmate to inmate correspondence approved), the court found a defendant "could reasonably conclude that rejecting *PLN* articles at issue here would not amount to a violation of constitutional rights." As such, the remaining three defendants are entitled to qualified immunity from claims for damages only. As the defendants conceded, neither qualified immunity nor sovereign immunity precludes injunctive or declaratory relief. Though the defendants claimed the suit only involved the erroneous exercise of delegated pow-

ers, rather than an "unconstitutional rule," the court found PLN's complaint was clear on this point and the defendants' argument unconvincing and dismissal of injunctive and declaratory claims improper.

**Statute of Limitations.** Section 1983 and *Bivens* claims are governed by Colorado's two-year residual statute of limitations found at § 13-80-102, C.R.S. The earliest action of PLN censorship identified in *PLN's* complaint was March 2001. The complaint was filed on December 10, 2003. While at first glance, it appears to be beyond the two-year limitation, *PLN* argued that the limitation period was tolled because of delayed notice from the BOP that some magazines were censored. The court found any dismissal on this issue premature and PLN "entitled to an opportunity to discover evidence-that would allow it to establish a factual basis." Besides, the complaint was timely to all magazines censored from December 10 forward.

This suit may now move forward on the claim of ADX's unconstitutional censorship of *PLN* articles as constituting "inmate correspondence." PLN is well represented in the case by Mickey Gendler of the Seattle law firm Gendler and Mann and Bill Trine of the Boulder law firm of Trine and Metcalf. See: *Prison Legal News v. Hood*, US DC, D CO, Case No. 03-D-2516(PAC). 

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# Wisconsin Enacts Law, Prison Reforms Regarding Sex Assaults

by Michael Rigby

On August 31, 2004, the Wisconsin Department of Corrections (WDOC) announced it would immediately implement sweeping policy changes in the way it views and handles staff-on-prisoner sexual assaults. The reforms come a year after legislation was enacted criminalizing sex between guards and prisoners, and more than 18 months after the Department made headlines for sentencing to a year in segregation a mentally ill prisoner impregnated by a guard.

Pursuant to the changes, prison employees will receive training about the new law, under which guards convicted of sexual assault can be fined up to \$100,000 and sentenced to a maximum of 40 years prison; prison investigators will undergo standardized training; all allegations of sexual misconduct will be referred to law enforcement; prison staff will be required to report sexual misconduct by any employee; prison administrators will be required to keep central records of all allegations, investigations, and dispositions of sexual assault cases involving staff; and prisoners reporting sexual assaults will no longer be segregated, but will either be transferred to another unit or the accused guard will be reassigned. (Department administrators can still order a prisoner segregated in limited circumstances).

"Hallelujah," said Todd Winstrom, an attorney with the Wisconsin Coalition for Advocacy, upon learning of the reforms. "It's outstanding. These are precisely the steps that ought to be taken. They will make it more likely that inmates will report sexual exploitation by staff."

Calls for change came after the *Milwaukee Journal Sentinel* reported on the plight of four female prisoners at the Taycheedah Correctional Institution (TCI). All had been placed in solitary confinement for having personal relationships with guards or for trying to report sexual misconduct.

One of the women, Jackie Noyes, a 24-year-old prisoner with a well-documented history of mental illness, was sentenced to a year in segregation in December 2002 after she was impregnated by guard Mathew Emery, also 24. Both claimed the sex was consensual. [See: *PLN*, August 2003, p. 4.] However, because Wisconsin was one of only four states at that time without a law banning sex between guards and prisoners (the other three were Vermont, Alabama, and Oregon), Emery was fired but not prosecuted.

The fact that the victim of a sexual assault was punished while the perpetrator walked free outraged prisoner advocates and state lawmakers alike. As a result, a bill was quickly pushed through the state legislature making it a felony for guards to engage in sex with prisoners. (Similar bills had been killed twice before, due in large part to opposition from the guards' union who apparently view their members having sex with the prisoners they oversee as a job perk). The bill became law on August 20, 2003.

State Representative Bonnie Ladwig (R-Racine), the bill's chief sponsor, said the law was necessary. "It's a crime to sexually assault somebody," she said. "It's especially needed because if you're in prison and a guard is telling you to do this, you probably would because there would be consequences if you didn't."

Molly Farady-Sultze, an advocate with the Reach Counseling Service in Oshkosh, said the statute will help preserve the dignity of prisoners. "Even if someone is incarcerated, they don't give up their basic human rights," she said. "By putting this into law, at least they will be protected while serving their time."

Although the new law extends to probation and parole officers, employees of county boot camps and work camps, juvenile detention centers, work-release programs, and jails--as well as contractors and volunteers at those facilities--sexual assaults are still occurring in the state's jails and prisons.

In 2004, two Milwaukee County sheriff's deputies were investigated for allegedly sexually assaulting female prisoners. Deputy Delano Terrell, 42, was placed on administrative leave after being charged with sexually assaulting a woman in a jury restroom at the county courthouse, according to a statement released by the Sheriff's Department. In the statement, Sheriff David Clarke called Terrell a "rogue officer" who committed "boorish behavior."

Apparently, while transporting a group of prisoners to the courthouse on February 24, 2004, Terrell also took a 21-year-old woman who was not scheduled for court that day. Once at the courthouse, Terrell took the woman into a jury restroom and locked the door, removed the woman's handcuffs, then her clothes, and sexually assaulted her.

On April 29, 2004, Terrell was charged with second-degree assault and misconduct in public office. He faces up to 43 years and

six months in prison if convicted on both charges. Terrell was acquitted of a similar charge in 2000. In that case, Terrell had been accused of kissing a prisoner and removing her shirt, then exposing himself while on a courthouse elevator.

In December 2003, deputy Tony L. Kearney was fired for allegedly allowing late-night strip shows and sexually assaulting prisoners at the Milwaukee county jail. On June 29, 2004, after hearing testimony from prisoners at the jail, the county's Personnel Review Board upheld the firing.

One prisoner testified that Kearney "made us show our bodies," while working alone on third shift. Two male prisoners said Kearney kept open his office blinds so male prisoners could watch the women undress and flash their breasts. These statements corresponded with the statements of other prisoners given independently, said jail investigators.

The review board also heard testimony relating to the sexual assault of two prisoners in 2003, but failed to sustain the allegations.

Kearney categorically denied the charges and said all the prisoners were lying. "That's why their called cons--they are con artists," he said.

County attorney Tim Schoewe, who represented the Sheriff's Department, said common threads ran through the prisoners' statements and that Kearney had taken advantage of prisoners and jeopardized jail security. Prosecutors have declined to pursue charges against Kearney.

Meanwhile, the WDOC was taking its time implementing proposed reforms. After news of the Noyes incident exploded, prison officials hired consultants from a branch of the U.S. Justice Department to review department policies and procedures relating to sexual assaults. In a report dated July 2003, they listed numerous systemic problems, many of which were addressed in the current spate of reforms.

However, it is unclear if the WDOC has actually defined what constitutes sexual misconduct. Angie Hougas, Amnesty International's Wisconsin coordinator, said such basic and necessary changes could have been made sooner. "They've had a long time to come up with a definition of sexual misconduct," she said.

The consultants were most critical of the prison's policy of segregating prisoners who alleged sexual assault by staff. Yet, as

recently as February 2004, the policy continued. On February 3, Christina Maves, a mentally ill female prisoner at TCI, was sent to solitary confinement in handcuffs and leg irons during an investigation of her relationship with a prison captain. She remained there for 25 days. WDOC spokesman Bill Clausius said Maves was segregated "to protect the integrity of the investigation and for her safety."

Maves's attorney, Todd Winstrom, saw it differently. "This is another very troubling situation where a woman has been placed in solitary when she had done nothing wrong," said Winstrom, who noted that Maves attempted suicide while in segregation.

The captain, James Harper Jr., 53, was initially placed on administrative leave with pay, but later chose to retire. Among Maves's belongings prison officials had discovered Harper's cell phone number, his birth date, and other personal information. In a February 16, 2004 letter to TCI warden Jodine Deppisch, Harper, who had worked for the WDOC since 1975, asked to retire with full benefits "in lieu of being dismissed" because of "misconduct."

Harper and Maves denied any physical involvement, claiming their relationship was

based on religious discussion. Harper told investigators that "each night" before he started his duties, the two would "do Bible study" and told a reporter he did "share personal information" with her over a 16-month period. When investigators asked Maves about their relationship, she said it was "strictly spiritual." "He is old," she said. "There has never been any physical contact."

After interviewing other guards at the unit, investigators concluded that Harper "spent an inordinate amount of time" with Maves, "failed to truthfully" respond to questions, and participated in inappropriate conduct by "conducting religious study/discussion sessions with inmate Maves on virtually a daily basis."

Only time will tell if the WDOC's reforms actually benefit prisoners. Until then, those who have dealt with the system may remain skeptical. "They're just trying to get the people who complained off their back," said Samantha Marks, who was released from TCI in June 2004. "Policy and procedures aren't always followed. If they were, there would be no sexual misconduct." ❧

Source: *Milwaukee Journal Sentinel*

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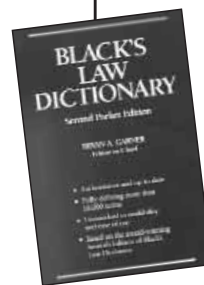
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# California Establishes Statewide Hepatitis-C Management Program

by John E. Dannenberg

The California Department of Corrections (CDC) Health Care Services Division instituted a statewide Hepatitis-C Clinical Management Program (Program) in March, 2004. The Program draws from the prototype HCV protocol developed under federal court order at Pelican Bay State Prison and a similar program recently begun at San Quentin State Prison. The Program is in response to the settlement in *Plata v. Davis*, (U.S.D.C., N.D. Cal., Case No. C 01-1351-1EH), a statewide prison medical care suit brought on behalf of all CDC prisoners by the non-profit Prison Law Office, San Quentin, California. The Program's stated purpose is to "ensure a consistent, appropriate, effective and efficient approach to the clinical management of persons infected with HCV." As such, it should bring to an end the "mixed bag" of treatment protocols that has characterized CDC's treatment of its estimated 64,000 infected prisoners (40% HCV infection rate). (See: *PLN*, May, 2004, p.1, Prisons Nationwide Fail to Treat HCV Epidemic.)

The Program's three phases are "Screening and Diagnosis," "Initial Management After Diagnosis Of HCV," and "Staging By Liver Biopsy And Combination Therapy."

Phase I offers HCV screening to all prisoner-patients who request it. The screening consists of a hepatitis [blood] panel and liver function tests. Those testing positive for the HCV antibody shall have their viral load measured and undergo repeated ALT enzyme tests. The estimated time to complete Phase I is three months. Those testing positive shall proceed to Phase II.

Phase II begins with vaccination for hepatitis-A and/or B (if required), to be completed within six months after the start of

Phase II. Possible contraindications to effective therapy will be evaluated using a list of sixteen "exclusion criteria for combination therapy," which sharply limits the number of patients who qualify for anti-viral treatment. The criteria include mental health concerns, other serious medical conditions, and age. Those over age 60, or having compromised immune systems (e.g., AIDS), cancer, diabetes or kidney disease may be excluded, as may those presenting decompensated cirrhosis (irreversible liver damage).

Next, HCV genotype is considered because it "impacts eligibility for receiving combination therapy related to remaining length of incarceration time."

In other words, if a prisoner is too "short to the house" to complete the treatment for the diagnosed disease, they will not receive anti-viral treatment. To qualify for a liver biopsy followed by combination therapy, the parole date must be at least 10 or 16 months (depending on genotype) from the time they are referred for the biopsy. Absent a time bar, they may then qualify for a liver biopsy to establish the baseline stage of your disease, if after three ALT tests one month apart, the ALT values are at least twice the normal value (waived if they over age 45). Moreover, if they already had appropriate combination therapy, but relapsed or did not respond, they will not be re-treated. The estimated time to complete Phase II is two months.

Phase III begins with counseling for and implementation of the liver biopsy. A hold will be placed to prevent the prisoner's transfer until the biopsy is done and the decision to begin combination therapy has been made. It is estimated that the biopsy will be completed within three months.

When the biopsy results are reviewed, the prisoner will be given combination therapy if they fit a list of "inclusion criteria." Generally, they are "included" if they have stage 3 liver fibrosis or greater (except stage 2, if co-infected with HIV). The estimated total time from Stage I screening to initiation of combination therapy is nine months.

The treatment will last until completed as appropriate for the genotype, unless terminated sooner due to non-responsiveness to the pegylated interferon ribavirin combination therapy or to clinical complications from intolerance to it. Non-responders will be kept in the program and will be advised of new treatment options as they may come available.

Throughout one's participation in the program, there is extensive counseling given as to both the risks attending biopsy and combination therapy drugs, as well as expectations of the patient. Instructions include the obvious stop smoking, drinking alcohol and using dope as well as avoid getting tattoos, or sharing toothbrushes or razors; reduce weight if overweight; restrict aspirin and ibuprofen use to that approved by doctors; avoid taking supplemental iron and pain medication.

In sum, if a prisoner is far enough along ("chronic HCV" liver deterioration) and not too close to parole, and doesn't have other serious medical conditions that counsel against the stressful and sometimes debilitating combination therapy regimen, they will be treated. Given that no one will be treated who does not request to be tested, but 40% are estimated to be infected, it behooves all California prisoners who have a history of susceptible behavior to request Phase I testing. They might learn that they have qualifying chronic HCV disease without any symptoms but gain treatment before irreversible cirrhosis of their liver sets in.

Among the twelve attachments to the Program plan are lists of potential side effects, exclusion criteria, samples of all Program evaluation forms and charts, the treatment contract they must sign, and recommended anti-viral drug dosage adjustment criteria. See: Hepatitis C Clinical Management Program, March 2004, California Department of Corrections, Health Care Services Division.

While the Program is a step forward in CDC healthcare, it will have little effect on stemming the growing HCV epidemic in California because 40% of CDC prisoners are parole violators, whose short terms preclude them from treatment. With 90,000 parole violators recycling through CDC's revolving doors each year, an estimated 36,000 of whom are HCV infected, the vector of infection from prisons back into the community will be unabated.

Moreover, for the remaining 100,000 term-serving CDC prisoners, 40,000 of whom are presumptively infected, only that tiny fraction whose health has deteriorated to the life-threatening level of Stage 3 liver fibrosis will be considered for the combination therapy.

To effectively stem the epidemic now a national emergency the federal government should take charge with a testing/treatment program targeted at the country's jails and prisons (where the disease is concentrated), that requires 100% testing and follows through by funding 100% treatment inside the walls and back in the community. ■

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# Wisconsin County Pays \$6.95 Million To Settle Strip-Search Suit

by Michael Rigby

St. Croix County, Wisconsin, and its insurer has paid \$6.95 million to settle a federal class-action lawsuit challenging the constitutionality of the county jail's blanket strip-search policy, according to the terms of a February 27, 2004, settlement agreement.

The two named plaintiffs, D.B. and T.B. (names are withheld at counsel's request) sued the County in federal district court under 42 U.S.C. § 1983 after they were strip-searched upon being booked into the county jail.

D.B. was arrested for driving while intoxicated on December 28, 1998. When he arrived at the jail, D.B. was strip-searched in a hallway and forced to remain there as males and females walked around him. When D.B. asked why he was being made to stand naked in the hallway, the jailers responded, "to show you what we can do to you if you don't cooperate," according to the complaint. The other plaintiff, T.B., was arrested on April 11, 1999, for driving with a suspended license. At the jail he was first strip-searched then forced to bend over and touch his toes so that jailers could perform a visual rectal search.


In their lawsuit, the plaintiffs alleged the County maintained an unconstitutional policy of strip-searching everyone booked into the jail, regardless of whether they were suspected of possessing contraband or weapons. Plaintiffs also sought, and were granted, certification of a class of all persons who had been strip-searched between August 6, 1996 and February 27, 2001 after being arrested on misdemeanor charges not involving weapons or drugs.

Pursuant to the settlement, plaintiffs will receive a total of \$6.95 million. St. Croix County will pay approximately \$2.5 million, with the remainder being paid by the County's insurer. The two named plaintiffs will receive \$35,000 each, said their attorney, Vincent Moccio. Payments to most of the other plaintiffs--possibly more than 2,200 of them--should range from \$2,000 to \$5,000, he said. (Juveniles making a claim will be paid 150% of the per search compensation amount.) Moccio's law firm will receive roughly \$1.4 million in attorney fees.

According to Moccio, many of his clients were shocked to be strip-searched after being arrested for fairly innocuous offenses such as driving with a broken tail-light or

bouncing a check. And all were humiliated, he said. "Basically, they didn't believe that in the United States, that anyone never found guilty of anything and picked up on a relatively minor charges could be forced to undergo that kind of humiliating and embarrassing situation," said Moccio.

Following the settlement, jail captain Karen Humphrey was suspended for one month without pay for her part in the illegal strip-searches. She began serving the

suspension on August 3, 2004. No other disciplinary actions were anticipated. Moccio can be reached at the law firm Robins, Kaplan, Miller & Ciresi, 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, Minnesota, 55402. Phone: 1-800-553-9910. See: *Blihovde v. St. Croix County*, USDC WD WI, Case No. 02-C-0405-C. 

Additional source: *Milwaukee Journal Sentinel*

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# Four Guards Suspended By CCA Following Their Murder of Prisoner in Tennessee Jail

by Matthew T. Clarke

Four male CCA Guards have been placed on paid administrative leave following their murder of a female prisoner at the CCA-run Metro-Davidson County Detention Center (MDCD) in Nashville, Tennessee.

Estelle Richardson, 34, a prisoner in MDCD, was found on the floor of her cell by emergency personnel responding to a call placed at 5:37 a.m. on July 5, 2004, saying that a female prisoner was injured and needed medical help. Richardson had been in an altercation with a guard or guards in her isolation cell the previous morning. Richardson's death was ruled a homicide after an autopsy revealed that she died from "blunt trauma" to the head which caused a skull fracture and had also suffered internal injuries. Richardson had been indicted for the non-violent offense of food stamp fraud and was charged with probation violation.

CCA placed guards Joshua D. Stockman, 23; Keith Andre Hendricks, 35; William Wood, 26; and Jeremy Nesse, 24, on paid administrative leave after the ruling. Stockman, who had been with CCA a little more than a year, has studied martial arts and had previous employment as a club bouncer. Hendricks is a senior prison guard who has worked for CCA since October 2000. Wood served in the Marine Corps. He and Nesse had worked at the CCA jail since February, 2001. Two of the four guards had been working double shifts due to a severe staff shortage at the time of the murder.

In a typical attempt to blame the victim, CCA released information that Richardson had a history of fights with other prisoners. This included an incident on March 30, 2004, and another on April 5, 2004, in which a guard described that Richardson "dropped to the floor and started shaking in what appeared to be a seizure" after the guard sounded the alarm. Sometime in April, Richardson is alleged to have ripped off a sprinkler head that was in her cell, causing a flood. On June 29, five days before her

death, Richardson is reported to have asked a guard, "Can you get the nurse down here? I am hurting, and if you don't get the nurse down here I am going to die." Nothing in the record shows whether she was seen by medical personnel at that time.

This may explain Richardson's presence in a solitary cell when she died, but it does nothing to explain her murder. She may well have been a difficult prisoner to handle, but that does not give guards the right to beat her to death. And she was savagely beaten according to a federal lawsuit filed on behalf of Richardson's 14-year-old daughter, Saviyance Beck, and 6-year-old son Savion Richardson. Richardson was the only prisoner in her cell at the time of the beating. That leaves only CCA employees as suspects in the murder. The suit seeks \$60 million in compensatory and punitive damages, accusing CCA of negligence by failing to provide sufficient training and supervision of its guards. Bart Durham, the children's attorney, said he looked forward to having the injustice addressed in court. The suit also alleges excessive use of force.

"There needs to be some well-defined boundaries between the guards and an inmate," said Durham in a July 29, 2004, interview. "That is not happening yet. Maybe the only thing that will make it happen is a hammer from a judge, or a jail cell slamming behind some people."

The police investigation was completed by July 30, 2004, yet no one had been charged with a crime and CCA never suspended supervisory personnel.

Perhaps the only way for the truth to come out is through the civil lawsuit. After all, regardless of whether the use of force was excessive or not, what excuse could there be for delaying medical attention to a severely injured woman for a day?

Nine prisoners have died in MDCD since 2000. Eight were ruled to be natural causes; the ninth was held to be a medication overdose. A tenth prisoner died on a work detail when she was struck by a train. Ten prisoner deaths in three and a half years seems like a lot for one jail.

Reports by the medical examiner and toxicology experts have shed new light and raised new questions in the case of the murder of Estelle Richardson. The reports revealed two anti-depressant drugs, Paxil and Doxepin, at "levels above normal thera-

peutic concentrations," in Richardson's body. According to Vanderbilt University Clinical Pharmacist David DePersio, the drug levels found in Richardson appeared high and would have caused her to act "oddly." This may help explain why, although CCA characterized Richardson as "mentally deficient" and "psychologically impaired," Dee McClain, who grew up with Richardson, and Margaret Turner, Richardson's parole officer, said that she had no mental health issues.

The autopsy report also revealed that Richardson's fatal wounds resulted from her body being slammed into a hard object such as a wall or floor. Although Nashville Medical Examiner Dr. Bruce Levy said the injuries could have happened "many hours," even days before Richardson's death, he firmly ruled out the possibility that they were accidental or self-inflicted.

"It's a restricted area. There's a limit to what you can do. If she had fallen from a high window or if she had been hit by a car, I would expect to see these types of injuries," said Levy.

Furthermore, the nature of the brain injuries indicates that Richardson's body was moving when the injuries occurred, rather than her having suffered multiple strikes, according to Levy. Levy also noted that, had Richardson remained conscious following the injuries, she would have been in intense pain and would have complained of the injuries. This puts a new light on her June 29th complaint to guard Captain Linda Hambrick that she felt like she was going to die. Hambrick wrote a report of the 2:00 a.m. incident nine days after Richardson's death. The report says Hambrick then "left segregation to talk to Nurse Abby and asked her to check on ... Richardson in Cell 01." However, it does not say whether anyone actually checked on Richardson. Furthermore, the segregation logbook for Richardson shows no notation of Richardson requesting or receiving medical attention on June 29th. CCA has refused to release any information regarding Richardson's medical treatment citing concerns for the privacy rights of the murdered prisoner.

A tempest in a courthouse stirred up when a second attorney, Geoffrey Fieger, a former candidate for the governor's office in Michigan who represented Dr. Jack Kervorkian, claimed to represent Michigan resident Estella Buie, Richardson's grandmother and her children's legal guardian.

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Durham represents Tyrone Gibson, Savion's uncle, and Jimmy T. Beck, Saviance's father, whom he claims to be their proper guardians. Fieger's team claims that Durham told the relatives keeping the children not to surrender them to Buie. Durham counters that Buie was not their true guardian and they have been living with their aunt, Nikeya Brown. Actions are pending in Michigan and Tennessee to have Buie dismissed as the children's legal guardian. Beating female prisoners to death in Nashville is not the only misconduct CCA guards have been up to lately. On August 4, 2004, Dustin Holey, a 22-year-old CCA guard at the Tulsa Jail in Oklahoma, was charged with possession of marijuana. The dope was found after a visual inspection of his car when he arrived for work at the staff parking lot on August 4, 2004. The visual inspection revealed a 9mm Ruger pistol partially hidden under the front seat. Holley consented to a search of his car which turned up a small bag of pot. Holley had worked at the jail eight months and had passed both a background check and drug screening when he was hired.

CCA guard Constance Edwards, 33, was arrested on September 17, 2003, as she tried to smuggle two balloons of heroin into the then-CCA-run Southern Nevada Women's Prison in North Las Vegas. Edwards allegedly was paid \$50 to \$200 per trip to smuggle drugs and other items to prisoner Valerie Moore. Moore's ex-cellmate, Karen Matthews, allegedly paid Edwards and provided her with the goods to be smuggled.

"We found the stuff today in [Edwards's] bra," said Nevada Department of Public Safety Lt. Matthew Alberto. "She was not only smuggling in dope, she was smuggling in other kinds of illegal contraband: cologne, toothbrushes, toiletries, Listerine... or things you couldn't get in commissary."


Alberto said Edwards had been under investigation for about a month and had worked at the prison for two years. She was arrested with more than \$200 worth of heroin.

Ashley Kinnon and Shounda Palmer, 22, were fired from the CCA-run Whiteville Correctional Facility in Hardeman County, Tennessee, on July 12, 2004. Palmer was discovered attempting to bring two packages of marijuana, wrapped in duct tape and hidden in potato chip cans, into the prison. She gave up Kinnon as her partner in crime. Palmer had been working for CCA for four months; Kinnon for nine-months.

Patricia Cole, 51, a GED teacher at the CCA-run Hardeman County Correctional Facility in Tennessee, has been charged

with introduction of contraband into a penal facility and possession of marijuana and cocaine. She has been under investigation for several months. She was arrested July 1, 2004, after an insider tip told investigators of a scheduled drug drop off. The drugs were later found on the prisoner fingered as working with Cole.

This all adds up to show that the bottom line for CCA is the bottom line--not public or prisoner safety. Should it then surprise

us when ill-trained, underpaid, overworked guards become corrupt or victimize prisoners in episodes of rage? One can only hope that a federal jury in Tennessee will get CCA's attention by changing its bottom line significantly. 

Sources: *Jackson Sun* (Jackson, Tennessee); *Nashville Tennessean*; [www.tulsaworld.com](http://www.tulsaworld.com); *Las Vegas Sun*; AP; [www.wkrn.com](http://www.wkrn.com); [www.nashscene.com](http://www.nashscene.com); *The Tennessean*.

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# Five Homicides In L.A. County Jail Blamed On Security Lapses; 25 Sheriff's Deputies May Be Disciplined

by Marvin Mentor

After investigating five brutal prisoner-on-prisoner slayings in a six month period inside the Los Angeles (L.A.), California County Jails, the L.A. County Board of Supervisors reported that L.A. County Sheriff's deputies "fell down on the job" by allowing huge lapses in jail security. The lapses and policy violations may lead to twenty-five deputies being disciplined.

With a daily prisoner population of 18,000, L.A. County's jail system is the size of 3 1/2 California state prisons. It houses misdemeanants and felons of all degrees of dangerousness, 6,400 of whom are in the aging Men's Central Jail. Sheriff Lee Baca was called on the carpet when gaping holes in jail security permitted rival gang members access to each other and permitted mutual access to informants and the defendants they were testifying against with predictably fatal results. While two in-jail murders per year had been the County Jail's "average," five in the six month interval from October, 2003 to April, 2004 triggered major investigations.

## Killings In Dorms

The first killing was on October 21, 2003, when 34 year-old Ki Chul Hong arrived at the Central Jail to serve a five day sentence for prostitution. Rival gang members Jae Cho (a murder defendant) and Kyu Hon Lee, who were working as "trusties," stabbed him 36 times, wrapped his body in a blanket and stuffed it in a trash bin. It was discovered 16 hours later by prisoners sorting the trash.

The second murder occurred on December 8, 2003 when Stephen Prendergast, 33, was in a holding cell with 57 prisoners awaiting transfer. Prendergast had just returned from court on drug charges. The reason for the beating death was unknown, but pruno-compromised Rafael S. Ferman, 22, and Jonathan Newell, 20, awaiting trials on weapons charges were charged with Prendergast's murder.

The very next day, transient Mario Alvarado, 24, was killed in the Reception Center adjacent to the downtown Twin Towers jail. Alvarado had been arrested for spousal abuse. He died from asphyxia and multiple head injuries inside the holding cell of 50 prisoners awaiting transfer. His blood was spattered across adjacent walls from the violent beating. Timothy

Trujillo, 25, a Highland Park gang member, was booked for the murder.

Kristopher Faye, 21, awaiting trial for residential burglary, was killed in a fight on January 12, 2004 involving up to 200 prisoners in the Central Jail. He was stabbed with makeshift knives 26 times in the arms, chest and neck, as well as hit and kicked, by three prisoners. No arrests have been made.

## Witness Is Attacked

Tony Shane Wilson was a witness who had testified in a San Fernando valley murder case. On March 27, 2004, he was slashed with a homemade knife requiring 200 stitches by another prisoner who used a ruse to leave his cell to attack Wilson. Wilson, a former Nazi Low Rider gang member with a long record, told interviewers, "I'm a big guy, I'm a bad guy." But after testifying in exchange for a lighter sentence, he said "I was scared for my life." Less than 24 hours after testifying, he sat alone in his cell under a court order for protection, waiting for dinner. At 4 p.m., a prisoner "trusty" delivered Wilson's meal. The trustworthy fumbled the tray, and as Wilson reached through the bars to save his dinner, the trustworthy cut a 5 inch slash across Wilson's face and neck. When Wilson yelled for help, a nearby deputy simply remained on his phone call. Other prisoners tried to drown out his pleas for help, taunting "the joke's on you." Wilson's attacker, Porfiro Avila, is a gang member convicted of two murders, including the killing of a witness, who had already been sentenced to life without parole. He was allegedly doing a favor for the Mexican Mafia gang.

Wilson, in turn, had been facing a possible 29 years-to-life as an accessory after-the-fact in a murder. After testifying against his crime partners and pleading guilty to accessory, he was promised a maximum sentence of three years. But Wilson was kept in the same part of the Jail as his co-defendants so close he could hear them talking through the vents. Sheriff's Deputy Ray Leyva said that prisoners in Wilson's area were only allowed out of their cells singly to take showers or perform duties such as food delivery and trash pickup. This work was supposed to be supervised, but Avila was alone at the time. "He was supposed to be a keep-away. I had no idea that other inmates would be feeding him," Leyva said. Wilson had had a real dilemma. He felt that if he did not testify and get the crime partner locked

away, that person would go free and kill him on the streets or worse he would go to prison for the rest of his life.

## Killer Roams The Jail

Then on April 20, 2004 despite a court order for special protection in the jail Raul Tinajero was allegedly killed by murder defendant Santiago Pineda, whom Tinajero had testified against. The bizarre story begins at 5:12 a.m. with Pineda using a court pass of another prisoner to leave his cellblock on the third floor. He took an escalator to the first floor and joined a line of prisoners going to court. Deputies spotted him and ordered him to go back to his cell, but they did not escort him, leaving him to roam around the jail alone for five hours, wearing a jail T-shirt and pants. Using the apparently unsecured escalator, Pineda went unchallenged to the second floor where he entered Tinajero's cell block. Entry to these blocks is through a double-door sallyport, where in between the two doors, guards check the person's identity before opening the second door. But Pineda made it through and walked to Tinajero's cell. There he was able to enter and strangle Tinajero, asleep on his cot. Pineda threatened other prisoners into silence, then waited in the cell with the body for four hours, leaving at 2:20 p.m. by following another prisoner who was permitted to leave the block for a class. Again, he was permitted through the sallyport screening, and returned to his third floor cell. Despite a rule requiring hourly cell checks -- the repeated failure to comply with having been documented already back in December, 2000 Tinajero's body was not discovered by deputies until four hours later at 6:20 p.m., when a cellmate phoned his lawyer to alert authorities. Tinajero's body was found with a ligature around the neck and a shoe-shaped bruise on the neck.

Still, the violence continued. On May 24, 2004, Pico Rivera was beaten into a coma by four prisoners in his 98 bed dorm at the Pitchess Detention Center in Castaic. Sheriff's Captain Ray Peavy said it was just "an in-house disagreement among inmates."

## Investigations Ordered

L.A. District Attorney Steve Cooley created a task force to investigate the murders and propose reforms. Office of Independent Review civil rights attorney Rob Miller was installed as a monitor inside the Central Jail.

State Senator Gloria Romero toured the death cells and commented, "This seems even more dismal that I've seen [in] some state prisons ... A dark, dank, depressing, deplorable confinement of space." As to chronic understaffing of jails statewide, Romero said, "Essentially, L.A. County is a canary for the state of California, a sign of things to come."

Angry county supervisors asked a grand jury to inquire into Tinajero's killing. Sheriff Baca, who has long complained of severe understaffing in the jails due to budget cuts, admitted that staff violated jail rules at least four times during Pineda's four hour soiree. One unnamed prosecutor stated he had handled several cases in which witnesses and defendants were placed on the same jail bus and even in the same cell. At a State Senate hearing on the deaths, L.A. jail officials laid the fault to lack of funding for technology to keep track of the 51 categories of L.A. Jail prisoners. Senator Romero stated, "I do hold Sheriff Baca accountable. I am dismayed by Baca's response for being out of compliance [for two years]."

Jail officials admitted security breakdowns with "keep-away" prisoners. While they are isolated from defendants they are testifying against, they are not isolated from friends or associates of those defendants, even if a judge has ordered maximum protection. It is quite possible that while walking unescorted to medical, visiting or attorney rooms, they will cross paths with assailants. One proposed solution is to rehouse such "keep-aways" in city jails instead, although the District Attorney's office complains of the \$75 per day cost for such outsourcing.

Adding to Baca's woes, on June 20, 2004, 50 year-old Gustavo Ortega, a misdemeanor insulin-dependent diabetic, was released from the Central Jail at 2 a.m. without medicine or someone to pick him up. On crutches from a recent foot amputation, he simply lingered in the release lobby for three days, until deputies "discovered" him there after frantic calls from his family seeking his whereabouts. Without meals or medicine, he grew steadily weaker, dying with his possessions, some clothes, a dollar bill and two slices of bread.

### Reports Recommend Changes

On August 5, 2004, the preliminary report on the five deaths issued from the Office of Independent Review. Finding repeated failures to challenge prisoners' identity, to conduct hourly checks and ultimately to protect prisoners, the scathing report recommended discipline for up to 25

sheriff's deputies. But with 950 prisoners streaming into the jail every day, many with urgent medical problems, the resulting overcrowding still forces them to sleep, without mattresses or bedding, on cold concrete floors sometimes for days. An ACLU-obtained court order for mattresses is often ignored, said Jody Kent, an ACLU legal advocate. On one day, 398 prisoners waited to be seen by the two doctors and eleven nurses for their intake testing and screening. L.A. guards its 18,000 prisoners with 2,100 deputies, in contrast to New York City, where 9,500 jailers guard 14,100 prisoners.

On September 16, 2004, District Attorney Cooley issued his 32 page report, recommending L.A. County establish a Witness Protection Unit. It also recommended installing telephone monitoring equipment, housing endangered witnesses in separate facilities, updating wristband technology to permit electronic monitoring of movement, and using civilian workers instead of prisoner "trusties."

### Security Breaches Continue

County Supervisors already received a vivid reality check on May 14, 2004 when Sheriff Baca gave them a tour of the jail to demonstrate the need for more deputies. A scant four hours earlier, two escape attempts had been foiled. In the first, prisoner Jose Pena (already serving 40 years to life, but back from prison to stand trial on a burglary charge) attacked a guard with an unloaded TEC-9 pistol. In the neighboring cell, guards found the prisoners had acquired a 16 pound sledgehammer, bolt cutters, and a makeshift rope; a floor jack was on the window ledge. The rope had apparently been used to pull the contraband through broken cell windows from the street several floors below, where a suspect was waiting by adjacent railroad

tracks for a pending escape.

### More Funding

In January 2005, the Los Angeles Board of Supervisors awarded the jail an additional \$24.4 million in funds, which is still \$44.6 million less than the jail had for custody operations in 2001. The lack of funds has led sheriff Baca to release some 120,000 sentenced jail prisoners early for lack of staff and housing. The prisoners are typically serving short misdemeanor sentences of less than a year. Under the jail's early release plan they are released after serving some 10% of the sentence. With the additional funding they can now expect to serve 40 to 50% of the sentence. Baca had requested \$79 million over three years for additional staff and security measures in the jail.

In early February, 2005, special counsel Merrick Bobb issued his report on the jail and noted that it "is nightmarish to manage" and has "lax supervision and a long standing jail culture that has short changed accountability for inmate safety."

Bobb recommended that the Men's Central Jail in downtown Los Angeles be closed and replaced with newer, smaller facilities. A move rejected by the sheriff as costing more than \$1 billion.

Bobb recommended that the jail change its classification system to better protect prisoners and also increase staffing levels.

Given the long known problems in the jail it remains to be seen if anything will be done to resolve its problems. ■■

Source: *Los Angeles Times*, *San Francisco Daily Journal*.

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# PLN Wins Washington DOC Bulk Mail Suit, Again

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals affirmed the U.S. District Court's ruling below (and permanent injunction) that the Washington DOC (WA DOC) policy of prohibiting prisoners' receipt of standard rate mail (AKA bulk mail) and catalogs with no notice to the sender or intended recipient violated the First and Fourteenth Amendment rights of Prison Legal News. While the Ninth Circuit upheld WA DOC's defense of qualified immunity as to the bulk mail claim, it denied WA DOC's similar defense for its policy restricting delivery of third-party legal materials, noting that the facts were seriously in dispute as to whether WA DOC's motive in so doing was intentionally discriminatory against PLN, and remanded that question to the trial court for factual resolution by trial.

PLN has now brought, and won, four federal cases against WA DOC over bulk mail issues. See: *Miniken v. Walter*, 978 F.Supp. 1356 (E.D. WA 1997); *MacFarlane v. Walter*, No 96-cv-03102-LRS (E.D. WA 1997); *Humanists of Washington v. Lehman*, No. 97-cv-05499-FDB-JKA (W.D. WA 1999) and the case being appealed here, *PLN v. Lehman*, 272 F.Supp.2d 1151 (WD WA 2003). PLN has also

filed, and won, two bulk mail cases against the Oregon DOC. *PLN v. Cook*, 238 F.3d 1145 (9th Cir. 2001) which resulted in an injunction and *PLN v. Schumacher*, USDC D OR, Case No. CV-02-428AS. The Ninth circuit also held prisoners had a right to receive for profit subscription bulk mail in *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001).

WADOC, with 16,000 prisoners housed in fifteen prisons, had a policy prohibiting prisoners from receiving bulk mail unless it was an ordered subscription publication. (That came about only after prior litigation by PLN forced delivery of the magazine). The policy denied due process notification of rejection of any such mail to the sender and intended recipient. In addition, all catalogs were prohibited, regardless of the mail class employed. This restriction included all bulk mail from non-profits or businesses, including even just circulars. Another restricted category was third-party legal material: judicial opinions, reports and recommendations, orders, complaints or answers, settlement agreements, class action notices, legal briefs and memoranda and motions, which were only permitted when expressly "approved" by prison staff.

These restrictions were part of the WA DOC's long standing efforts to keep PLN out of Washington prisons. When forced to deliver PLN despite the fact it was sent at standard mail rates, Washington prison officials seized upon the idea of banning "catalogs", which included PLN renewal notices and its subscription flyers and book order flyers, with the goal of ensuring PLN would lose its Washington prisoner readership: existing subscribers would not know when or how to renew their subscriptions, new subscribers would never be allowed to receive ordering information. Books from PLN? Out of the question if the book listing were banned. PLN filed suit and won injunctions on these issues in the trial court. The defendants filed an immediate interlocutory appeal. PLN cross appealed the grant of qualified immunity.

The Ninth Circuit first dealt with whether the district court properly granted PLN summary judgment on the ban on non magazine bulk mail and catalogs as being unconstitutional. The court relied heavily upon *PLN v. Cook* and *Morrison* as it related to subscription bulk mail receipt. Here, the unique question was the receipt of non-subscription material [PLN argued all the mailings at issue were subscription related]. The court applied

the familiar four-part test in *Turner v. Safley*, 482 U.S. 78 (1987) to see if the challenged prison regulations were "reasonably related to legitimate penological interests." The district court had held that the bulk non-subscription mail ban was *not* so related, and that ended its inquiry. The Ninth Circuit reviewed all WA DOC claims *de novo*.

First, it reasoned that contraband would more likely find its way into *first* class mail, rather than bulk mail. The next concern, of reducing prison mail volume by banning bulk mail, was deemed arbitrary, because the postal rate simply does not rationally relate to any penological interest. WA DOC's fire hazard concerns were accounted for in their *total* property quantity regulations. In any event, first class mail burns no less fiercely than bulk mail. Thus, this claim was deemed "irrational." Moreover, PLN was sending mail in response to requests, not blindly to all prisoners, differentiating this case from *Jones v. North Carolina Prisoners' Union, Inc.*, 433 U.S. 119 (1977).

In distinguishing *Morrison* and *PLN v. Cook*, the court found the only difference was that those cases involved paid subscription bulk mail. But because here the mail was *requested*, the First Amendment was again implicated. "The sender's interest in communicating the ideas in the publication corresponds to the recipient's interest in reading what the sender has to say. We can perceive no principled basis for distinguishing publications specifically ordered by a prison inmate from letters written to that inmate for purposes of first amendment protection..." (citing *Miniken v. Walter, supra*, at 1362). Importantly, the Ninth Circuit held that "it is the request on the part of the sender, and not the payment of money, that is relevant to the First Amendment analysis."

Beyond this First Amendment claim, PLN argued that failing to notify it and the prisoners of rejection of their mail violated their Fourteenth Amendment rights under *Procunier v. Martinez*, 416 U.S. 396 (1974). Since this was upheld already in *PLN v. Cook*, the court affirmed the same conclusion reached below in this case.

As to WA DOC's claim of qualified immunity, the Ninth Circuit agreed with the district court's grant. The courts reasoned that since only *subscription* bulk mail bans were previously found unconstitutional, a reasonable prison official was not on notice that non-subscription bulk mail could likewise not be rejected. Under *Saucier v. Katz*, 533 U.S.

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194 (2001), they were insulated by such lack of notice. The Ninth Circuit observed that even if WA DOC officials' motives in stopping PLN mail were malicious or otherwise improper, they were protected under *Crawford-El v. Britton*, 523 U.S. 574 (1998).

But the final qualified immunity question was resolved favorably to PLN. PLN complained that restricting third-party legal materials violated PLN's constitutional rights. PLN offered evidentiary support for its claim that this policy was discriminatorily applied only to PLN-originated mail. WA DOC refused to deliver over 100 PLN-originated legal documents, but other publishers were permitted to deliver similar mail. The mail at issue includes US supreme court opinions, unpublished and published federal and state court opinions, verdicts, settlements, complaints, appeal briefs and similar pleadings. PLN argued the obvious: that WADOC's real motive was to suppress materials that embarrass WA DOC and educate prisoners on how to file successful claims. However, because WADOC singled out PLN for this treatment, it undermined its qualified immunity defense and created a factual dispute that cannot be resolved on summary judgment but which must be resolved by trial.

Accordingly, the Ninth Circuit affirmed the permanent injunction against WA DOC's policy requiring that all standard rate mail and catalogs be delivered to the prisoner recipients and that due process notice be provided to the sender and intended recipient of all such mail in the event it was censored, but expressly left the qualified immunity question to the district court to resolve factually regarding third-party legal mail. PLN requested rehearing on the defendants receiving qualified immunity for denying it due process notice when its mail was censored. PLN argued that such a right has been clearly established for at least 30 years and neither the lower court nor the panel in the case properly addressed the matter. The court denied rehearing. PLN has been well represented throughout this case by Jesse Wing and Tim Ford of the Seattle law firm McDonald, Hogue and Bayless. We would also like to thank the Washington ACLU and Joseph Bringman of the Seattle law firm Perkins Coie for filing an amicus brief on PLN's behalf in this case. See: *Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005).

PLN readers should note that many prison systems have tried (unsuccessfully) to ban PLN because they couldn't handle the truth. PLN will always vigorously defend its First Amendment rights, and those of its readers. PLN has successfully litigated over a dozen censorship suits around the country. 🐼



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# Woman Touched Sexually By Texas Deputy Awarded \$3,415,400

On March 14, 2004, a federal jury awarded \$3,415,400 to a woman who, while in custody, was touched in a sexual manner and propositioned by a Bexar County, Texas, sheriff's deputy.

Plaintiff Decota Watson, 21, was arrested on July 3, 2000, in Bexar County for driving while intoxicated and leaving the scene of an accident. The arresting officer, sheriff's deputy Keith Bell, took her to jail in San Antonio. Watson alleged that at the jail Bell massaged her sexually and offered to let her go if she would give him "some booty."

Watson agreed and Bell took her to a substation where his personal vehicle was parked. When Bell went inside the substation, Watson fled from the patrol car and ran to a nearby restaurant where she phoned her parents. Watson's father hurried to the restaurant and picked her up. Watson then filed a complaint against the sheriff's department.

Bell was indicted on charges of soliciting sexual contact in exchange for leniency, engaging in sexual contact with a person in custody, and official oppression.

Watson subsequently sued the sheriff's department, the county, and Bell under 42 U.S.C. § 1983 and the Texas Tort Claims Act alleging wrongful search and seizure, false imprisonment, grossly negligent failure to train, and assault. Watson further alleged that the county maintained a custom, policy, or practice that allowed its officers to exchange leniency for sexual favors. Bell failed to file an answer or appear at the trial.

A judge in the U.S. District Court for the Western District of Texas dismissed the sheriff's department on summary judgment and granted a directed verdict to the county. The county's attorney commented that the county could not be held liable under § 1983 because Watson failed to show that county policy makers knew or should have known that the incident was likely to occur.

Thus, the jury was left to consider damages against Bell only. The jury determined that Watson's actual damages were \$915,400 (\$12,500 past medicals, \$3,200 future medicals, \$109,200 past lost earnings, \$30,000 future lost earnings, \$8,000 past incidental damages, \$500,000 past mental anguish, \$250,000 future mental anguish, \$2,500 past physical pain) and that Bell acted with malice. Punitive damages were assessed at \$2.5 million. Watson's total award amounted to \$3,415,400.

In addition, the DWI charges against Watson were dropped and all other tickets issued to her by Bell, including failure to have a driver's license and insurance, were dismissed.

Watson was represented by Vincent A. Lazaro of San Antonio, Texas. See: *Watson v. Bexar County*, USDC WD TX, Case No. 02-CV-646. ■

Source: *VerdictSearch Texas Reporter*.

## Untreated Dental Infection Kills California Prisoner

A 41 year-old prisoner at the California State Prison (Solano) in Vacaville died six days after having a tooth extracted, when prison medical staff failed to treat his resulting infection.

Anthony Shumake, sentenced to 12 years, 8 months in 2000, had an abscessed tooth pulled on June 22, 2004. Unfortunately, an infection set in - so severe that he could not swallow for several days nor eat for six days. Prison doctors did not find that Shumake needed emergency medical care, but they found he did need care that Solano could not provide. By then, Shumake's symptoms were that his neck "was swollen and red in

color down to his clavicle" and that he "was also spitting up gray sputum."

In spite of the fact that the Vacaville area has a prison hospital (California Medical Facility) and area community hospitals, Shumake was finally taken by life-support ambulance - on oxygen - for a two-hour, 76 mile drive to (prison-contracted) Doctor's Hospital in Manteca. One reason that Solano may have avoided using a local hospital is that the prison is currently being sued for \$18 million in unpaid hospital bills.

At the hospital, Shumake was given anti-inflammatory medication and antibiotics, but went into full respiratory failure two hours later. The coroner ruled the cause of death was heart failure resulting from the infection. He further ruled the death was "accidental, due to complications from therapy," thereby foreclosing any criminal investigation. Although the California Department of Corrections spends 20% of its \$6.2 billion budget on medical care, this doesn't necessarily translate into quality of care, State Senator Jackie Speier commented later.

Shumake's lack of follow-up care may have been due to the two-thirds reduction in dental chairs - from six to two - during a construction project, that has lengthened the time for a dental appointment for Solano's 6,000 prisoners to five months. Indeed, the state Inspector General warned in January

2003 that Solano's shortage of dental chairs and treatment "may expose the state to possible legal action."

"Possibility" became reality on October 4, 2004 when Shumake's family filed a wrongful death action in federal court. LaShua Shumake, Anthony's sister, said the suit seeks \$10 million in general damages and \$50 million in punitive damages. They are represented by Beverly Hills, California attorney Mark Ravis, who has two other wrongful death lawsuits pending in California. "Undoubtedly, there will be more lawsuits as people surface," he said. He has already been contacted by families of 75 prisoners and expects 15 of those cases will result in lawsuits. "This is a new civil rights movement," he said, "because medical care for an inmate is a constitutional right." Indeed, on September 17, 2004, CDC entered into a stipulated injunction to improve its \$1 billion health care delivery system.

Anthony's uncle, Rev. Andre Shumake, was notified by telegram of the death and instructed to claim the body within five days or it would be cremated. "There has been tremendous negligence," he said. "They didn't even have the decency to knock on the door." ■

Sources: *Sacramento Bee*; *San Francisco Chronicle*; *Contra Costa Times*; *Los Angeles Times*.

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# Nine California Guards Fired For Prisoner Assaults

Nine guards at California's maximum security Salinas Valley State Prison (SVSP), including some belonging to the "Green Wall" satanic gang of rogue guards, were fired on November 8, 2004 as a disciplinary action for allegedly assaulting a prisoner and then conspiring to keep the beating secret. A tenth official was demoted.

The assault occurred in October 2003, when prisoner Henry Stephen Serrano refused to leave an exercise cage and return to his cell. Guard Walter Faulkner, leading the charge to remove Serrano, told other guards in a surveillance tower to turn off the video cameras and recording devices before they entered Serrano's cage. Serrano was then pushed to the ground, where other guards proceeded to beat him up. One guard kicked Serrano while he was pinned down, according to former Warden Ed Caden, who since retired and became a whistleblower. Afterwards, the guards and their superiors conspired to cover up the beating. None of the staff filed the required "use of force" forms. The supervisors instructed the guards to lie to investigators. When the assault was referred for prosecution, the Monterey County District Attorney's Office was unable to press charges because none of the guards would talk.


Those fired included Sergeant Fernando Chavez and guard Faulkner, who both had been disciplined before in 2001 (one year 5% pay cut) for covering up another beating and for being members of the "Green Wall" guards' gang. Others fired included Lt. Clarence Vanhooose, Sergeant Robert Parin, and guards Kevin Rawhoof, James Benefield, Darrell Mackinga.

The 2001 prior incident, implicating Faulkner and Chavez, resulted in an investigation by the State Inspector General (IG) a prison watchdog group. But the IG's findings were watered down by then Warden Anthony LaMarque, who personally supported the "Green Wall" gang. "They were his kids," said superseding Warden Caden. "LaMarque did little with [the IG's reports]." The facts of the 2001 incident were that Faulkner and Chavez had pummeled a prisoner, planted a weapon (a filed-down toothbrush) in his cell, and then perjured themselves about it in a July 2001 preliminary hearing in Monterey County Superior Court. However, the State Personnel Board overturned the disciplinary actions and restored all back pay. The "Green Wall" association's hallmark is the legendary "code of silence" wherein guards band

together to cover up their criminal activities inside California's prisons. (See: *PLN*, Sept. 2004, p.17, "Green Wall" Code of Silence Said to Rule California's Prisons.)

Caden was Chief Deputy Warden at SVSP in 2001, but did not know about the incident until he became acting Warden in February, 2004. Upon finding out, he immediately began an investigation, asking for support from California Department of Corrections (CDC) headquarters as well as from the IG. The response was telling. CDC headquarters removed him to Sacramento without explanation and terminated his executive status. "They're not getting tough," he said. "They're putting on a show." He then went public with his demotion and retired from his 28 year CDC career. Caden went on to criticize the Governor's newly appointed Secretary for Corrections, Rod Hickman, accusing him of paying lip service to reforming the state prison system. Hickman countered in September 2004 that prison employees "will be held to the highest level of accountability," adding that Caden was removed because he "wasn't meeting

the needs" of SVSP.

Five of the nine were fired for direct participation in Serrano's beating; the remaining four were fired for failing to report it. In addition to the nine fired guards, a number of others were served with disciplinary actions. But the powerful guards union (CCPOA) has a track record of getting 60% of all guard firings reversed. In 1996, eight guards were fired for viciously beating three dozen prisoners debarking from a prison bus at Corcoran State Prison. All were later reinstated with back pay, including an Associate Warden who was allowed to retire. 

Sources: *Sacramento Bee*; *Monterey County*

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# CCA Pays House Majority Leader's Personal Charity \$100,000

by Matthew T. Clarke

In August, 2004, Corrections Corporation of America (CCA) gave House Majority Leader Tom DeLay, R-Sugar Land, Texas, a check for \$100,000 for his DeLay Foundation for Kids during a Lexington, Kentucky, political fund raiser for DeLay's defense fund organized by Representative Hal Rogers, senior congressman from Kentucky. The event also raised \$113,000 in donations to the defense fund.

DeLay has been under fire for questionable fund raising since three of his political aides were indicted for money laundering and illegally using corporate money to influence elections in Texas. The September 21, 2004, indictments resulted in large legal expenses for DeLay, who is seeking to avoid indictment himself. Thus far, DeLay has spent tens of thousands of dollars on defense lawyers with no end in sight. That may not be a problem since DeLay's defense fund raised over \$400,000 between July and December, 2004.

CCA donated nearly \$180,000 to politicians for federal elections during 2004. DeLay received \$4,500 for political contributions from CCA in 2004, while Rogers received \$6,000. CCA is the largest, for profit, private prison company in the world with more than 65,000 prisoners under its control. Despite a long history of scandal,

deaths and mismanagement, the company continues to thrive due in large part to the political largesse bought by its campaign donations and political lobbying.

Jonathan Grella, DeLay's spokesman, says DeLay Foundation donors receive no political favors in return for their contributions. DeLay's critics disagree, claiming he has blurred the line between political and charitable contributions.

"These political foundations have become methods for well-heeled corporate executives, lobbyists and others to purchase influence and face time with top politicians, and without the limits or disclosure required of campaign donations or lobbying," according to Rick Cohen, executive director of the National Committee for Responsible Philanthropy.

Meanwhile, DeLay has generated more controversy by accepting seven donations to his defense fund from lobbyists or law firms registered to lobby in Congress. House rules enacted in 1996 prohibit such contributions.

"It's a clear-cut violation of House rules," said Conor Kenny of Public Citizen, a watchdog group that has frequently criticized DeLay's fundraising.

Lobbyist Vin Webber, who contributed \$1,000 to the defense fund, and law firm Locke, Liddell & Sapp, which contributed \$2,500, both said they were unaware of the

rule. Brent Perry, trustee of the legal defense fund, said that Weber's and Locke, Liddell's checks would be returned. However, the other five checks cited by Public Citizen would not be returned because they were signed by the wives of the lobbyists, not the lobbyists themselves.

"Obviously we take great care in making sure that we abide by the rules," said Grella.

Public Citizen is also investigating \$23,000 in legal defense fund contributions from Reliant Energy and Bacardi USA, both of which are being investigated for possible illegal fund raising by a DeLay political committee in Texas, the members of which were indicted on September 21, 2004. Of course rule violations have not been a problem for DeLay in the past: he just had the House change those pesky rules. That's what he did in 2003 when the rules were changed to allow representatives to accept free vacations from lobbyists and corporate executives so long as the vacations are connected to charity events like the DeLay-foundation-sponsored golf tournaments held in Texas and Florida. Seems DeLay likes using charitable organizations to dodge the fund-raising rules. ■

Sources: *msnbc.com*, *Knight Ridder News Service*, *Newsweek*.

## California Drug "Possession" Disciplinary Satisfied By Positive Urine Test

The California Court of Appeal held that a positive urine test for THC (marijuana) was "some evidence" sufficient to uphold a prison disciplinary finding of "possession" of drugs. However, because the higher burden of proof required for a misdemeanor or felony conviction for drug possession was not met here, the 130 day prison disciplinary credit loss assessment was reduced to 30 days, the maximum allowable without a criminal conviction.

Jason Dikes, a state prisoner at California State Prison, Solano serving eight years for drug offenses, tested positive for THC in a random drug test he was subjected to. Based upon the test results, he was administratively convicted of "possession" of a controlled substance in violation of prison regulation 15 CCR § 3016(a), and was assessed 130 days loss of

good-time credits. He successfully petitioned the Solano Superior Court, which granted his writ upon a finding that the evidence was insufficient to sustain the disciplinary charges of "possession."

The Court of Appeal reversed, relying upon *Superintendent v. Hill*, 472 U.S. 445, 447 (1985) for the proposition that only "some evidence" was needed to uphold a disciplinary finding against a state prisoner. The legal question posed was whether a positive urinalysis test was sufficient evidence to support a "possession" charge rather than just a "being under the influence" charge, which carries a lesser punishment. Dikes relied upon *People v. Spann*, 186 Cal.App.3d 400 (1986), which held that a urinalysis test was insufficient to uphold a criminal conviction for "possession." But the court distinguished *Spann* because it involved the standard of

proof-beyond-a-reasonable-doubt to sustain a criminal conviction, whereas in the prison disciplinary forum, only "some evidence" was required. The fact that "possession" and "use" of drugs are treated differently under various California criminal statutes was irrelevant.

But Dikes had been assessed 130 days for his disciplinary conviction. He complained that under California Penal Code § 2932(a)(4), no more than 30 days credit loss could be assessed for any prison disciplinary conviction unless the misconduct can be prosecuted as a misdemeanor or felony. Here, the state admitted Dike's conduct could not be prosecuted criminally. Accordingly, the court ordered Dike's credit forfeiture reduced to 30 days. See: *In re Dikes*, 121 Cal. App. 4th 825; 18 Cal. Rptr. 3d 9 (2004). ■



# Phone Companies Gouge California Jail Prisoners' Families

by John E. Dannenberg

In a scenario reminiscent of the "Spy versus Spy" cartoon, phone companies are gouging California jail prisoners' families with outlandish collect call rates, while prisoners are defrauding the phone companies by taking advantage of new computerized phones to clandestinely bill their defense attorneys for collect calls cleverly rerouted elsewhere.

An *Associated Press* investigation revealed that the average California county jail prisoner's local phone calls home cost more than seven times as much as a 50 cent pay-phone call, yielding over \$120 million per year in trappings to the phone companies. From this pot, the phone companies pay nearly 50% in kickbacks to the counties for the privilege of gouging their customers - the jail phone contract going to the highest bidder of kickbacks. The annual payola to Los Angeles County alone runs nearly \$17 million per year.

Perhaps the greater crime is that the burden of such calls falls upon the lower income families whose members most often land in jail. Worse yet is that when these costs become prohibitive, family contact is lost and the prisoners' broken lifeline to the community only deepens their chances of becoming "stuck" in the system. Charles Carbone, an attorney with California San Francisco based prisoner-rights group Prison Focus, decried the process for "[i]ts gouging of family members, those who have never committed a crime."

The total "take" is staggering. Over the past five years, California counties have realized kickbacks of more than \$303 million, according to data gathered from each of the 57 California counties via the Public Records Act. Specifically, in fiscal year 2002-2003, San Mateo County realized a whopping \$1,375.83 per prisoner; Santa Clara County gained \$719.03; Alameda County took in \$521.20; Santa Cruz County accepted \$468.57; and San Francisco County pocketed \$451.

Bridget Stachowald, representative of the largest contractor, Texas based SBC, explained the higher costs away only by saying that jail telephone systems are "more complex." Michel Hennessey, San Francisco County Sheriff, noted that some sheriffs - who find the booty easy money to fill in budget gaps - dismiss this public extortion flippantly: "Why do I care what the rates

are? I don't have to pay them."

On the other side of the coin -literally, the proverbial dime to call home, technology-savvy prisoners desperate to contact families have outsmarted the phone companies by figuring out their new computerized systems. At the San Francisco County jails, prisoners discovered that they can fool the systems into permitting added calls after getting their defense attorneys to accept collect calls. "A person calls from jail collect and [we] pick up and accept the call," said defense attorney Joe Morehead. "Then the person on the other end breaks the connection, hangs up but somehow keeps the connection. I have no idea how." The attorney not only gets the bill for the \$2.95 collect call, he also gets the bill for the follow-on call.

Defense attorney Ira Barg became suspicious when his August, 2004 bill was \$129 - "significantly higher" than normal. He noted he had been getting collect calls where the caller gave their name, then either hung up or said it was a wrong number. Attorney Randy Knox reported being victimized ten times. "The folks inside [have] nothing but time to come up with scams," he said. The San Francisco Bar Association has warned its members.

Conning attorneys may turn out to be an expensive business practice for the phone companies themselves. San Francisco attorney John Allured has filed suit on behalf of two local attorneys against Evercom, SBC and Verizon, alleging unfair business practices and unjust enrichment. He is also seeking class certification for all California residents who may have thus been bilked - asking for restitution and an injunction against future such charges. The respondents' answers to the suits were filed under seal to protect trade secrets. [See: *PLN*, July, 2004, for details.]

Colleen Dziuban, spokesperson for Correctional Billing Services, the Texas based firm handling these bills and those of over 2,000 correctional facilities in 48 states, said they will refund any fraudulent charges. As to explaining the process, Dziuban said "I can't talk about it. We don't want to educate any more people on how to do it." ■

Sources: *San Jose Mercury News*; *San Francisco Daily Journal*.

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# New Federal Civil Rights Tax Relief Act Ends Double Taxation On Attorney Fee Awards

by John E. Dannenberg

On October 22, 2004, President Bush signed into law the Civil Rights Tax Relief Act (CRTRA), enacted as section 703 of the American Jobs Creation Act of 2004. While the CRTRA was intended to provide relief from double taxation of attorney fees owed prevailing plaintiffs in employment discrimination cases, a close examination of the statutory language shows that it also applies to other civil rights actions. The double taxation liability accrues first to the prevailing plaintiff who must declare the total award (i.e., damages plus attorney fees) on his or her income taxes, and later, to the attorney when they declare just the fee portion as income.

The full scope of the CRTRA is enumerated in newly added paragraph 19 to subsection (a) of section 62 of section 703 ("Civil Rights Tax Relief"), wherein the term "unlawful discrimination" is defined in terms of applying specific civil rights statutes. Notably, for prisoner litigants, the list includes Section 501 or 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 791 or 794); Section 1977, 1979 or 1980 of the Revised Statutes (42 U.S.C. § 1981, 1983 or 1985);

Section 703, 704 or 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-1, § 2000e-3 or § 2000e-16); Section 102, 202, 302 or 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12112, 12132, 12182 or 12203); and any provision of federal, state or local law, or common law claims permitted under federal, state or local law providing for the enforcement of civil rights. The new Act applies to fees and costs paid after October 22, 2004 with respect to any judgment or settlement occurring after that date.

The benefits of CRTRA can be enormous, as the following example shows. An individual who under current law settles a civil rights case for \$50,000, and for which the court awards \$75,000 in attorney fees, presently receives as little as 13.2%, or \$16,707 of the total award. This happens because the \$75,000 is presently counted in the plaintiff's adjusted gross income, where it is subject to high marginal personal income tax rates. In other words, after a prevailing plaintiff "recovers" their attorney fee of \$75,000 and pays it to the attorney they still owe taxes on the attorney's \$75,000. And when paid, the attorney owes taxes on it again.

The situation could get even worse for plaintiffs who are awarded only nominal damages. For example, if a plaintiff sued for injunctive relief and damages, winning the former but only \$1 nominal damages, and his or her attorney was awarded \$50,000 in fees for winning the injunctive relief, the plaintiff would owe substantial taxes on that but would only have the \$1 damage award to draw from. In other words, under the previous law, a victorious plaintiff could go in the hole even though they won their case.

Under the new law, the attorney fee is passed through the plaintiff without tax liability, leaving only the attorney to declare it as personal income. In the previous example, the plaintiff would keep \$44,624 of their \$50,000 damage award as a result.

Plainly, the new CRTRA favorably alters the calculus of whether it is worth suing. Now, attorneys can fight hard for their clients, get paid for it, and the plaintiff doesn't suffer having to pay income taxes on his fees. ■

Additional Source: *National Employment Lawyers Association news release.*

## California Criminal Fine Surcharges Ruled Ex Post Facto

The California Court of Appeals determined that surcharges on fines levied upon criminal convictions were ex post facto where the laws establishing the surcharges were punitive and were enacted after the crimes had been committed.

Daniel High was convicted of property and drug offenses suffering eleven years in prison plus various fines, fees and penalties.

On appeal, he asked that lately enacted punitive surcharges on such fines be stricken because the enabling statutes became effective after his crimes were committed. Specifically, he challenged the application as to him of Penal Code § 1465.7 [20% surcharge on base fines] and Government Code § 70372 [state court facilities construction penalty].

The court focused on the ex post facto principle "makes more burdensome the punishment for a crime, after its commission" [citing *Beazell v. Ohio* (1925) 269 U.S. 167]. Timing was not in question here. The inquiry was whether the surcharges were truly punitive or merely regulatory/civil in intent. Relying upon *People v. Rivera*, (1998) 65 Cal.App.4th 705, the court was to be guided first by the declared purpose of the legislature and the structure and design of the statutes. If that failed to adequately inform the court, the challenging party would have to prove that the statute was nonetheless so punitive as to negate its alleged non-punitive intent.

The state conceded that § 1465.7 vio-

lated ex post facto principles because the very nature of its surcharge was nothing more than a percentage of the base fine which by definition is punitive.

But the state argued that § 70372's surcharge for court facilities construction was "more in the nature of a user fee than a penalty for criminal behavior." Upon reviewing the legislative Judiciary Committee notes on § 70372, however, the court found the surcharge described as a "penalty ... to supplant existing penalties...." Moreover, the court reasoned that "if it were a user fee, there would be a rational relationship between the amount of the assessment and the extent of the individual defendant's use." It thus distinguished § 70372's surcharge from the jail booking fees approved in *Rivera*. Because § 70372's surcharge was plainly both penal in nature and not related to "use," it was not a "user fee."

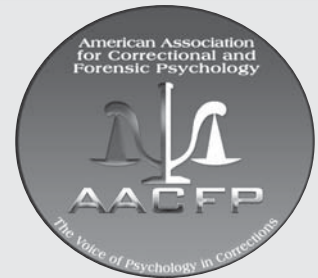
Accordingly, the court remanded for re-sentencing to strike High's \$2 assessment under § 1465.7 and his \$34 assessment under § 70372. See: *People v. High*, 119 Cal. App.4th 1192 (2004). ■

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## New York Legislator Pays For CSC-Chauffeured Rides

A New York State Assemblyman has been sentenced to three years probation and ordered to pay \$5,000 in fines and restitution for unlawfully billing the state for rides he got for free from Correctional Services Corporation (CSC). The sentence was imposed after Roger Green, a veteran Brooklyn Democrat, pleaded guilty to two counts of petty larceny and one count of offering a false instrument.

Green's legal problems resulted from an investigation of free transportation provided to lawmakers by the scandal-plagued CSC. According to Albany County prosecutors, Green, 54, billed the state for travel expenses he never incurred while being chauffeured from Brooklyn to Albany in CSC vans. Green filed fake claims for about 30 trips, they said.

Green, along with many other current and former state legislators, also wrote letters to New York officials advocating extensions of CSC's state contracts for halfway house services. Between 1992 and 2000, the state, paid CSC \$25.4 million for those services.

Green was nearly jailed in April 2004 for not paying a \$2,000 fine in the case. Green had claimed he was too tapped to pay, but finally coughed up the money on April 29, two days after an Albany Judge issued an arrest warrant. As a state lawmaker, Green legally earned \$91,000 a year, and who knows how much in kickbacks and bribes.

Green has admitted to using CSC vans but says he paid for gas and requested reimbursement only because he was confused by the state's vague guidelines. Green also contends that he was the victim of unfair treatment by the criminal justice system.


His case is not indicative of wider ethical problems in Albany, says Green. Instead, it shows that African-Americans—even those who make innocent mistakes—receive extra scrutiny from the criminal justice system.

Some young blacks from Brooklyn are mired in the “prison industrial complex” because they commit serious crimes, said Green. But, he continued, “We have a lot of children who get caught up in the system because they were careless. I’m in that last

category.” He said this with a straight face despite being convicted of taking kickbacks from a private prison company, one of the many financial beneficiaries and components of the “prison industrial complex” he purports to criticize. All his acts on behalf of CSC were to perpetuate its feeding at the trough of New York tax dollars.

But this isn't a problem for New York voters. Apparently, many in the community agree with him. Green resigned his position in June, 2004 after pleading guilty to the charges, but ran again. He was reelected.

Still, there's at least one person who probably didn't vote for Greene--Albany District Attorney Paul Clyne, the man who prosecuted him. “If the voters of Brooklyn want Roger Green to represent them in the Assembly, then they can have him,” said Clyne. “It's up to the voters to decide whether they want to be represented by a convicted thief.”

PLN reports extensively on CSC and other for-profit prison contractors. See indexes for more. 

Sources: *Daily News (New York)*

## Concubine and Children Cannot Sue for Wrongful Death of Federal Prisoner

The Eleventh Circuit Court of Appeals has held that a concubine and her children could not sue for damages resulting from the cancer death of federal prisoner Jose Miguel Ruiz.

This action was brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346, against the United States in the District Court for the Middle District of Florida. First, the District Court held Luz Gonzelez lacked standing to sue for any wrongs inflicted on Ruiz, or for any emotional distress she may have suffered as a result thereof. Gonzelez contended she could bring the claims because she was either Ruiz's common-law wife or his “concubine more uxorio” under Puerto Rican law.


In affirming the district court, the Eleventh Circuit held that because the alleged wrongful acts occurred in Florida, Florida law—including Florida choice of law rules—gov-

erns the action. Florida law directed the court to consider Puerto Rican law to see whether Gonzelez qualifies as Ruiz's common law spouse. Rather than examine that law, the court affirmed because Gonzelez “has provided us with no authority, however, to suggest that Puerto Rico recognizes common law marriage. Moreover, while she may have held concubine more uxorio status, she has provided us with no authority demonstrating that concubines have the right under Puerto Rico law to sue for wrongful death.”

The Eleventh Circuit then turned to the claims of Gonzelez's children. Because the children failed to brief or argue the district court's dismissal of their claim for “loss of associational benefits,” the court deemed that point waived.

The district court held the conduct that “Gonzelez's children brought suit was, as a matter of law, insufficiently outrageous to support a claim for intentional infliction of emotional distress.” That court said, “Plaintiff's factual allegations establish, at most, a series of BOP deceptions regarding Mr. Ruiz's terminal medical condition, the BOP deceptions regarding Mr. Ruiz's family with reasonable access to Mr. Ruiz during

his illness, the BOP's failure to inform plaintiff's of Mr. Ruiz's death, the BOP's death, the BOP's conduct in exposing plaintiff's to Mr. Ruiz's pain and suffering due to substandard medical care, and the BOP's delay in transporting Mr. Ruiz's remains. None of the conduct can be characterized as ‘atrocious’ or ‘utterly intolerable to a civilized community.’” See: *Gonzelez-Jimenez de Ruiz v. United States*, 231 F. Supp.2d 1187 (M.D. Fla. 2002). A sad but accurate commentary on the reality of prison medical care.

The Eleventh Circuit agreed that “while substandard medical care is regrettable and not to be tolerated—even in a federal correctional facility—the rendering of substandard medical care does not constitute the intentional infliction of emotional distress.” Additionally, “mere deception, while unfortunate, does not amount to intentional infliction of emotional distress.” Florida law requires “physical injury as a result of the emotional trauma,” to state such a claim. The children failed to allege sufficient physical injury. Based upon the above, the Eleventh Circuit affirmed the district court's dismissal order. See: *Gonzelez-Jimenez de Ruiz v. United States*, 378 F.3d 1229 (11th Cir. 2004). 

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# California Awards MCI WorldCom Another Sole-Source Prisoner Phone Contract

by Marvin Mentor

The California Department of Corrections (CDC) awarded a sole-source contract to MCI WorldCom (MCI) for all CDC prisoner phones. The October 29, 2004 agreement covers four years, with options for up to two one-year extensions. Significantly, CDC entered into the contract with no input from its prisoner users or their families even those few remaining phone call recipients who have accounts with MCI. Prior contracts with MCI and Verizon expired in February, 2005.

The new contract provides that in-state long distance rates will be reduced by 20% (from what has been \$.93 per minute), but out-of-state rates will remain unchanged. Future rate reductions are provided for when call volumes increase (reviewed annually). MCI will also provide newer technology equipment that includes Personal Identification Number capability, which CDC might use in the future. MCI will upgrade equipment at its current sites.

According to Lorretta Fine, CDC's Telecommunications Branch (TB) Chief, the new contract is designed to aid CDC investigative staff. Statewide reports on telephone use can be generated. Auto-archiving will be done on MCI computers. Call detail records and voice recordings will be accessible for the life of the contract. MCI will provide computer workstations for investigative staff, tied to the phone network. Voice recordings will be compatible with any computer having a sound card. And MCI will give access to its databases to CDC investigative staff.

Prisoners, in turn, will gain volume control buttons on all phones. As for the prisoners' families who pay the bill, MCI will provide an Internet website regarding services, a toll-free number to inquire about billing, and the option of pre-paid or direct bill accounts with MCI. The TB will issue a memo to Wardens at prisons where Verizon is being purged, to permit "prisoners and families/friends to allow time to prepare for the transition and potential impacts."

That's the good news. Reality is not so pretty, however. PLN previously reported on criminally bankrupt MCI's non-competitive 43% kick-back contract with CDC, as well as MCI's sordid national track record (see: *PLN*, Oct. 2003, p.12, Scandal Ridden, Bankrupt MCI WorldCom "Wins" No-Bid California Prisoner Phone Contract) wherein

MCI, fresh from exposure of its world-record \$11 billion accounting fraud, won kick-back bidding wars (up to 60% in New York) and forced small business competitors out of business. Some of their officials faced criminal charges in Oklahoma.

It is not known what pay-to-play fee MCI promised CDC, nor who the competitors were (if any), nor on what basis the contract was awarded. State Senator John Vasconcellos called MCI's earlier 2002 no-bid award "grossly immoral," a public image CDC apparently still accepts today.

But what is known is MCI's current CDC performance. Since announcing "billing changes" in November, 2003, MCI has stopped inter-company billing for calls placed to non-MCI customers' phones. If a prisoners' family deals with other established phone companies, or has switched to new Voice Over Internet Protocol or cell phones prisoners can forget calling them. At one CDC prison, prisoners reported los-

ing contact with over 80% of their contacts when stopped by a lame recorded message, "Billing dispute with. MCI" [read: switch to MCI from your present vendor or lose your loved ones' calls].

But if the call recipient tries to fix the problem, the story only gets worse. One determined contact reported it took 11 hours of on-phone time, over a 30 day period, to get MCI to permit them to receive up to six calls per month from one prisoner. Others less stalwart have given up even trying to get MCI to work with them. There is hope, however. If MCI continues to cut off prisoners from their loved ones, the losses incurred may hasten finality of their bankruptcy and permit a competitive new phone source for CDC that will charge fair rates and treat its customers and CDC prisoners with dignity. ■

Source: CDC TB Bulletin No. 04-01, New Statewide Inmate/Ward Telephone Contract, 11/16/04.



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# California Youth Authority Fires Six For Pummeling Prisoners And Filing False Reports

On September 10, 2004, six California Youth Authority (CYA) Correctional Counselors (guards) were fired for using "excessive force" in beating two prisoners at a Stockton, California youth prison on January 20, 2004, and then falsifying the reports. The San Joaquin County prosecutor and the State Attorney General declined criminal prosecution of the guards.

In nationally publicized footage from video cameras inside the N.A. Chaderjian Youth Correctional Facility, two of the counselors [who are peace officers and members of the powerful prison guards union (CCPOA)] were filmed pummeling the two youths long after they had been subdued. Counselor Delwin Brown struck 28 blows to the side of the head of handcuffed prisoner Narcisco Morales while sitting on top of the face-down youth. Counselor Marcel Berry was observed kicking subdued and restrained prisoner Vincent Baker in the face, while driving his knee repeatedly into Baker's neck. The remaining four counselors, Linda Bridges, Steve Chiu, Danny Torrez and Robert Dutra, were fired for pepper spraying the prisoners after they were subdued and/or for filing false, self-serving reports on the incident.


The melee apparently began when prisoner Morales punched one of the counselors

in the face in his office, bloodying and breaking his nose. The scuffle spilled into the video-monitored lounge area, where the pummeling was documented showing one counselor shooting a prisoner with a gun that fired balls of pepper spray, while another counselor sprayed their faces with chemical mace. The counselors falsified their reports by saying that the chemical weapons were used only to subdue the two prisoners, when the tape clearly showed it happened after they were handcuffed, face-down and prone on the floor. CYA Director Walter Allen concluded that the firings were the appropriate level of reprimand, noting that "they have their appeal process that they have to go through" with the State Personnel Board. However, that Board's record on prison guards' appeals has been to reverse disciplinaries, reinstate jobs and order back pay for over 60% of the cases heard.

Local CCPOA Chapter President David Darchuk said that the appeal would disclose "the truth ... that what took place was perpetrated by these wards, these inmates, these gang members and predators." "Brown was fighting for his life, and Berry was helping defend him," Darchuk said of his union brethren who repeatedly kicked, kneed, punched and maced the subdued and restrained youths.

San Joaquin County Assistant District Attorney Jim Willet had to dismiss charges they had initially filed on the two youths when the guards refused to testify at the preliminary hearing, instead invoking the Fifth Amendment. Willet declined to prosecute the guards, in turn, because of the fact that the prisoners had started the fight. State Attorney General Bill Lockyer who accepted six-figure donations from the CCPOA during his recent election campaign declined to prosecute the guards as well.

Youth and Adult Correctional Agency Secretary Roderick Q. Hickman, a dues-paying member of the CCPOA, called the counselors' reports "troubling" and a reminder of the need to wipe out the "code of silence" that protects criminal guards. [See: *PLN*, Aug. 2004, p. 17 ("Green Wall" Code of Silence Culture Said To Rule California Prisons.)] Hickman opined that the counselors here "exacerbated problems through their behavior in the aftermath."

Darchuk called the incident isolated, adding that gang-affiliated prisoners organized plans to assault staff including Brown. "Imagine the stress he was under, knowing he could be assaulted or killed at any time." 

Sources: *Sacramento Bee*, *Los Angeles Times*, *San Jose Mercury*.

## Louisiana Jail Settles Suicide Suit For \$3 Million

On June 10, 2004, the City of Shreveport, Louisiana, agreed to pay \$3 million to settle a lawsuit arising from the suicide death of a prisoner in the city's jail.


Frances Loggins, 48, was arrested for public drunkenness and taken to the Shreveport City Jail on July 5, 2002. Loggins informed the arresting officer that she was going to kill herself, and the officer told jail supervisors.

After being processed in, Loggins was put in a "day cell"--a recreation area that contains a shower hidden from security cameras. Approximately 30 minutes later, Loggins hung herself from a shower rod using her jail-issued pants. She was in a coma for four days and died after life support was discontinued.

Loggins' family brought a 42 U.S.C. § 1983 lawsuit against the City, the mayor, and various jail officials in the U.S. District Court for the Western District of Louisiana alleging violation of Loggins' due process rights and deliberate indifference to her serious medical needs. The family specifically claimed that when jailers learned that

Loggins was suicidal they should have taken her to the hospital for evaluation and should have dressed her in paper clothes pursuant to jail policy. The family also cited a 2000 report which found the jail was understaffed, inadequately designed, and used outdated surveillance equipment.

Loggins' survivors--her husband and four children--sought wrongful death and survival damages for the pain and suffering they and Loggins experienced. A nursing school student, Loggins' future wage loss was estimated at \$800,000.

The City settled before trial, agreeing to pay \$3 million on behalf of itself and all defendants. The family was represented by Laurie W. Lyons of the Shreveport law firm Walker, Tooke & Lyons. See: *Loggins v. City of Shreveport*, USDC WD LA., Case No. CV03-1277 S. 

Source: *VerdictSearch National*

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# Court Holds Florida's Administrative Processing Fee is Constitutional

by David M. Reutter

On December 21, 2004, Florida's Leon County Circuit Court held that a 2004 law that imposed an administrative processing fee on monies deposited into prisoner accounts does not violate the Florida Constitution's single-subject rule. The December 2004 *PLN* reported the enactment of this law and ensuing lawsuit.

Before the Court was summary judgment motions filed by both parties. This class action suit was brought against the Florida Department of Corrections (FDOC) by prisoners Jesus Scull and John O'Callaghan. The lead plaintiff was Kindred Spirits Charitable Trust, who is "dedicated to addressing the spiritual and emotional needs of Florida's prisoners and their families."

The Court said it had three issues to determine. The first concerned the standing of the plaintiffs. The Court said there is no doubt Scull and O'Callaghan had standing, as their meager prisoner accounts, comprised of funds they receive from Kindred Spirits, are directly and adversely affected by the imposition of the processing fee, which will substantially reduce their available funds. Kindred Spirits, however, had no standing to bring the suit. In so holding, the Court said Kindred Spirits gave the funds to the prisoners and no longer had an interest in those funds. "While the new law may frustrate Kindred Spirits' charitable mission, Kindred Spirits does not have an actual, present, adverse, or antagonistic interest in

the subject matter," the Court held. FDOC was granted summary judgment against Kindred Spirits on that basis.

The Court then decided if Scull and O'Callaghan were required to exhaust administrative remedies before seeking relief from the Court. The Court held administrative remedies cannot resolve the constitutional issues challenging the law under attack. This is the type of claim that does not call for administrative remedy exhaustion, the Court held.

Finally, the Court turned to the constitutional challenge. "The specific constitutional question is whether the act embraces more than one subject, rendering it violative of article III, section 6 of the Florida Constitution."

The first sentence of the act states: "An act relating to the operational authority for state correctional facilities." The Court held the administrative processing fee is "logically connected to the operational authority of the state prisons. "While the act also contained sections dealing with private prisons." While the act also contained sections dealing with private prisons, "the collection of an administrative processing fee falls within the operational functions of the prisons." Accordingly, the Court held the law was not violative of the single subject rule and it entered summary judgment in favor of FDOC. See: *Kindred Spirits Charitable Trust v. Crosby*, Florida Second

Judicial Circuit, Case No: 04-CV-1799. The plaintiffs have appealed.

As of mid-January 2005, FDOC had yet to remove funds from prisoner accounts under the administrative processing fee law. FDOC, nonetheless, has established procedures to take prisoners' money by enacting rules in the Florida Administrative Code. Those procedures became effective January 23, 2005.

Under the new procedures, prisoners "shall be charged an administrative processing fee of no more than \$6.00 per month." The fee will be based upon account activity. No fee will ensue if there is no account activity for the month. Account activity will be charged as such: "\$1.00 for each weekly draw, \$0.50 for each deposit and each special withdrawal." See: Rule 33 203.201(h), Fla. Admin. Code.

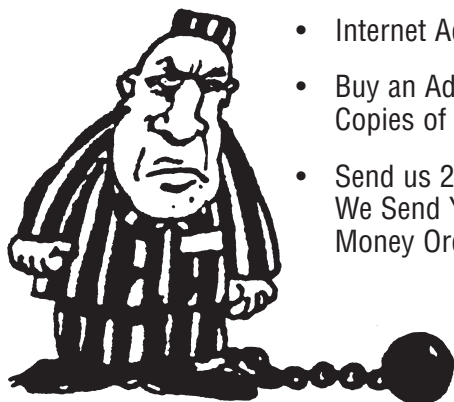
The processing fee is a continuation of the Florida Legislature's efforts to squeeze every penny they can out of prisoners and their families. In the last 10 years, the legislature has enacted a \$4.00 fee for sick call use, raised canteen prices to "fair-market value," and required canteen profits to be placed in the general revenue fund rather than used for recreation and vocational programs. The administrative processing fee is just another wheel in the prison industrial complex's machine. ■

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# Florida's Faith-Based Programs

## Under Watchful Eyes

by David M. Reutter

With budget cuts eliminating its substance abuse programs and most educational programs in its prisons, the State of Florida is turning to religious groups to rehabilitate its prisoners. Since 1995, Florida's prison population has exploded from 62,000 prisoners to its current population of 80,000 which nets the Florida Department of Corrections (F.D.O.C.) a \$1.7 billion annual budget. Over that same period, FDOC's substance abuse programs have been eliminated despite the fact that at least 80% of all Florida prisoners have substance addictions. Moreover, despite the fact prisoners have a median educational grade of 6.5, basic education and vocational programs have been cut as FDOC adjusts to representing 8.0% of the states budget compared with 8.6% in 1997-98. That has resulted in money flowing from religious groups to the state.

At a December 12, 2003, White-House sponsored news conference in Tampa, which was organized to highlight President Bush's attempts to give religious organizations a greater role in solving social problems, Florida Governor Jeb Bush announced the FDOC would house 800 prisoners at Lawtey Correctional Institution (L.C.I.) that volunteered for the faith-based program.

To be eligible for the program, prisoners must be within three years of completing their sentences and have had a clean prison record for the previous 12 months, said FDOC spokesman, Sterling Ivey.

"I believe that when people commit violent acts, it is appropriate to enforce laws and that people should be punished for their actions," Governor Bush said. "But I also believe that lives can be changed for those

individuals who are motivated to change their lives, programs like this can make a tremendous difference and create a pathway out of the criminal justice system."

Space at the program is first-come, first-served. Once accepted into the program, prisoners receive religion-based classes in everything from parenting and character building to job training. Volunteers from religious groups also will help prisoners find work after their release.

On Christmas Day 2003, Governor Bush and 800 prisoners from 26 faiths attended a dedication ceremony at LCJ. More than 90 percent of those who express a religious preference are Christians, 5 percent are Muslims, and less than 1 percent are Jews.

The community volunteers are in principle, to be from all faiths. In practice, most volunteers who help out are Christian fundamentalists.

Those volunteers and the groups that support them have nominally invested financially to reach the prisoners. Because of the State's financial squeeze, LCI Warden, Dwight J. White said each church group wishing to sponsor a dormitory was required to invest at least \$10,000 in equipment, including ceiling fans and musical instruments.

These groups are almost entirely from one tradition: Southern Baptists and other Protestant evangelicals who read the Bible as the literal word of God, believe in creationism, and hold that Jesus is the only way to Salvation. White said the prison has had difficulty attracting clergy from other faiths.

Florida is known as a bread-and-water state among prison experts. That principle holds prisoners should live no better inside than the state's poorest residents do on the outside. Hence, Florida does not install air conditioning, has banned state spending on recreational equipment, and has cut daily operating expenses from \$40 to \$35 per prisoner since 1999.

Critics of the faith-based program are closely watching. That has caused the FDOC to act. Prior to creating the program at LCI, FDOC instituted 10 faith-based dorms, including the Horizon program at Tomoka Correctional Institution (TCI).

Horizon has largely been supported by Christ-to-Inmates, which was created by TCI Chaplain Perry Davis. Davis is a former FDOC prisoner who accepted Jesus Christ as Lord while imprisoned. At a sermon in the

summer of 2004, David told prisoners that pressure was coming down to take Jesus from the Horizon program, and if that happened he would disassociate himself from Horizon.

Shortly thereafter, the Horizon program curriculum changed. TCI prisoner Michael Sanders, who is a practicing Jew, was relieved. Sanders reported that he was required to read Christian books as part of the Horizon program. Fellow prisoners pushed to have their Christian faith recognized by Sanders, who reported that other prisoners placed a cross and a "Jesus saves" mural in the community prayer booth after he began using it regularly. Davis, meanwhile, has backed away from full support of Horizon after the FDOC ordered the curriculum changes. Sanders and other prisoners report a much more faith-based, rather than Christian-based, program is emerging.

At LCI, three Muslim prisoners who chose to skip a community night sponsored by Beaches Chapel Church in the prison gym slipped into a utility room that contained a sink, mop and pail. While their Christian brothers prayed, sang, and gave testimonials to their god in the gym, the three Muslim prisoners sat at a chipped formica table with two Korans and an Arabic-language workbook.

Burl Dees, 36, is less than impressed with his experience of the Lawtey program. He had a long list of grievances. The prison had only been visited by a Muslim cleric once in 12 months; each morning, all prisoners were encouraged to join Christian "devotions." Little instruction is provided in other faiths. While the utility room provided seedy accommodations, Dees and his Muslim fellows were glad to have it, as they were told that participation in community night was mandatory.

In April 2004, FDOC expanded its faith-based program to create one for 300 female prisoners at the Hillsborough Correctional Institution. Critics threatened legal action. "It's incredibly irresponsible to open a second facility when so many constitutional and practical questions remain about the first facility," said Barry Lynn, Executive Director of Americans United for Separation of Church and State.

Critics fear, nonetheless, that FDOC's faith-based programs create privileges for those enrolled and may lead prisoners to believe a parole board may be more sympathetic to bible-believing prisoners than

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they might be to non-believers who have not participated in a faith-based program. This may coerce some prisoners to fake conversions to receive systematic advantages while those who remain true to their unpopular faith, or proudly profess no faith, may receive harsher treatment by the prison system. This has long been the reality of American prisons which were founded on a religious basis in the 1700s.


Governor Bush prefers to focus on Florida recidivist rates as justification for the program. "Wouldn't it be nice if we could figure out a way to lower that 38 percent closer to zero percent, for your family and your community?" asked Bush when announcing the program.

Florida has "systematically over the last decade made prison time nasty time," said Todd R. Clear, professor of community justice and corrections at John Jay College of Criminal Justice in New York. "But then they say private individuals can set up other types of facilities with amenities that make them much more comfortable places to do time, and all you have to do is give your life to Jesus Christ, our Lord and Savior. That doesn't feel to me like it's a constitutional arrangement."

To date, no lawsuits have been filed against FDOC's faith-based programs. The American Civil Liberties Union of Florida is waiting for the results of a test case challenging Florida's voucher program that

gives students tax payer money to attend religious schools.

With no future plans by the Florida Legislature to increase funding educational and substance abuse programs in Florida prisons, prisoners can expect to see an expansion of the faith-based program. The critics say they will be watching, and foreigners have taken notice too because the LCI program was reported by Al-Jazeera.

As noted in the April 2004 issue of *PLN*, Jails for Jesus, this is a long standing pattern of eliminating what modest rehabilitation programs exist for prisoners that are provided by the state and then either paying or allowing private, religious groups (who are almost uniformly Christian fundamentalists) to provide similar services with the caveat that the prisoners must either claim a religious conversion or be willing to undergo religious indoctrination to receive the services. The programs claim to be inclusive of all religious faiths even though in practice they are not. However, this ignores the prisoners who are atheists or agnostics and profess no religious belief at all. It amounts to little more than another guise to funnel tax dollars to conservative religious groups favored by legislators and politicians. 


Sources: *Washington Post*; *Beliefnet.com*; *Tallahassee Democrat*; *Sun Sentinel*; *Christian Science Monitor*; *Washington Times*; *Aljazeera*; *Crosswalk.com*; *Myway.com*.

## \$40,000 To Settle Excessive Force Claim At Los Angeles County Jail

In September, 2004, the Los Angeles County Claims Board (Board) agreed to pay \$40,000 to settle an excessive force claim brought by a prisoner injured at the L.A. County Main Jail.

On March 17, 2002, prisoner Joseph Amezola was protectively housed in the 2500 Module of the Main Jail because he was known to have a "hit" authorized against him by the Mexican Mafia. When released from his cell to shower, he bolted out of the module, ignoring orders to stop, and went downstairs towards the shower in 2800 Module instead. After ignoring another order to stop, Sheriff's deputies tackled Amezola around the waist, whereupon his forehead struck a steel shower door frame. He continued to resist, but was finally subdued and handcuffed. His injuries were listed as a bloody nose, contusions, cuts, bumps and abrasions to his head, shoulders, back and legs were tended to at the clinic over three days. When subsequently trans-

ferred to state prison in Chino, he made no requests for further treatment.

Two years later, when Amezola was again in state prison, he began complaining of frequent headaches and occasional seizures, which he attributed to his former jail head injuries. A June 10, 2004 civil rights suit trial date in Superior Court was stayed pending possible settlement. County counsel estimated to the Board an exposure of \$225,000, consisting of \$25,000 future medical expenses, \$100,000 emotional damages and \$100,000 in attorney fees. Counsel opined that in spite of Amezola's obvious contribution to his own plight, available witness testimony stating that deputies continued to strike Amezola after he was subdued might convince a jury that deputies violated Amezola's civil rights. A settlement of \$40,000 for damages, costs and attorney fees was authorized. See: *Amezola v. County of Los Angeles*, Los Angeles Superior Court Case No. BC 291633. 



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# Texas State Equipment and Employees Used for Private Prison Labor Lobbying

by Matthew T. Clarke

Republican State Representative Ray Allen of Grand Prairie, Texas, Chairman of the Texas House Corrections Committee, has been using his state employees and state equipment to operate a private firm that specializes in consulting and lobbying for the private prison industry. Allen's company, called Service House, has one client: the National Correctional Industries Association, a promoter of programs designed to use prisoner labor in private business.

Allen, 53, is known as a conservative Republican who is very pro-gun and anti-abortion. He took a leading role in passing the 1995 law that allowed Texans to carry concealed firearms.

Two government watchdog groups have criticized Allen for his practices of using state employees and equipment to further his private company. For instance, Scott Gilmore, Allen's top aide, was paid by the state while he was traveling around the U.S. doing paid consulting and lobbying for the prison factory industry. In another incident, a letter to a lobbying client was found stored on a state computer used by ex-Allen employee Tedrah Hutchins, who left Allen's office in June, 2004 for another state job. Hutchins also used the state computer system's email to send a "to do" list to Gilmore that was almost exclusively Service House items.

Allen acknowledges that Hutchins erred in using state email and said the storing of

the lobbying letter on the state computer was a "violation of everything we do and know." However, he fully defended Gilmore's double (or triple) dipping, claiming that Gilmore's long hours when the legislature is in session more than make up for the weeks when he ran off to do consulting or lobbying in Washington, D.C. and San Francisco. Gilmore earns the highest salary for House employees: \$43,680, while being paid \$22,000 by Service House and \$600-a-month as a retainer by Allen's campaign. The Texas State Legislature meets in regular session for about six months every other year.

"It's probably more unusual for somebody to use state staff in a private industry business, but campaign work would be very common," according to Allen. "The question is not, 'Is it wrong to do this?,' the question is, 'How do you keep it separate?'"

You shouldn't have state workers in the state capitol in state government offices doing private business because you can't keep it separate according to Suzie Woodford, director of Common Cause of Texas.

"I do not believe you can keep everything that segmented," said Woodford.

Campaigns for People director Fred Lewis believes Allen should make his employees keep precise records of how many hours they spend working for the state, on the campaign and for Service House.

"You have to document that no public funds were spent for a person on the legislative payroll to engage in either private business or campaign work," said Lewis.

Currently, Allen's staffers are paid as full-time state employees, but are not required to keep track of how many hours they actually work for the state. Furthermore, the House apparently does not have a standard for the minimum number of weekly hours an employee must put in to be considered full-time. Service House employees do report billable hours for Allen's lobbying practice, according to Allen.

Allen poo-pooes the controversy. He says that he provides separate computers and phones for the separate purposes and periodically reimburses the costs of private long-distance phone calls. He claims that any use of state equipment was unintentional or incidental. He didn't address the use of a state office to conduct private business.

Allen makes a paltry \$7,200 a year as a part-time Texas state legislator plus per diem payments when the legislature is in session. He claims to have made about \$35,000 from Service House in 2003 and about \$10,000 teaching gun safety courses.

"I'm not a bit embarrassed to be doing the work I'm doing," said Allen. "I am a bit embarrassed it doesn't pay better."

Allen says that he merely put the expertise he gained as Chairman of the House Corrections Committee to use to make an "honest living" promoting the use of prison slave labor in private industry.

"I didn't come to the Legislature with a big business or an insurance company or a law firm keeping me on retainer," said Allen by way of explanation.

No, instead Allen sought out a large industry—the private prison labor industry—to get himself put on retainer too. What does it say about Texas government, and Allen, when the legislators expect to be paid off by big business or other special interests? What does it say about Texas voters that they reelected Allen in 2004? What does it say about the media that no one even discussed the obvious conflict of interest of the Chairman of the House Corrections Committee lobbying for the private prison slave labor industry? ■

Sources: *Fort Worth Star-Telegram*, *Dallas Morning News*, *Austin Chronicle*.

## Rhode Island Prisoner Awarded \$3,900 for False Imprisonment

A Rhode Island jury awarded a prisoner \$3,900 for false imprisonment on April 21, 2004. In August 1994, William Ross was incarcerated and held by the Rhode Island Department of Corrections (RIDOC) on a minor larceny charge.

During his incarceration, the State of Oklahoma issued a warrant for his arrest stemming from probation violations in that state. Ross was taken to court and his Rhode Island charges were disposed of based upon the Oklahoma warrant, the judge remanded Ross back to RIDOC's custody. The judge, however, did not directly articulate the reason for remanding Ross back to jail. On the remand order there was a written note. It was disputed at trial if this notation was made by the judge.

Ross continued to be incarcerated from early August 1994 through September 27, 1994, for a charge of fugitive from justice. He remained held by RIDOC until late November, 1994, when Oklahoma officials retrieved him. Once in Oklahoma, Ross was sentenced to time served.

Ross claimed in his lawsuit that he was unlawfully held for 40 days on a remand order with no reason given to justify his detention after the Rhode Island charges were disposed of. He sought emotional distress damages for wrongful incarceration. After deliberating for 2½ hours, the jury entered a verdict in Ross's favor and awarded him \$3,900. See: *Ross v. Rhode Island Department of Correction*, Rhode Island Superior Court, Providence and Bristol Counties, Case No. PC19971664. ■



# Georgia Prison Official Immune, Prison Nurse Not, in Prisoner's Suicide

by Robert H. Woodman

The Court of Appeals of Georgia, Second Division, affirmed in part and reversed in part the judgment of the Gwinnett Superior Court in a case brought against a prison official, a prison nurse, and other defendants under 42 U.S.C. § 1983 and state tort law claims for the suicide of a Georgia state prisoner.

Brent Barwick was incarcerated in the Phillips State Prison on July 6, 1998, for a parole violation. On August 30, 1998, Barwick attempted suicide by deliberately cutting his foot on his cell toilet. Barwick was hospitalized then released to a mental health unit where he was allowed to self-medicate with acetaminophen (a.k.a. Tylenol®). The mental health unit, operated under contract with the Georgia Department of Corrections (DOC) by the Medical College of Georgia (MCG), kept no log of how many pills prisoners were given and did not require prisoners to ingest the pills in the presence of staff. According to prisoner witnesses, Barwick talked daily about suicide. Prisoners reported this to mental health staff and told staff that Barwick was hoarding pills; however, nothing came of these reports.

On September 29, 1998, Barwick ingested 110 acetaminophen pills that he had hoarded and stashed on prison grounds. That same day, a prison psychiatrist making rounds evaluated Barwick and determined that he did not show signs of suicidal impulsiveness or of an acetaminophen overdose. However, that afternoon, following a statement given by another prisoner, a mental health counselor examined Barwick for an overdose on acetaminophen. He called in nurse Bob Jones to evaluate Barwick. Barwick denied overdosing, and Jones concluded no follow-up was needed.

Barwick subsequently admitted to overdosing on acetaminophen to a guard, who informed Sergeant Mabel Davenport. After examining Barwick, Davenport repeatedly demanded that medical personnel check on Barwick, but nurse Jones refused, and nurse Carter, after examining Barwick, concluded nothing was wrong with him. Lieutenant Stuart Minor reportedly told Barwick he didn't care if Barwick lived or died and refused to transport Barwick to an outside hospital.

Barwick was not transported to an outside hospital until September 30, after he was discovered bedridden in a fetal position suffering terrible pain. He died on October

3, 1998, of acetaminophen poisoning.

Barwick's estate's administrator sued Lt. Minor, Nurse Carter, the DOC, the MCG, and Captain Isaiah Bailey, Minor's supervisor, under 42 U.S.C. § 1983, for deliberate indifference to Barwick's serious medical needs and for violation of his Due Process rights, and under Georgia state law claims for medical malpractice, breach of contract, wrongful death, and negligence. The parties filed cross motions for summary judgment. The trial court granted in part and denied in part the motions and issued a certificate for immediate review.

The Court of Appeals held that summary judgment against nurse Carter was proper. Evidence established that she likely knew that Barwick had attempted suicide by overdosing on acetaminophen. She disregarded this information, thereby deliberately and wantonly inflicting serious pain on him. She was not entitled to qualified immunity on the § 1983 claims.

Minor, however, was immune from

suit. The trial court held Minor was acting within the scope of his employment when he refused to transport Barwick to an outside hospital, but that a fact question remained for the jury whether Minor acted with intent or malice to injure Barwick. The appeals court held that the question of intent or malice to cause injury was irrelevant. Minor was acting within the scope of his employment. Given everything that the evidence established that Minor knew at the time, the court could not conclude that he acted unreasonably. Furthermore, under Georgia law, even if Minor did act with malice or intent to injure, he and Carter were both immune from suit on the state law claims, except as specifically provided in the Georgia Tort Claims Act, O.G.A. § 50-21-20, *et seq.*

The trial court judgment was affirmed in part and reversed in part and the case remanded for further proceedings. This is not a judgment on the merits of the case. See: *Minor v. Barwick*, 246 Ga. App. 327, 590 S.E.2d 754 (2003). ■

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# Race-Based California Prison Job Lockout May Violate Equal Protection

by John E. Dannenberg

A divided panel of the Ninth Circuit U.S. Court of Appeals held that during a California prison partial lockdown limited to two ethnic populations, prison officials' exclusion from early return-to-work of pre-screened "critical" prisoner workers solely because of their race, did not rise under the facts of the case to the prison officials' claimed level of a rational connection to a legitimate penological interest. While thus reversing the district court's grant below of summary judgment for the prison officials, the Ninth Circuit noted the officials were nonetheless protected by qualified immunity.

Jamel Walker is a black Lead Law Library Clerk at Calipatria State Prison. In 1994 and 1995, Calipatria experienced numerous lockdowns due to prisoner on prisoner vio-

lence as well as assaults on staff. Because the perpetrators were mostly black and Hispanic, prison officials often locked down just those two populations, pending completion of an investigation. However, during a lockdown, Calipatria's procedure calls for escorting non-involved prisoners to their job assignments if their names appear on a "critical workers" list. As the investigation/review process proceeds, additional screened "critical workers," even those within designated racial groups may be cleared for work. [Editor's Note: California appears to be unique in its use of race based lockdowns.]

In one such lockdown, Walker complained that even after he had personally been cleared of any culpability in the unrest, he was still denied "critical worker" status solely because "he was black." Nonethe-

less, black prisoners who had deadlines for ongoing legal work were escorted to the law library during the lockdown to ensure their continuing right of access to the courts. Walker pointed out the anomaly that while they were in the library, their sole supervision was by a staff librarian, not a guard. Thus, as a law clerk (and presumably "critical" to the library patrons' success in their legal research), Walker was banished from the library, post-screening, solely because he was black, while his black brethren patrons were permitted unguarded access. This state of affairs persisted even though Walker had been repeatedly screened during prior lockdowns and always found to be non-affiliated with the gang-related strife.

Walker sued in U.S. District Court (S.D. Cal.) under 42 U.S.C. § 1983 on an equal protection theory, seeking declaratory and injunctive relief and damages. Because prison officials did not provide any evidence to support their race-based policy (unlike in *Johnson v. California*, 321 F.3d 791 (9th Cir. 2003), cert. granted, 124 S.Ct. 1505 (2004), and reversed, see: *PLN*, Apr. 2004, p.40), and the court could not divine any good reason for it, the Ninth Circuit held that the first (and preclusive) prong of *Turner v. Safley* had not been met [citing *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001)], namely that the prison policy did not evince a rational relationship to a legitimate penological interest. Accordingly, the summary judgment below for prison officials was reversed, and the case remanded to the district court on the question of future declaratory relief grounded in equal protection.

Separately, the court opined that because Walker's case predated *Johnson*, there was no prior clear notice to prison staff (*Saucier v. Katz*, 533 U.S. 194 (2001)) that such race-preclusive behavior would violate Walker's constitutional rights. Therefore, qualified immunity protected the defendants from liability for damages.

The dissenting judge disputed the majority's attempt to distinguish gang affiliation from racial allegiance, noting that in prison culture, racial identity is a legitimate penological litmus based upon peer pressure alone. Moreover, the dissent concluded that Walker's proposed reasonable alternatives were at best speculative and that any injury to him was only de minimus. See: *Walker v. Gomez*, 370 F.3d 969 (9th Cir. 2004). ■

## Illinois Appeals Court Reinstates Prisoner's Disciplinary Mandamus Petition

The Appellate Court of Illinois, Fourth District, held that prisoner in the Illinois Department of Corrections (DOC) had adequately stated causes of action for mandamus relief pertaining to disciplinary sanctions imposed against him.

On September 11, 2002, William Cannon, Jr., a prisoner at the Pontiac Correctional Center, was issued a disciplinary citation for yelling to another prisoner while standing inside his cell door. The guard who issued the citation, Michael Burger, told Cannon the citation was for violating a January 1, 2002, memorandum prohibiting excessive noise. On September 17, 2002, and again on September 29, 2002, Burger issued Cannon additional citations for excessive noise. Cannon was found guilty of all three disciplinary infractions.

In November 2002, Cannon filed a grievance relating to all three disciplinary cases. The grievance was denied and Cannon filed a pro se petition for mandamus relief alleging multiple violations of DOC rules and his due process rights. On September 26, 2003, the same day he filed it, the Circuit Court of Livingston County denied Cannon's petition for failing to state a cause of action. The sua sponte dismissal came in a docket entry consisting of three terse sentences. Cannon appealed.

On appeal, the Appellate Court of Il-

linois, Fourth District, held that Cannon had indeed stated causes of action for three of his claims. First, Cannon's claim that the DOC failed to issue the excessive noise level guidelines to him stated a cause of action because, if proved true, it would establish a violation of his due process rights. Second, Cannon's claim that the disciplinary committee failed to state its reasons for recommending the disciplinary action imposed stated a cause of action because a written statement of the reasons for a disciplinary action is required by both *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) and DOC Rule 504.80(I)(3) and (2). Third, Cannon's claim that the disciplinary committee failed to give the reasons for disregarding his exonerating evidence stated a cause of action because "DOC Rule 504.80(I)(2) provides that 'if exonerating evidence is presented and disregarded, the committee must state the basis for disregarding the evidence.'"

The Appellate Court chastised the trial court for not stating the basis for its decision, noting that "This court ought not be required to review a record in detail ... when the trial court itself has provided no analysis or explanation of the reasons for its dismissal." Affirmed in part, reversed in part, and remanded. See: *Cannon v. Quinley*, 351 Ill. App. 3d 1120; 815 N.E.2d 443 (Ill. App. Ct. 2004). ■

# New Jersey DOC Liable for Prisoner Death Caused by CMS

by Robert H. Woodman

The Superior Court of New Jersey, Appellate Division, partly affirming a New Jersey prisoner's estate's suit, held that the New Jersey Department of Corrections (DOC) could be held liable for the negligence of Correctional Medical Services (CMS) in treating a prisoner's medical condition, resulting in the prisoner's death.

Tyrone Neal was a DOC prisoner in February 1997 at the East Jersey State Prison when he was diagnosed with a medical condition known as "Paroxysmal Nocturnal Hemoglobinuria with hemolytic episode" (PNH). The illness is a breakdown of the red blood cells. Treatment requires prednisone. The only known cure is a bone marrow transplant. After discharge from the hospital, the DOC administered prednisone until May 1997, then quit. In June 1997, Neal transferred to the Middlesex County Adult Corrections Center (MCACC) for sentencing on an unrelated charge. While there, he repeatedly completed medical request forms for treatment, but MCACC physicians refused to administer prednisone to Neal.

On August 1, 1997, Neal died of PNH.

Neal's estate and his daughter, Tymirah Scott-Neal sued the DOC, MCACC, and CMS, but none of the individuals involved, under New Jersey state law claims and 42 U.S.C. §1983. The case was dismissed on summary judgment but partly reinstated on appeal. CMS was dismissed as a defendant. On remand, the trial court dismissed all claims, and Plaintiffs appealed.

The appeals court held that dismissal of the §1983 claims against the DOC was proper because DOC is not "person" within the meaning of the statute. MCACC was properly dismissed under § 1983 because it is also not a person and, further, because Plaintiff failed to show the existence of a policy, practice, or custom by MCACC that caused Neal's death.

The appeals court, however, reversed dismissal of the negligence claims. The court held that the trial court's reasoning was flawed. The trial court held that DOC and MCACC were relieved of their obligations

to provide medical care to Neal once they contracted the care out to CMS. The appeals court held, "Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody."

The appeals court further held that the plaintiffs made a sufficient showing to survive summary judgment on the negligence claims. The trial court dismissed the claims on grounds that CMS was an independent contractor. The appeals court repeated that contracting care out to CMS relieved neither DOC nor MCACC of their obligations to provide adequate medical care to Neal. However, citing New Jersey's Tort Claims Act, the appeals court agreed with the trial court that plaintiffs could not win punitive damages against the government agency defendants.

The trial court decision was affirmed in part and reversed in part and remanded for further proceedings. See: *Scott-Neal v. New Jersey State Department of Corrections*, 366 N.J. Super. 570, 841 A.2d 957, (2004).



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# No *Miranda* Error During FBI Office Interrogation Where Parolee Knew He Was Free To Leave

by John E. Dannenberg

An en banc panel of the Ninth Circuit U.S. Court of Appeals held that no *Miranda* violation occurred in failing to suppress an interrogee's statement taken in the office of the FBI, where the person knew he was free to leave. The court further held that no Fourth Amendment violation occurred where the interrogee, a California state parolee, had signed a "Fourth Waiver" [consent to search by any law enforcement officer] as a condition of parole.

In 1998, FBI agent David Bowdich, while investigating a February 10, 1998 armed bank robbery in San Diego, California, was informed that a "Ralphie Rabbit" was involved. This led Bowdich in 2000 to Raphyal Crawford, a California parolee. After talking with Crawford's parole agent, Carl Berner, Bowdich scheduled a "parole search" accompanied by four state police. Crawford had moved twice in the two years following the robbery. But Bowdich never intended to find evidence at Crawford's apartment. Rather, he used the search as a pretext to talk about the bank robbery.

The search occurred on July 27, 2000, when the five cops found Crawford asleep with his wife and 18 month-old daughter. The four state police entered the bedroom with weapons drawn and announced a "parole search." Bowdich took Crawford into the living room for "chitchat." When asked about an "old bank robbery case," Crawford clammed up which Bowdich attributed to the presence of the four state police. Crawford agreed to instead accompany Bowdich to "a private place" where he and San Diego Police Detective Michael Gutierrez could talk. They drove in silence for twenty minutes to Bowdich's FBI office.

There, Crawford was told he was not under arrest and could leave at any time. When Bowdich attempted to give Crawford *Miranda* warnings, Crawford protested and said he was there just to talk about an old case. They made no further attempts to "Mirandize" Crawford. The interview went on for an hour. Every time Crawford tried to end it, the police would ask one or two more questions. Eventually, Crawford admitted he had participated in the robbery and used a gun during the crime. Bowdich and Gutierrez ended the interview without arresting Crawford, drove him home, and left.

Thereafter, a grand jury indicted Crawford for armed bank robbery and use of a

firearm. When taken to trial, Crawford tried unsuccessfully to suppress the July 27th statements he had made. Although the court ruled that the search of Crawford's home was a Fourth Amendment violation (citing *U.S. v. Knights*, 219 F.3d 1138 (9th Cir. 2000)), the court nevertheless determined that the confession was sufficiently attenuated from the search to purge the taint of the constitutional violation. Moreover, the trial court held that Crawford was not in custody when questioned and that *Miranda* warnings were therefore not required. The court was not swayed by Crawford's claim that his confession was involuntary because of alleged promises by Bowdich and Gutierrez that he would not face prison for his involvement in the crime if he cooperated. Crawford then entered a conditional guilty plea, reserving for appeal the denial of his motion to suppress the confession.

On the initial appeal, a three judge panel of the Ninth Circuit reversed, holding that the parole search was illegal under the Fourth Amendment and that there was insufficient attenuation to avoid exclusion of Crawford's confession (*U.S. v. Crawford*, 323 F.3d 700 (9th Cir. 2003)). However, an en banc rehearing was later granted (*U.S. v. Crawford*, 343 F.3d 961 (9th Cir. 2003)), and that panel now affirmed the trial court's rulings, albeit on different grounds.

On rehearing, Crawford revitalized his trial court motion to suppress, arguing that under the Fourth Amendment, the pretextual "parole search" exceeded the scope of his state parole "Fourth Waiver." He also argued that the phony search amounted to an illegal detention, tainting any testimony gained as a result.

Under the Fifth Amendment, Crawford argued that his interrogation was "custodial in nature" and therefore required *Miranda* warnings and that his confession was involuntary because of the promises of non-prosecution allegedly made by Bowdich (which he later denied).

The en banc Ninth Circuit court began by assuming, without deciding, that the pretextual parole search was invalid under the Fourth Amendment. It concerned itself with whether the "exclusionary rule" should apply per *Wong Sim v. U.S.*, 371 U.S. 471, 484-488 (1963), after observing that detention-impairment diminishes when the questioning is attenuated from the detention,

as here. Bowdich had had probable cause to arrest Crawford at his apartment, based upon the informant's word, but he did not. Nor did he arrest Crawford when he admitted his participation. Thus, there was no "arrest without probable cause" in hopes that something would turn up. Indeed, case law (*U.S. v. Manuel*, 706 F.2d 908 (9th Cir. 1983); *U.S. v. Villa-Velazquez*, 282 F.3d 553 (8th Cir. 2002)) is dispositive on the non-application of the exclusionary rule when probable cause to arrest exists, but no arrest occurs. The court therefore concluded that the initial detention in Crawford's home did not require suppression of his statement at the FBI office.

The court then examined whether that statement was nonetheless the product of the illegal search, but concluded that the fact of the search itself did not make the later-given confession the "fruit" of that search.

As to the Fifth Amendment complaints, the court first held that because Crawford was not in custody and was told he was free to leave, there was no *Miranda* error. Second, the court examined the question of "psychological advantage" the police may have gained by means of the pretextual search. The critical inquiry was whether the psychological pressure overcame the will of the suspect at the time. Relying on *U.S. v. Kontny*, 238 F.3d 815 (7th Cir. 2001), the court held that even "trickery, deceit and impersonation do not render a confession inadmissible ... unless government agents make threats or promises." Here, because the alleged promise of non-prosecution was discredited, the court found that the ruse of the search did not render Crawford's statements involuntary.

Five judges concurred separately in the admissibility of the confession and affirmed the conviction, but (disagreeing with *Knights*, supra) opined that as a "waivered" parolee, Crawford had not suffered any Fourth Amendment violation. Three other judges dissented by distinguishing the bank robbery as a pre parole crime not subject to later imposed conditions of parole.

Accordingly, the en banc court upheld the trial court's ruling denying Crawford's motion to suppress his confession. Separately, it vacated the two-level enhancement on Crawford's sentence and remanded solely on that issue. See: *Crawford v. United States*, 372 F.3d 1048 (9th Cir. 2004)(en banc). ■

# Fifth Circuit Allows Sexual-Orientation Discrimination in Texas Prisoner Rape Suit

by Matthew T. Clarke

The Fifth Circuit court of appeals held that a homosexual prisoner who prison officials allegedly allowed to be repeatedly sexually assaulted and made a sex slave may sue the prison officials for both failures to protect him in violation of the Eighth Amendment and discrimination based upon sexual orientation in violation of the Equal Protection Clause.

Roderick Keith Johnson, a former Texas state prisoner, filed suit under 42 U.S.C. § 1983 in federal district court against various prison officials alleging they denied him protection from physical and sexual assault. [PLN Oct. 2002, p. 20]. Margaret Winters, Associate Director of the ACLU's National Prison Project (NPP) and the NPP's Craig Cowie represented Johnson.

Johnson is black, homosexual, and of slight build and effeminate manner. He was imprisoned 18 months at the Allred Unit. At the time of his incarceration, Allred was infamous for being gang-infested and extremely violent. Johnson alleged that prison gangs made him a sex slave, buying and selling him like chattel. He was allegedly raped, abused and degraded on a daily basis. Johnson filed numerous grievances and "life-endangerment" forms. He also wrote letters to prison officials complaining of his treatment. Johnson alleged that, although he was brought before a Unit Classification Committee (UCC) seven times, he was not given the safe-keeping (a form of protection for vulnerable prisoners), protective custody or transfer he requested. Instead, Johnson was told that "black punks" were not required to remain in general population on the unit and that he must either "fight or fuck" or alternatively should "find a man" or "choose somebody to be with" to gain protection from rape. After eighteen months of this treatment, Johnson was transferred to Michael Unit and placed in safekeeping there. Johnson was released on mandatory supervision to a halfway house after the suit was filed.

Johnson's suit consisted of three types of claims: (1) prison officials denied him protection from other prisoners in violation of the Eighth Amendment's prohibition against cruel and unusual punishment; (2) the failure to protect was racially motivated in violation of the Equal Protection Clause; and (3) the failure to protect was motivated by animosity toward homosexuals

in violation of the Equal Protection Clause. Defendants filed motions for judgment on the pleadings, to dismiss and for summary judgment alleging: (1) Johnson had failed to exhaust administrative remedies; (2) he had failed to plead a cause of action; and (3) defendants were entitled to qualified immunity. The district court denied all the defendants' motions and they filed an interlocutory appeal.

The Fifth Circuit carefully examined Johnson's grievances and found that several had not been fully exhausted by filing an appeal of the Step One denial. Therefore, the claims based upon events which occurred prior to the events that formed the basis of the first fully-exhausted grievance were not fully exhausted and must be dismissed.

The Fifth Circuit further held that, although prisoners need not state the legal basis of their suit in their grievances, they must present sufficient facts for the prison officials to be able to discern the legal basis of the claim. Johnson's grievances did not claim racial discrimination or even mention his race. Therefore, the grievances could not have put prison officials on notice of his race-based equal protection claims and those claims must be dismissed. The grievances did repeatedly mention his sexual orientation, adequately putting prison officials on notice of his sexual-orientation equal protection claim.

Furthermore, Johnson did not have to show that other, non-homosexual, similarly-situated prisoners had been treated differently to state a claim for sexual-orientation discrimination. His pleading alleged direct evidence of discrimination based on animus toward his sexual orientation proven by the defendants' statements. When there is direct evidence of discriminatory motivation, no comparison with similarly situated persons is required.

The Fifth Circuit found that, when they received knowledge of Johnson's complaints, the prison system executive director, warden

and chief unit classification officer passed them on to subordinates for investigation. Because this was a reasonable response to the situation by such higher-level prison officials, the claims against them had to be dismissed.

The Fifth Circuit held that the duty of prison officials to protect vulnerable prisoners has been established since the Supreme Court issued its decision in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994). Thus, defendants were not entitled to qualified immunity.

The Fifth Circuit reversed the district court's determination that Johnson had exhausted administrative remedies for incidents that occurred prior to the incident underlying the first fully exhausted grievance. All claims predating those incidents were dismissed. Defendants involved solely in those incidents were dismissed from the suit. The district court's denial of qualified immunity to the prison system executive director, warden and chief classification officer was reversed and those defendants dismissed from the suit. The remainder of the district court's decision was upheld. The case was returned to the district court for further proceedings with the remaining defendants, which included primarily those involved in the UCCs. See: *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004).

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# Ohio Appeals Court Upholds \$7,820 Award for 70 Days Unlawful Incarceration

by Robert H. Woodman

The Tenth District Court of Appeals of Ohio upheld a \$7,820 damages award by the Ohio Court of Claims to Alton M. Stroud, a prisoner of the Ohio Department of Rehabilitation and Correction (DORC). In its 2-1 decision, the appeals court found that DORC "may be found liable for the tort of false imprisonment" if it knowingly confines a prisoner beyond his mandatory release date. Further, the Tenth District found that DORC was collaterally estopped from litigating the issue of whether Stroud was falsely imprisoned.

Stroud was sentenced to a ten-month federal term of incarceration on April 10, 1998 for violating his supervised release. On May 14, 1998, before being sent to federal prison, he pled guilty in the Franklin County Court of Common Pleas to a state charge of second degree burglary and was

sentenced to two years imprisonment with 50 days of jail time credit. The trial judge did not specify whether the sentence was to be served concurrently or consecutively to the federal prison term. Stroud remained in jail until June 2, 1998, then went to federal prison to serve that sentence. He was returned to Franklin County Jail on January 20, 1999, and entered DORC custody on February 26, 1999.

Stroud began filing repeated motions for jail time credit with the trial court. The court eventually granted him an additional 58 days of jail time credit. Stroud also argued that he was entitled to credit for his time spent in federal prison; however, the court refused to grant him this credit. On January 27, 2000, Stroud filed a petition for writ of *habeas corpus* with the Ohio Fourth District Court of Appeals claiming unlawful

incarceration. Stroud argued that the trial judge did not specify whether his sentence was to be served concurrently or consecutively; consequently, under Ohio Revised Code (ORC) § 2929.41(A) and Ohio Administrative Code (OAC) § 5120-2-03 as they existed when he was sentenced for his state felony, Stroud's sentence, by default, was to be served concurrently with his federal sentence. The Fourth District agreed with Stroud and ordered his immediate release on the writ. See: *Stroud v. Lazaroff* (June 1, 2000), Pickaway App. No. 00 CA 09 (unpublished). Stroud left prison on June 2, 2000. DORC did not appeal the writ.

On January 26, 2001, Stroud filed a complaint in the Court of Claims charging DORC with false imprisonment from January 27, 2000, until June 2, 2000. He sought \$15,900 in compensatory damages, costs, and legal and equitable relief. Both Stroud and DORC moved for summary judgment. Both motions were initially denied, but the court later vacated its order and granted summary judgment to Stroud, awarding him \$7,820. DORC appealed claiming that it was compelled to abide by the trial court's orders denying the additional jail time credit, and, therefore, did not unlawfully imprison Stroud and that it was not subject to the tort of false imprisonment.

The Tenth District held, first, citing case precedent, that DORC had an independent, affirmative duty to correctly calculate Stroud's release date and to release him on January 27, 2000, because O.R.C. § 2929.41(A) and O.A.C. § 5120-2-03 are self-executing. Second, the appeals court held that DORC could not relitigate whether Stroud was illegally held. That issue was decided in the writ of *habeas corpus* and could not now be raised. Third, the court found that DORC was liable for a false imprisonment tort because (a) it had an independent, affirmative duty to release Stroud, (b) it intentionally held Stroud well past his release date, and (c) no intervening justification excused DORC's action. Thus, summary judgment was appropriate.

The Court of Claims grant of summary judgment to Alton Stroud and the award of \$7,820 in damages were affirmed. This case is published only in online formats. See: *Stroud v. Department of Rehabilitation and Correction*, 2004 Ohio 580, 2004 Ohio App. LEXIS 541 (10<sup>th</sup> Dist.).

## D.C. Prisoner Receives \$19,500 Settlement for Slip-and-Fall

The United States and the District of Columbia agreed on June 4, 2004, to pay Robert M. North \$19,500 for injuries he received from falling down a set of stairs while handcuffed. North was arrested on Thanksgiving Day 2000 by Federal Marshals. Since all federal buildings were closed for the holiday, North was taken to the Superior Court for the District of Columbia's holding cells.

While sitting in a second floor cell block waiting to be arraigned and for bail to be set, another detainee plugged a toilet and flooded the second floor, Federal Marshals evacuated

the detainees to the third floor court room. Each detainee was handcuffed behind the back and led up a flight of stairs.

As each detainee was led up the stairs, water was tracked on the stairs, which became wet and slippery. North was one of the last detainees to be taken up the stairs. While ascending the flight of stairs North slipped and fell backwards. Because he was cuffed behind the back, North was unable to break his fall and sustained injuries to the lumbar area of his back.

North alleged the Marshals were negligent in transporting him up the wet stairs, causing his injury. The defendants contended there was no documentation of North's accident and the incident never occurred. Moreover, they contended the detainees were taken down a flight of stairs, not up a flight as North claimed. A court reporter's transcript of the arraignment and bail proceedings, however, confirm the detainees were evacuated from the second floor to the third.

The United States paid North, \$11,000 and the District of Columbia paid \$8,500. North was represented by Washington attorney Geoffrey D. Allen. See: *North v. United States of America*, USDC DCDC, Case No. 1:02-CV-01835-HHK.

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# BOP Good-Time Statute Upheld By Three Circuits

by John E. Dannenberg

The Seventh Circuit U.S. Court of Appeals reversed a U.S. District Court ruling that had accorded BOP prisoners 54 days good-time credit per year, holding instead that the maximum credit available is only 47 days per year. In separate cases, the First and Third Circuit Court of Appeals likewise held BOP prisoners are only entitled to 47 days of good time credits per year.

Yancy White had won a writ of habeas corpus awarding him 540 days maximum good-time credit against his ten year BOP sentence, after having complained that Warden Joseph Scibana misinterpreted the good-time credit statute, 18 U.S.C. § 3624(b)(1) to allow White only 470 days. See: *White v. Scibana*, 314 F.Supp.2d 834 (W.D. Wis. 2004); *PLN*, Sept. 2004, p.23.

The district court had based its ruling upon a construction of § 3624(b)(1)'s language "term of imprisonment" wherein it held that "one year of imprisonment" meant "one year of a sentence," i.e., inclusive of earned good-time credits. In so doing, the district court disagreed with regulation 28 C.F.R. § 523.20 that BOP had promulgated based upon its reading of § 3624(b)(1), which required serving the actual 365 days of "one year" before credits were awarded.

The Seventh Circuit analyzed the statute and found that "term of imprisonment" was used three times - but with necessarily different meanings. To resolve the ambiguity, the court, relying upon *Chevron, USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984), first accorded deference to BOP's properly promulgated regulation

to see if it could find support in 18 U.S.C. § 3264(b)(1) - the enabling statute.

Analyzing the effect of the district court's more generous computation, the Seventh Circuit found an anomaly. White's ten year sentence, if construed to be his "term of imprisonment," would permit award of credits for time he was no longer in prison. In other words, to be hypothetically released after ten years less 540 days would assume credit-earning status during those 540 days. In contrast, Warden Scibana's practice of awarding 54 days after completion of each year (per 28 C.F.R. § 523.20), would avoid this anomaly.

Following *Chevron*, the Seventh Circuit accorded "considerable weight ... to the executive department's [BOP] construction of a statutory scheme it is entrusted to administer." Although *Chevron* does not automatically cede ambiguities in favor of the agency, it informed the court to defer to BOP's interpretation here because it was reasonable. In so doing, and reversing the district court below, the Seventh Circuit joined the Ninth Circuit (*Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1271 (9th Cir. 2001); *PLN*, Jan. 2003, p.19) in the interpretation of § 3624(b)(1). See: *White v. Scibana*, 390 F.3d 997 (7th Cir. 2004).

Separately, Puerto Rico federal prisoner Jimmy Perez-Olivo appealed his denial of writ relief on the same issue in the U.S. District Court. Perez-Olivo had argued that because the statute in question was ambiguous, he was at least entitled to the rule of lenity doctrine. He grounded his argument in *Chevron, supra*. The First Circuit found that a "plain language

of the statute" construction, using a dictionary, did not resolve the admitted ambiguity. Nor did looking into the legislative history.

The court then looked to the BOP's interpretation, the second step in a *Chevron* analysis, and found it to "reasonable."

It rejected the "lenity" argument by holding that that doctrine only applied to "criminal statutes," which it deemed would not include the good-time credit law, relying upon *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 704, n. 18 (1995) [rule of lenity does not apply to administrative regulations attaching to government rules on criminal enforcement].

Looking at the statute as a whole, the court concluded as in *Scibana, supra*, that it made no sense to award credits for time after one was released. The First Circuit noted that courts in other circuits (now including the Seventh in *Scibana*) were in agreement. See: *Perez-Olivo v. Chavez*, 394 F.3d. 45 (1st Cir. 2005).

The Third Circuit Court of Appeals, in a case filed by a BOP prisoner in Pennsylvania, also held that the BOP's interpretation of 28 C.F.R. § 523.20 is constitutional and allows 47 days of good time credit per year. See: *O'Donald v. Johns*, 2005 U.S. App. Lexis 4618 (3rd Cir. 2005). ■

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# First Circuit Rejects Interlocutory Appeal for Authorities Accused of Frame-Up

by Robert H. Woodman

In a case involving charges of frame-up and cover-up by former Massachusetts and federal authorities brought by former Massachusetts state prisoners, their family members, estates, and survivors, the United States First Circuit Court of Appeals upheld the U.S. District Court for the District of Massachusetts and rejected defendants' interlocutory appeal on grounds of qualified immunity and lack of favorable termination under *Heck v. Humphrey*, 512 U.S. 477 (1994).

Edward "Teddy" Deegan was murdered in 1965. In 1968, the State of Massachusetts convicted Peter Limone, Louis Greco, and Henry Tameleo of Deegan's execution and sentenced them to death but later commuted these sentences to life in prison. All three men steadfastly maintained their innocence and fought for decades to prove it, but their repeated appeals were rejected, because the evidence against them — testimony by informant Joseph "Baron" Barboza — was so strong.

Barboza and another man, Vincent "Jimmy" Flemmi, were working with the Federal Bureau of Investigation (FBI), Boston Police Department (BPD), and the Chelsea Police Department (CPD) as organized crime ("the mob") informants. FBI agents H. Paul Rico, Dennis Condon, John Morris, and John Connolly, supervised by then Special Agent in Charge James Handley, developed Barboza and Flemmi as informants. As early as May 22, 1964, however, other FBI mob informants informed these agents that Flemmi had aspirations of becoming the Boston mob's "number one hit man" and that "all [Flemmi] wants to do now is kill people." Furthermore, the FBI received information over several months showing that Flemmi wanted to kill Deegan and was seeking approval from mob leaders to do so. On March 10, 1965, another informant warned Agent Rico that mob leader Raymond Patriarca had approved Flemmi's hit on Deegan. Neither Rico nor any other FBI agent warned Deegan, who was killed on March 12, 1965. On March 13 and 23, 1965, the Boston FBI office received "very good" information from an informant that Flemmi, Barboza, Roy French, Joseph Martin, and Ronald Cassesso organized and carried out Deegan's murder and that Barboza used a .45 caliber handgun to shoot Deegan. Agent Rico sent CPD Captain Robert Renfrew a memorandum containing

this information.

In Spring 1967, Agents Rico and Condon met with Barboza to talk with him about Deegan's murder. Barboza discussed the execution with the agents but told them that "he would not, under any circumstances, implicate Flemmi in the murder." Barboza instead falsely named Limone, Greco, and Tameleo in the crime and did not implicate Flemmi. Rico, Condon, and BPD detective Frank L. Walsh took Barboza's statement on September 12, 1967. Barboza gave a contradictory statement on October 16, 1967, and then perjured himself before a grand jury on October 25, 1967, again implicating Limone, Greco, and Tameleo, with the full knowledge and approval of the investigators. Barboza named Greco as the triggerman.

Throughout the investigation, pre-trial, trial, and post conviction proceedings, Rico, Condon, Walsh, and others suppressed exculpatory evidence, suborned perjury, perjured themselves, and intimidated those who tried to help exonerate the three men. When people came forward after trial with evidence showing the men's innocence, the authorities investigated them for organized crime ties. They even investigated Massachusetts parole board members who voted to commute the men's sentences. All evidence of the three men's innocence that was in possession of the FBI, BPD, and CPD was deliberately suppressed by the investigators until 2001. According to Limone's civil complaint, investigators acted on the theory that the three men were guilty of organized crime because they were of Italian descent.

Barboza eventually entered the federal witness protection program. When he was charged with murder 1971, Condon and Rico helped him get the charge reversed. Tameleo died in prison in 1985, Greco in 1995. The truth began to be revealed in 2000. In 2001, Limone's conviction was vacated, and he was released from prison. The prosecutor declined to retry him, explaining to the Superior Court, "[the Commonwealth] does not now have a good faith basis — legally or ethically — to proceed with any further prosecution of the defendant."

Limone and his family members and the estates and survivors of Tameleo and Greco filed various tort and civil rights claims against the United States under the

Federal Tort Claims Act, 42 U.S.C. §§ 1346, 2671, *et. seq.*; under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) against the FBI agents; and under 42 U.S.C. § 1983 against the state agents. The defendants sought dismissal under a variety of legal theories, which the district court denied in a detailed opinion. Defendant FBI and state agents took interlocutory appeal. See: *Limone v. United States*, 271 F.Supp.2d 345 (D. Mass. 2003).

Defendants argued on appeal that they were entitled to qualified immunity under *Bivens* and § 1983 for their actions. Further, they argued that Tameleo and Greco, because they died in prison, could not sue under *Bivens* or § 1983 because they failed to satisfy the "favorable termination" rule of *Heck v. Humphrey*, 512 U.S. 477 (1994). Qualified immunity shields a government official from retributive civil suits for damages when they are performing discretionary functions, unless the official understood, or should have understood, that what he or she was doing was unlawful. The question of unlawfulness turns on how well the law was established at the time the official acted. *Heck's* "favorable termination" rules forbids a plaintiff from recovering damages against an official for unconstitutional conviction unless the underlying conviction is first terminated in favor of the plaintiff.

Defendants argued that even if their actions in convicting Limone, Greco, and Tameleo are considered unconstitutional now, the law in 1967 was not clear that what they did was legally wrong. The First Circuit held that, indeed, the defendants acted unlawfully, saying, "[I]f any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit. ... Actions taken in contravention of this prohibition necessarily violate due process...." Further, going back to *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam), *Brown v. Mississippi*, 297 U.S. 278 (1936), and *Pyle v. Kansas*, 317 U.S. 213 (1942), the appeals court held that it was well-settled in 1967 that a conviction secured by deliberate deception through "testimony known to be perjured" was necessarily invalid. Citing *Napue v. Illinois*, 360 U.S. 264 (1959), and *Miller v. Pate*,


386 U.S. 1 (1967), the court held that even if the defendants did not actively suborn perjury, they knew that Barboza's testimony was perjured and failed to correct it, thus violating the constitution. Citing numerous precedent cases, the court held that in 1967 that law applied equally to law enforcement authorities and prosecutors.

Defendants sought to characterize the charged conduct against them as being merely a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), which only recently has been held to apply to law enforcement authorities. The appeals court forcefully rejected that argument, calling it deeply flawed and "a self-serving mischaracterization of the factual allegations."

Finally, on the question of qualified immunity, the court, detailing the factual allegations against each defendant, held that the individuals involved in securing the convictions should have known that their conduct was unlawful. The appeals court, quoting the district court, concluded, "[n]o reasonable law enforcement officer would have thought it permissible to frame somebody for a crime he or she did not commit." Thus, the appeals court held that none of the defendants was entitled to qualified immunity at this stage of the proceedings.

The defendants also urged the court to exercise pendant appellate jurisdiction over the *Heck* "favorable termination" issue. After analyzing whether it could and should exercise jurisdiction over the issue, the appeals court held that they should not do so, saying "We conclude, therefore, that it would be ultracrepidarian — and wrong — for us to exercise pendant appellate jurisdiction over the favorable termination issue just for the *Heck* of it."

The district court decision was affirmed. See: *Limone v. Condon*, 372 F.3d 39 (1<sup>st</sup> Cir. 2004).

On remand the district court denied motions to dismiss by the United States and some of the defendants, but also denied other motions to dismiss and, in a lengthy and detailed opinion, set the case for trial. See: *Limone v. United States*, 336 F. Supp. 2d 18 (D MA 2004). 

## ***Heck* Doesn't Apply to Parole Revocation Incarceration Without Attorney or Hearing**

**T**he Tenth Circuit court of appeals has held that a prisoner who claims he was denied an attorney or court hearing for 73 days while awaiting extradition for parole revocation need not show that the revocation had been reversed before filing suit.


Steven Roy French, an Oklahoma state prisoner, filed suit under 42 U.S.C. § 1983, alleging his civil rights were violated when he was held in jail for 73 days without access to an attorney or the courts. French was convicted in Oklahoma, but was serving out his parole in Colorado. On November 13, 2001, he was summoned to his parole officer's office. There she accused him of having "flushed" his system of drugs to beat a urinalysis. She arrested him for parole violation.

For the following 73 days, Adams was incarcerated at the Adams County Detention Center in Colorado, awaiting extradition to Oklahoma for parole revocation proceedings. Despite repeated requests, he was neither informed of the specific reason for his incarceration, allowed to meet with an attorney, nor given a hearing. French wrote a local public defender who secured his release. Later he filed suit.

The district court dismissed French's suit, reasoning that the suit, if successful, "necessarily would imply the invalidity of incarceration." Thus, it would be barred pursuant to *Heck v. Humphries*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), un-

less French first showed that the revocation had been reversed. French appealed.

The Tenth Circuit held that there is an exception to the prior reversal requirement that is stated within *Heck*. That is "if the plaintiff's action, even if successful, would not demonstrate the invalidity of the outstanding criminal judgment against the plaintiff, the action should be allowed to proceed."

Thus, if the plaintiff seeks damages for using the wrong procedures, not for reaching the wrong decision, the claim may still be raised even though the decision has not yet been reversed. Because successful suit for not providing specific charges, access to an attorney, or a hearing while awaiting extradition for parole revocation proceedings would not necessarily demonstrate the invalidity of the revocation, plaintiff could proceed without first reversing the revocation. Furthermore, it is not clear from the record whether revocation occurred or whether French's current incarceration is the result of some other proceeding. Thus, because "nothing in the record indicates that his damages would be inconsistent with proper parole revocation," the district court erred when it dismissed the suit. The dismissal was reversed and the case returned to the district court for further proceedings. See: *French v. Adams County Detention Center*, 379 F.3d 1158 (10th Cir. 2004). 

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## News in Brief:

**Arkansas:** On February 6, 2005, real estate developer NGI Rental filed a \$2 million lawsuit against sex offender Randall Collins, his wife and the real estate company that allowed the Collins to purchase their home. NGI claims that after Collins moved into the neighborhood sales stopped. The day after the Collins bought the house, police distributed flyers in the neighborhood informing residents that Randall is a convicted sex offender. The lawsuit claims residents said they would move if Collins did not leave and that sales also halted because now the developer must inform potential buyers that a sex offender lives in the area. The suit claims Collins told the developer he was willing to move in exchange for \$250,000 "or he would stay there and kill their subdivision."

**Arkansas:** On March 11, 2005, Johnnie Pruett, 27, a guard at the Paragould jail was fired and charged with battery for giving jail prisoner Darryl Bartlett, 19, a laxative after Bartlett requested cold medication. Bartlett developed severe diarrhea, vomiting and stomach pains after consuming the laxatives and during the ordeal Pruett taunted him and asked him if he needed a diaper.

**California:** On March 14, 2005, Erik Morales, a defendant standing trial on two counts of first degree murder in San Fernando, spat a razor blade out of his mouth during the jury trial and used it slash his lawyer Linda Wieder on the arm. The jury was removed from the courtroom. Los Angeles county Sheriff Lee Baca said the attack was disturbing and showed a need to enhance courtroom security. Morales was already classified as a high security risk during the trial. Apparently Morales disagreed with Wieder's questioning of witnesses. Morales had previously surrendered to police and confessed to the two murders for which he is standing trial.

**California:** On March 4, 2005, William Danser, a former Santa Clara county judge who was serving a 90 day home detention sentence after being convicted in a ticket fixing scheme, was arrested and sent to jail

seven days before the expiration of his sentence because he drank Nyquil cough medicine which contains alcohol. Danser's home confinement conditions prohibit him from consuming alcohol. He was required to serve the remaining seven days of the sentence in jail.

**Colorado:** On March 17, 2005, prisoners Stephen Crouse, 23, Jonathan Jackson, 19, and Cody Dutton, 19, escaped from the Archuleta county jail by climbing through a ventilation shaft. Crouse and Jackson were captured in Montana on March 20 as they tried to cross into Canada. They apparently stole a vehicle to go from Colorado to the Canadian border.

**Connecticut:** On December 31, 2004, Bruce Carrier, a former prison guard shot and killed police officer Peter Lavery, 47, who was responding to a domestic violence call at the Carrier's Newington home. After a 14 hour stand off with police Carrier shot and killed himself. Connecticut DOC spokesman said Carrier had been fired as a guard in 1999.

**Florida:** On January 21, 2005, Rodrigus Patten, 24, was sentenced to life in prison after being convicted of the 2001 strangulation murder of psychiatrist David Hoyer, 56. The murder occurred in the Collier County jail where Patten had been awaiting trial on carjacking, kidnapping, battery and robbery charges. Patten has a history of mental illness and was heavily medicated during the trial. Hoyer had been examining Patten to determine his fitness to stand trial when he was murdered. The trial judge, William Blackwell, had dismissed the death penalty charges against Patten.

**Florida:** On March 19, 2005, Jacqueline Santoni, 25, a guard at the Seminole county jail was arrested on charges of driver's license fraud, forgery, perjury and criminal use of a public record. Before being hired by the jail in December, 2004, she had been employed by the Florida Department of Corrections as a guard at the Central Florida Reception Center. She began a relationship with a prisoner and in order to visit the prisoner and conceal the relationship from the jail she sought state identification under a false name. Jail employees are barred from associating with convicted felons, aside from family members.

**Florida:** On March 4, 2005, Hernando county jail guard Louis Gregory, 38, pleaded guilty to sexual misconduct stemming from his sexual assault of a 17 year old female prisoner in the jail. He was sentenced to six

months in jail. The jail is operated by the for profit Corrections Corporation of America.

**Idaho:** On May 24, 2004, Joel Lamm, 34, a guard at the Gooding jail was sentenced to 15 years in prison after being convicted of having sex on two occasions with a female prisoner at the jail.

**Illinois:** In March, 2005, Bureau of Prisons (BOP) officials announced that the population of the US Penitentiary in Marion was doubling to 900 prisoners after an expansion of the maximum security lock down prison was completed. The expansion cost \$22 million.

**Indiana:** On March 11, 2005, Thomas Walker, 34, a prisoner at the US Penitentiary in Terre Haute, was sentenced to 20 years in federal prison after pleading guilty to stabbing four guards at the prison on July 14, 2004. Walker stabbed guards Gregory Brummett, Terry Ray, Joseph Sims and Lloyd McPherson with two metal shanks while the guards were conducting searches at a metal detector in the main corridor of the prison. No reason was given for the attacks.

**Kentucky:** On March 14, 2005, Reginald Wilson, 37, a guard at the Atwood Prison Camp at the Federal Medical Center in Lexington was sentenced in federal court to one year of probation for having sex with a female prisoner at the prison. He pleaded guilty to one charge of sexual abuse of a ward, a misdemeanor. He was also fined \$500 and ordered to pay \$25 in court costs. In January, 2005, Gregory Goins, 35, another guard at the Atwood facility, was sentenced to concurrent sentences of nine years in prison for one felony charge of sexual abuse of an inmate, five years for making false statements to a federal agent and one year for eight counts of misdemeanor sexual abuse of an inmate.

**Mississippi:** On February 10, 2005, Vicksburg police officer Clay Griffin was fired for kneeling a shackled prisoner who allegedly made a lewd comment about Griffin's wife. Griffin was working as a prisoner transfer officer and the assault occurred outside a holding cell.

**New Jersey:** On March 17, 2005, an unidentified man carjacked a van from a prison work detail on the Garden State Parkway and led police on a 50 mile chase during which three vehicles were struck and the driver blew out three tires before flipping over. After which the driver surrendered to police.

**New York:** In May, 2004, Frankie

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Cortes, a guard in the Bronx Criminal Court, filed suit against the city claiming that he was attacked by two female jail guards in a backroom at the courthouse and required hospitalization for his injuries. His supervisors then retaliated against him when he complained about the attack and his request that the attackers be arrested was denied and he was demoted to work at Rikers Island. Cortes noted that the female guards who attacked him were both "over six feet tall and weigh approximately over 200 pounds."

**New York:** On July 22, 2004, Mark Mullen, 44, a guard at the Five Points Correctional Facility in Romulus, drove away from the prison in a prison vehicle, crashed the vehicle into a tractor trailer, walked away from the wreck and then shot himself dead.

**New York:** On March 7, 2005, Jerryl Reece, 33, a guard at the Albion Correctional Facility, pleaded guilty to two counts of sexual misconduct with a female prisoner. Reece had originally been charged with six counts of third degree rape, six counts of official misconduct and three counts of sodomy. He was also accused, but not charged, with bringing a cell phone to the prison and allowing a prisoner to use it.

**New York:** On November 24, 2004, Everett George, 34, a former Rikers Island jail guard shot and killed his two children, Dominic, 12, and Christina, 1. George murdered his daughter while she sat in her highchair. George forced his way into his girlfriend's apartment to carry out the attack. He was arrested later that day when he checked himself into a local hospital suffering from an overdose of Zoloft, an anti depressant. The girlfriend, who had several restraining orders against George, escaped with her life because his gun jammed. George worked as a jail guard off and on between 1997 and 2000 before being fired for not showing up for work. An aspiring record producer, George had appeared in a recent episode of *NYPD 24/7*, a seven part ABC News documentary about New York City police officers. In the episode George is shown calling police to report an incident of domestic violence, not involving himself, and standing with police as they prepare to break down a door.

**Ohio:** On March 17, 2005, three Lucas county work release prisoners were hospitalized after eating jail food that contained metal shavings. The food at the jail is prepared by private contractor Aramark.

**Oklahoma:** On March 16, 2005, Lincoln county jail guards Kathy Hernandez, 28, Tracy Keller, 29, Jamie Freeze, 27 and

Misty Simon, 28, were charged with second degree rape for having sex with male prisoners in the facility. Keller and Simon were also charged with conspiracy to distribute drugs for allegedly bringing the prisoners a pound of marijuana. Sheriff's investigators were able to bring the charges after an unidentified prisoner at the Cimarron Correctional Facility told investigators several jail guards were having sex with the prisoners and bringing drugs into the jail.

**Pennsylvania:** On March 10, 2005, Allegheny county jail guard Joseph Addison, 55, pleaded guilty to five counts of indecent assault, a misdemeanor. Addison admitted he offered female prisoners in the jail cigarettes (which are banned) if they showed him their breasts. Addison is the fourth guard to accept a plea out of a dozen guards charged with raping female prisoners in the jail.

**Pennsylvania:** On March 4, 2005, state Supreme Court justice Thomas G. Saylor Jr., paid a \$750 federal fine for twice attempting to smuggle a Swiss Army pocket knife onto an airplane in February, 2005. He was caught both times.


**South Africa:** On March 15, 2005, Cape Town Correctional Services Minister Ngconde Balfour told parliament that the rape and throat slitting of two prison nurses at the Baviaanspoort prison near Pretoria by two juvenile prisoners was due to "human lapses." The attacks occurred in the prison hospital on March 13 and the attackers were allowed through several security checkpoints to carry out the attacks. The nurses survived the attack but have severe throat injuries.

**Texas:** On March 16, 2005, Albert Deleon, a guard at the Guadalupe County Jail, was charged in state court with having consensual sex with a female prisoner in the medical unit of the jail. State law bans sex between prisoners and staff.

**Washington:** On March 15, 2005, police arrested an unidentified 31 year old prisoner at the Special Commitment Center on McNeil Island which houses the state's civilly committed sex offenders, and charged him with making obscene telephone calls. The suspect is awaiting a civil commitment trial to determine if he is a "sexually violent predator." The calls were traced by the phone company to the SCC after they began six months ago.

**West Virginia:** In early March, 2005, Preston county jail guards Gary Garlits, 53, and Robert Haught III, 26, were indicted by a state grand jury on charges that they had sex with female prisoners in their care. Haught was employed by the county's home

confinement program and is accused of having sex with a woman he supervised on home confinement then later living with her. He was also charged with arson for allegedly burning down the home they had lived in. West Virginia, like most states, criminalizes sex between prisoners and staff.

**Wisconsin:** On November 11, 2004, four prisoners at the New Lisbon Correctional Facility armed with padlocks placed in socks attacked guards at the prison sending eight to the hospital with minor injuries. News reports did not indicate the motive for incident. Prison officials said they would review prisoner access to padlocks. 

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## Triple-Dipping Jail Psychiatrist Fired For Past Medicare Fraud Conviction

**D**r. Kripa Kashyap, 62, a psychiatrist providing treatment to prisoners at the Harford County (Maryland) Detention Center in Bel Air was barred from treating any more prisoners after *The Baltimore Sun* newspaper revealed his past conviction for Medicare fraud. For the past seven years, Kashyap counseled prisoners and prescribed medications at the jail six hours a week through a contract with ConMed Inc., a private prison medical service company from LaPlata, Maryland.

Until June, 2004, Kashyap was associate clinical director of a state-run institution for the mentally ill in Cantonville, Maryland, being paid \$120,692 a year. He was fired from that job after state auditors discovered that he had been falsifying time sheets to get double pay. The auditors said that Kashyap billed the Department of Mental Health and Hygiene for at least 160 hours he had spent as a private consultant at the

state-run Regional Institute for Children and Adolescents in Baltimore while receiving his regular salary from the Department for the same hours. The 160 hours he fraudulently billed amounted to \$8,800 between July 2003 and February 2004.

In January 1987, Kashyap pleaded guilty to billing Medicaid for services he did not perform. He was given a suspended sentence of one year imprisonment, given five years probation, fined \$10,000 and ordered to pay Medicaid \$146,391 in restitution.

State officials refused to say whether they knew about the conviction or his moonlighting when they hired him. Jail officials said that, although they prohibit the hiring of personnel with a history of criminal convictions, they depended upon ConMed to do background checks on the personnel they provided under contract with the jail. 

Source: *The Baltimore Sun*.

## Other Resources

### ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

### Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

### CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

### FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

### Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rulings, administrative developments and news about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

### Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 881, Coquille, OR 97423.

### Hepatitis C Awareness News

Hepatitis C and HIV/HCV newsletter free on request. Write: National Hepatitis C Prison Coalition, PO Box 41803, Eugene, OR 97404.

### November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

### Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

### Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.



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**Everyday Letters For Busy People**, by Debra Hart May, 287 pages. \$15.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Lots of tips for writing effective letters 1048

**The Criminal Law Handbook: Know Your Rights, Survive the System**, Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$34.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

**Represent Yourself in Court: How to Prepare & Try a Winning Case**, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

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# PRISON Legal News

15th  
Anniversary  
Issue

VOL. 16 No. 5

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*Dedicated to Protecting Human Rights*

May 2005

## The History of Prison Legal News

*by Paul Wright*

In May 1990, the first issue of *Prisoners' Legal News (PLN)* was published. It was hand typed, photocopied and ten pages long. The first issue was mailed to 75 potential subscribers. Its budget was \$50. The first 3 issues were banned in all Washington prisons, the first 18 in all Texas prisons. Since then we have published 180 consecutive issues, grown to offset printing of 48 page issues and now have over 4,200 subscribers in all 50 states as well as numerous other countries. This is how it happened.

In 1987 I entered the Washington state prison system with a 304 month prison sentence. In 1988 I met Ed Mead, a political prisoner and veteran prison activist, at the Washington State Reformatory (WSR)

in Monroe, Washington. Ed had been imprisoned since 1976. In that period he had been involved in organizing and litigating around prison conditions and issues. He had also started and published several newsletters, including *The Chill Factor*, *The Red Dragon*, and *The Abolitionist*. By late 1988 Ed and I were jointly involved in class action prison conditions litigation and other political work.

As the 1980s ended it became readily apparent that collectively prisoners were in a downhill spiral. Prisoners were suffering serious setbacks on the legislative, political, judicial and media fronts. Prisoners and their families were the people most affected by criminal justice policies, but were also the ones almost entirely absent from what passed as debate. There was also a lack of political consciousness and awareness among prisoners and widespread ignorance about the realities of the prison system among those not incarcerated.

Ed and I decided to republish *The Red Dragon* as a means of raising political consciousness among social prisoners in the U.S. We planned to model the new *Red Dragon* on the old one: a 50-60 page Marxist quarterly magazine Ed had previously published. We eventually put together a draft copy, but it was never printed for distribution. The main reason was the lack of political and financial support on the outside. We lacked the money to print a big quarterly magazine, and we were unable to find volunteers outside prison willing to commit the time involved in laying out, printing and mailing a big magazine. In 1989 I was also subjected to a retaliatory transfer to the Penitentiary at Walla Walla, due to success in the WSR overcrowding litigation. Prison officials also wanted to ensure that the *Red*

*Dragon* never got published. The transfer meant that Ed and I were relegated to communicating by heavily censored mail.

We scaled back our ambitions and instead decided to publish a small, monthly newsletter focusing on prison issues in Washington. If the support was there it would grow. Originally named *Prisoners' Legal News* we set out with the goal of publishing real, timely news that activist prisoners could use.

With the social movements that had traditionally supported the prison movement in this country at a low ebb (i.e., civil rights, women's liberation and anti-war movements), we saw *PLN's* objective as one that would emphasize prisoner organizing and self reliance. Like previous political journalists who had continued publishing during the dark times of the 1920s and 1950s, we saw *PLN's* role as being similar. From the outset *PLN* has striven to be an organizing tool as much as we are information source. When we started we had no idea that things would get as bad as they have gotten.

In 1990 I was transferred to the Clallam Bay Corrections Center, a then new Washington prison. In May, 1990 the first issue of *PLN* appeared. Ed and I each typed up five pages of *PLN* in our respective cells. Columns were carefully laid out with blue pencils and graphics applied with a glue stick. We sent the proof copy to Richard Mote, a volunteer in Seattle, who copied and mailed it. Ed contributed *PLN's* start up budget of \$50.

The first three issues of *PLN* were banned in all Washington prisons on spurious grounds. Ed was infracted by WSR officials for allegedly violating copyright laws for writing law articles. Officials at Clallam Bay ransacked my cell and confis-

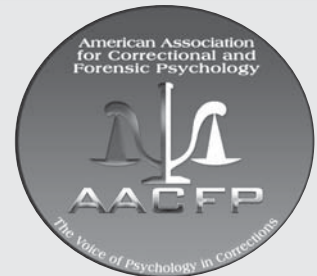
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PUBLISHER  
**Rollin Wright**

EDITOR  
**Paul Wright**

EXECUTIVE DIRECTOR  
**Donald W. Miniken Jr.**

CIRCULATION MANAGER  
**Jennifer Umbecker**

COLUMNISTS  
**Mumia Abu Jamal, Denise Johnston, Daniel E. Manville, Kent Russell**

CONTRIBUTING WRITERS  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams, Mark Wilson & Robert Woodman**

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*PLN* is indexed by the *Alternative Press Index*, *Criminal Justice Periodicals Index* and the *Department of Justice Index*.

## **History of *PLN* (Contd)**

cated my writing materials, background information and anything that was *PLN* related. Eventually Ed's infraction was dismissed and I received my materials back. Just as we were on the verge of filing a civil rights lawsuit challenging the censorship of *PLN*, the Washington DOC capitulated and allowed *PLN* into its prisons. Jim Blodgett, then the warden at the Penitentiary in Walla Walla, told me that *PLN* would never last because its politics were "harmless and outmoded," and prisoners were too "young and immature to be influenced" by our ideas. The reprisals had been fully expected, given prison officials' historic hostility to the concept of free speech.

Disaster then struck. Richard Mote turned out to be mentally unstable. He refused to print and mail *PLN*'s second issue because he took offense to an article by Ed calling for an end to the ostracization of sex offenders. Mote took off with all of *PLN*'s money that contributors had sent, about \$50, the master copy of the second issue and our mailing list. For several weeks it looked like there would be no second issue of *PLN*. Fortunately, we located a second volunteer, Janie Pulsifer, who was willing to print and mail *PLN*. Ed and I sent Janie a second copy of that issue of *PLN* which she copied and mailed. We were back on track.

### **The Presses Keep Rolling**

Ed's then partner, Carey Catherine, had agreed to handle *PLN*'s finances and accounting, such as they were, after Mote jumped ship. This was short-lived, because by August, 1990, she was preparing to go to China to study. The only person we knew who had a post office box who might be able to handle *PLN*'s mail, mainly to process donations, was my father, Rollin Wright.

He lives in Florida but generously agreed to handle *PLN*'s mail for what Ed and I thought would be a few months at most, until we found someone in Seattle to do it.

*PLN*'s support and circulation slowly began to grow. In January, 1991, *PLN* switched to desk top publishing. Ed and I would send our typed articles to Judy Bass and Carrie Roth, who would retype them and lay them out. Ed and I would then proof each issue before it was printed and mailed. In 1991 *PLN* also obtained 501(c)(3) status from the IRS in order for us to be able to use lower postage rates. *PLN*'s circulation

had stabilized at around 300 subscribers. We purposely did not seek further growth at that point because we did not have the infrastructure to sustain it. Once we had non-profit status and postal permits from the post office we were ready to grow.

In the summer of 1992 we did our first sample mailing to prison law libraries. Since *PLN*'s reader base had grown, and changed, we decided to reflect this change by renaming the magazine *Prison Legal News*, *PLN* wasn't just for prisoners anymore. *PLN* was now being photocopied and mailed each month by a group of volunteers in Seattle.

When *PLN* started out in 1990 Ed and I had decided *PLN* would be a magazine of struggle, whether in the courts or elsewhere, and everything would be chronicled. At a time when the prisoner movement was overcome by defeatism and demoralization we thought it important to report the struggles and the victories as they occurred, to let activists know theirs was not a solitary struggle.

A mainstay of *PLN*'s coverage from the beginning is the issue of prison slave labor. This is where the interests of prisoners and free world workers intersect at their most obvious. If people outside prison didn't think criminal justice policies affect them, *PLN* would make prisons relevant by showing how prison slave labor took their jobs and undermined their wages. This coverage was helped by the fact that Washington was a national leader in the exploitation of prison slave labor by private business. *PLN* has broken stories on how corporations like Boeing, Microsoft, Eddie Bauer, Planet Hollywood, Starbucks, Nintendo and U.S. congressman Jack Metcalf have all used prison slave labor to advance their interests. These stories were all picked up by other media, increasing *PLN*'s exposure.

In June, 1992, I was transferred back to WSR where Ed and I could collaborate on *PLN* in person for the first time since the magazine started. In 1991 I had been infraacted by Clallam Bay prison officials for reporting in *PLN* the racist beatings of prisoners by gangs of white guards. Unable to generate attention for the beatings themselves, my punishment for reporting the attacks generated front page news in *The Seattle Times*. Eventually the disciplinary charges were dropped, but not until after I had spent a month in a control unit for reporting the abuses. The presses kept rolling.

### ***PLN* Becomes A Magazine**

On *PLN*'s third anniversary in May, 1993, we made the big leap. We switched to offset printing instead of photocopying



and permanently expanded our size to 16 pages. *PLN* was no longer a newsletter, we were now a magazine. *PLN* had 600 subscribers.

In October, 1993, Ed was finally paroled after spending 18 years in prison. The state parole board, no doubt unhappy at *PLN*'s critical coverage of their activities, imposed a "no felon contact" order on Ed. This meant Ed could have no contact, by mail or phone, with me or any other felon. The parole board made it very clear that this was for the purpose of preventing Ed's involvement with *PLN*. If Ed were involved in publishing *PLN* in anyway he would be thrown back in prison.

The ACLU of Washington filed suit on our behalf to challenge the rule as violating Ed's right to free speech as well as my own. In an unpublished ruling, judge Robert Bryan in Tacoma dismissed our lawsuit, holding that it was permissible for the state to imprison someone for publishing a magazine while they were on parole. The Ninth circuit court of appeals would eventually dismiss our suit as moot when, after three years on state parole, Ed was finally discharged from the parole board's custody. In the meantime, Ed had tired of *PLN* as he had with all his previous publishing efforts and got on with his life and moved to California, where he is successfully employed in the computer industry.

*PLN* switched to an East coast printer that offered significant savings over Seattle printers. This allowed *PLN* to expand to 20 pages. Within the year we were no longer being mailed by volunteers; our printer did the mailing as well.

In January, 1996, *PLN* hired its first staff person, Sandy Judd. *PLN*'s needs and circulation had grown to the point that volunteers were simply unable to do all the work that needed to be done. With some 1,600 subscribers, data entry, lay out, accounting and other tasks all required full time attention. By 2001, Don Miniken became *PLN*'s executive director. Sandy also returned as *PLN*'s data manager and lay out person and *PLN* began its employment of work study students and local volunteers for office tasks. Hans Sherrer, a former prisoner and expert on wrongful convictions became *PLN*'s circulation manager until October, 2004, when he went to work full time for *Justice Denied*, a magazine specializing in wrongful convictions.

This issue marks *PLN*'s fifteenth year and 180th issue of publishing. We have around 4,300 subscribers in all 50 states.

*PLN* goes into every medium and maxi-

mum security prison in the U.S. and many of the minimum security ones and jails as well. *PLN*'s subscribers include prisoners, judges, lawyers, journalists, academics, prison and jail officials, activists and concerned citizens.

The bulk of each issue of *PLN* is still written by prisoners and former prisoners. In 1999, the Washington DOC banned correspondence between prisoners. The resulting breakdown in communication made coordinating *PLN* difficult, to say the least, between myself and *PLN*'s imprisoned contributing writers. Upon my release from prison in 2003 I was able to do a lot more in the way of research and advocacy as *PLN*'s editor than I had while imprisoned.

My first day out of prison illustrates the transition from prison editor to non prison editor. I was picked up at the Monroe Correctional Complex in Monroe at 8:30 AM on December 16, 2003 by Don Miniken and Hans Sherrer, *PLN*'s director and circulation manager respectively. By 10:30 AM we were in *PLN*'s Seattle office and I was learning to use the internet and e mail, my first experience with both. At noon we had lunch with Jesse Wing and Carrie Wilkinson, part of the McDonald, Hogue and Bayless legal team that has successfully represented *PLN* in *PLN v. Lehman*, a censorship suit against the Washington DOC. At 2:30 I was back in *PLN*'s office doing an interview with *Fox News* on prison slave labor. It hasn't stopped since.

Over the years *PLN* has had a number of contributing writers across the country who contribute articles and reporting to *PLN*. Our first contributing writer was James Quigley, then a Florida prisoner, who began writing articles for *PLN* in 1995. James killed himself in a Vermont prison control unit in 2003. Other contributing writers have included, in no particular order: Willie Wisely, Alex Friedman, Matt Clarke, Mark Wilson, Julia Lutsky, Daniel Burton-Rose, Ronald Young, Mark Cook, Dan Pens, Rick Card, Bob Williams, Mike Rigby, Roger Smith, Lonnie Burton, Rabih Aboul Hosn, Floyd Spruyte, Gary Hunter, Roger Hummel, David Reutter, Robert Woodman, Sam Rutherford, and others. Our quarterly columnists have included attorneys John Midgley, Walter Reaves, Kent Russell and Dan Manville; political prisoners Linda Evans, Marilyn Buck and Mumia Abu-Jamal. Denise Johnston contributes a column on incarcerated parents. For stories that require investigative follow-up *PLN* has been able to count on excellent investigative reporters, like Ken Silverstein, Jennifer Vogel, Tara Herivel, Daniel Burton-

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## History of *PLN* (Contd)

Rose, Silja Talvi, Ian Urbina, Leah Caldwell, Mark Dow, Peter Wagner, Anne Marie Cusac and others. This has helped *PLN* provide a wider spectrum of voices, deeper and better coverage of criminal justice issues and helped us expand in size while continuously improving our quality.

In 1998 Common Courage Press published our first book, *The Ceiling of America: An Inside Look at the U.S. Prison Industry*. Edited by Daniel Burton Rose, Dan Pens and myself, the book is a *PLN* anthology. The book lays out in one place the reality and politics of the prison industrial complex in the mid 1990's. Now in its third printing, the book has received critical acclaim and helped boost *PLN*'s profile. Between 1998 and 2000 I did a weekly radio program on KPFA's Flashpoints program called *This Week Behind Bars*. The show aired on Fridays and consisted of news reports from *PLN* about what was happening in American prisons and jails. Hans Sherrer and I have done hundreds of radio interviews on *PLN*'s behalf advocating for the rights of prisoners. In addition, *PLN* is frequently quoted on prison issues by other publications.

In 2003 Routledge Press published *Prison Nation: The Warehousing of America's Poor*, a book edited by prisoner rights attorney Tara Herivel and myself which made the connection between mass imprisonment and under funded indigent defense

systems. Now in its second printing, winner of the 2003 Gustavus Myers Outstanding Book award, has been well received.

*PLN* remains unique in many respects. First, *PLN* is the only independent, uncensored nationally circulated magazine edited and produced largely by prisoners and ex prisoners anywhere in the U.S., if not the world. It is also the longest lived, if not in history, at least in recent memory. Second, *PLN* is one of the few publications that offers a class based analysis of the criminal justice system. No other publication has the depth and breadth of coverage of detention facility litigation as well as news that *PLN* does.

To date, *PLN* has remained self reliant. Despite a lot of effort on our part, *PLN* has never been able to attract significant funding from foundations or similar sources. For the past fifteen years *PLN* has existed almost exclusively on donations sent by subscribers. In recent years advertising income has helped offset *PLN*'s costs as well. In 1998 *PLN* began distributing books with the release of *The Ceiling of America*. Our book list has expanded as a way to both augment our public education mission and providing prisoners with the means to help themselves, and to help contribute to *PLN*'s continued existence. Until *PLN* had to hire a staff person we operated on a break-even basis. As late as 1995 we were giving away up to 48% of our subscriptions to prisoners who could not, or claimed they couldn't, afford to subscribe. With the expense of a staff person we had to dramatically limit the number of free subscriptions we provide. A free press doesn't come cheap.

Neither does free speech. From the very first issue to this day, *PLN* has been censored in prisons and jails across the country. In most cases we have been able to resolve censorship issues administratively. In cases where that was not possible, we filed suit and resolved the matter in court. The sidebar to this article gives a rundown on *PLN*'s litigation history. Whether as a reflection of the times or a comment on *PLN*'s effectiveness, we are being faced with more attempts at censorship nationally than at anytime in the past fifteen years. *PLN* may well be the most censored publication in America.

### *PLN* In the Next Decade

A question I have been asked is whether *PLN* is "successful." Success is a relative term. When a French journalist asked Mao Tse-Tung in the 1960's if he thought the French Revolution in 1789 had

been successful Mao reportedly replied "It's too soon to tell." So too with *PLN*. The prison and jail population in the U.S. has doubled to well over two million people just in the time we have been publishing, and continues to grow exponentially. By any objective standard, prison conditions, overcrowding and brutality are now far worse than at any time in the past 30 years. Draconian laws criminalize more behavior, impose harsher punishment in worse conditions of confinement than at any time in modern world history. With 5 percent of the world's population the U.S. has 25% of the world's prisoners. The legal rights of American prisoners are diminishing daily under coordinated attack from conservative courts, yellow journalists and reactionary politicians. The corporate media and politicians alike thrive on a daily diet of sensationalized crime and prisoner bashing, while prisons and jails consume ever increasing portions of the government budget, to the detriment of everything else.

*PLN* has duly chronicled each spiral in this downward cycle of repression and violence. We have provided a critique and analysis of the growth of the prison industrial complex and exposed the human rights abuses which are the daily reality of the American gulag at the turn of the century. When some people purported to be shocked when the American torture chambers in Iraq were first exposed in the Abu Ghraib pictures, we could sadly point out that *PLN* had been reporting similar occurrences in American prisons since our inception in 1990. In that sense, I believe *PLN* has been successful. Even if we didn't stop the evils of our time, at least we struggled against them and did the best we could under the circumstances. That we have managed to publish at all under these circumstances is a remarkable success. When I started *PLN* fifteen years ago I never thought I would be writing this retrospective after being released from prison fifteen years later in the same magazine.

But, not all is gloom and doom. *PLN* has helped stop some of the abuses that are legion in the American gulag. We have also borne witness to what is happening and duly documented it. Recent years have seen an increase in interest and support for prison issues and human rights in the United States. Many of *PLN*'s critiques of prison slave labor and other issues have been picked up and adopted by labor groups and even some elements of the corporate media. Our censorship litigation has helped secure the rights of prisoners and publishers alike in many states and our public records litigation has helped ensure government transparency in several

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states as well.

I believe that ultimately *PLN*'s success will be measured by its usefulness to the prisoners, activists, journalists, lawyers and citizens who tried to make a difference for the better. We have tried our best to provide timely, accurate, useful information that people can use in their daily struggle for justice. *PLN* will also provide a useful, contemporaneous account of prison issues for later historians.

The main obstacles that *PLN* faces are those faced by all alternative media in the U.S.: under-funding and the corresponding inability to reach more people with our message. Absent relatively (for *PLN*) large scale funding from outside sources to do outreach work, this will continue to be a problem for the foreseeable future. The other primary problems *PLN* faces are prisoner illiteracy (depending on the state, between 40 to 80 % of the prisoner population is functionally illiterate), and political apathy. Despite that situation, *PLN* has survived and grown. The need that led to *PLN*'s creation has only increased.

Corporate media coverage of prison and criminal justice issues tends to be abysmal. Most media coverage is little more than press release journalism. Input from prisoners or activists is rarely sought. Since its inception *PLN* has ensured that the voices of class conscious prisoners are heard. We are proud of the fact that over the years many stories originally broken or developed by *PLN* have been picked up by other news sources, including the corporate media. We are heartened by the fact that prisoners in other states started similar publications to deal with their local issues. This includes *Florida Prison Legal Perspectives*, *Prison Information Network*, among others.

After a decade and a half of publishing it has to be emphasized that *PLN* has always been very much a collective effort. *PLN* has had editors who bore the brunt of our captor's displeasure for speaking truth to power, but the reality is that *PLN* would never have been possible if it were not for the many volunteers and supporters who have so generously donated their time, energy, skills, labor, advice and money to *PLN*. The cause of prisoner and human rights has never been too popular in this country. In today's political climate it takes extraordinary courage and commitment to support a project like *PLN*.


The volunteers, without whose support *PLN* would not exist today, include, in no particular order: Dan Axtell, Dan Tenenbaum, Rollin Wright, Zuraya Wright, Allan

Parmelee, Janie Pulsifer, Jim Smith, Jim McMahon, Scott Dione, Cathy Wiley, Ellen Spertus, Sandy Judd, Wesley Duran, Janie Pulsifer, the late Michael Misrok, Shannon Hall, Thomas Sellman, Linda Novenski, Jo Wigginton, Jennifer Umbehoeker, Zina Antoskow, Martin and Rebecca Chaney, Bob Fischer, Latoya Anderson, Sue Hartman, and many others.

The lawyers that have advised and represented *PLN* on matters as diverse as Internet law and censorship litigation over the years include, in no particular order: Bob Cumbow, Mickey Gendler, Bob Kaplan, Joe Bringman, Leonard Schroeter, Dan Manville, Rhonda Brownstein and the Southern Poverty Law Center, the Washington ACLU, the Oregon, Kansas and Nevada ACLUs, Mac Scott, Darren Nitz, the ACLU National Prison Project, Lee Tien and the Electronic Frontier Foundation, J. Patrick Sullivan, David Fathi, Randy Berg, Peter Siegel, Cullin O'Brien, Jognwon Yi, Darrell Cochran, Bruce Plenk, Max Kautsch, Alison Howard, Andy Mar, David Bowman, Jesse Wing, Tim Ford, Carrie Wilkinson, Sandy Rosen, Janet Tung, Janet Stanton, Susan Seager, Bill Trine, Alison Hardy, Marc Blackman, Frank Cuthbertson, Mike Kipling, Brian Barnard, Peter Schmidt, David Bowman, Don Evans, and Sam Stiltner.

Ultimately, the people who have contributed articles, donated money and subscribed are what have made *PLN* possible today. Without all these people contributing to *PLN*'s collective effort, and there are far too many to name here, we would have met the fate of the vast majority of alternative publications: we would have folded within a year.

*PLN*'s current projects include the completion of our website with all *PLN* back issues, thousands of cases and a brief bank on line with the goal of being the premier prison news and litigation research site on the internet. Tara Herivel and I are currently working on a third prison book, this one focusing on the political economy of prisons and mass imprisonment. Continued advocacy on behalf of prisoners and their families and ensuring the right of prisoners to receive *PLN* are all daily projects at *PLN*. Expanding *PLN*'s book distribution list and further expanding *PLN*'s size to bring readers still more news and information and increasing our circulation are all goals for the immediate future.

Going into the 21st century *PLN* will still be here, giving voice to the voiceless and providing the best news and analysis on prison and jail related issues around. 

**"I know what a dump truck is, and I'm no dump truck! As an innocent man, I too have been to prison."**

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# PLN in Court

by Paul Wright

Since *PLN* started in 1990 we have been censored in prisons and jails around the country. We have always attempted to resolve censorship issues administratively, but in cases where the goal was to keep *PLN* out of prison at any cost, that obviously wasn't possible. We have aggressively challenged censorship across the nation and have won all but one of our battles. I would like to thank all the fantastic attorneys who have represented *PLN* in censorship and public records litigation over the years. Thanks also go to those attorneys who volunteered to represent us in suits that we wound up not having to file after all. A brief summary of *PLN*'s closed cases are:

**Washington Parole Suit:** In 1994 Ed Mead and Paul Wright sued the Washington Indeterminate Sentencing Review Board challenging their order that Ed have no contact with any felons for the purpose of publishing *PLN*. In an unpublished ruling, judge Robert Bryan of Tacoma upheld the ban. The case was dismissed as moot by the Ninth circuit when, after three years, Ed was discharged from ISRB supervision. The suit was sponsored by the ACLU of Washington. Frank Cuthbertson and Mike Kipling represented the plaintiffs. See: *Mead v. ISRB*.

**Washington Bulk Mail Ban:** When Airway Heights Corrections Center opened in 1994 it banned all third and fourth class mail. In 1996 *PLN* subscribers Don Miniken and Don MacFarlane filed suit against the practice. In *Miniken v. Walter*, 978 F. Supp. 1356 (ED WA 1997), the ban was struck down as unconstitutional. In another, unpublished ruling, *MacFarlane v. Walter*, another judge also struck down the ban. Mickey Gendler represented Don Miniken on behalf of the WAACLU. In addition to an injunction the court awarded attorney fees, costs and damages.

**Utah Jail Publication Ban:** In 1995 a *PLN* subscriber was transferred to the Box Elder county jail in Utah, which banned all publications. *PLN* and another publisher filed suit challenging the ban. Soon after filing the jail settled, paying damages and attorney fees and changing their policy. Brian Barnard represented *PLN* in this suit. See: *Catalyst v. Box Elder County*.

**Michigan Book Ban:** In 1998 the Michigan DOC banned our book, *The Celling of America: An Inside Look at the U.S. Prison Industry*, from all of its prisons claiming the book incited violence. *PLN*, Common Courage press (the book's pub-

lisher) and two prisoners filed a class action suit challenging the ban. Michigan prison officials settled soon afterwards, paying damages, costs and attorney fees, removing the book from their banned book list and revamping their censorship procedure. The plaintiffs were represented by Dan Manville. See: *PLN v. Ransom*.

**Washington Gift Subscription Ban:** Beginning in the mid 1990's the Washington State Penitentiary in Walla Walla began to require that prisoners purchase all books and publications from their prison trust accounts. *PLN* was among the publications censored under this policy. Clayton Crofton challenged the policy pro se and obtained two injunctions requiring delivery of his *PLN* subscription even though not purchased from his prison trust account. The injunctions were upheld on appeal. Mickey Gendler represented Crofton on appeal. See: *Crofton v. Roe*, 170 F.3d 957 (9th Cir. 1999).

**Washington Censorship Litigation:** In 1997 *PLN* filed suit, with other publisher and prisoner plaintiffs, challenging a Washington DOC ban on third class mail, gift subscriptions, bans on magazine articles, photocopies and court rulings, limits on newspaper articles, sexually explicit materials, etc. In early 2000, the Washington DOC settled the suit by changing its mail censorship policies and paying attorney fees and costs for the plaintiffs. The suit was sponsored by the ACLU of Washington. The plaintiffs were represented by Seattle attorneys Mickey Gendler, of Gendler and Mann and Joe Bringman of Perkins Coie. See: *Humanists of Washington v. Lehman*.

**Utah Jail Bulk Mail Ban:** In 1998 the San Juan county jail in Utah refused to deliver *PLN* to a jail prisoner subscriber because it was sent third class mail. *PLN* filed suit challenging the rule. The case eventually settled for fees, damages and a change in jail policy. *PLN* was represented by Brian Barnard. See: *PLN v. San Juan County*.

**Oregon Bulk Mail Ban I:** From 1991 until 2001, the Oregon DOC banned third class mail from its prisons. In 1998 *PLN* filed suit challenging the ban. We lost in the district court and appealed to the Ninth circuit which reversed in *PLN v. Cook*, 238 F.3d 1145 (9th Cir. 2001). The appeals court instructed the lower court to enter injunctive relief in *PLN*'s favor holding that the ban on bulk mail, and absence of

due process when such mail was censored, violated the constitution. The district court entered an injunction, which is still in effect, and awarded attorney fees. *PLN* was represented in the district court by Alison Hardy and Marc Blackman of Portland. On appeal it was represented by Sam Stiltner and Janet Stanton of Seattle.

**Oregon Bulk Mail Ban II:** Despite the injunction in *PLN v. Cook*, the Oregon DOC continued to ban mail sent by *PLN* to Oregon prisoners via standard rate mail. The Oregon DOC also enacted bans on catalogs and gift subscriptions and continued censoring mail without notice to the sender. *PLN* filed a second suit challenging these practices. The Oregon DOC settled the suit in 2002 by entering into a consent decree, which remains in effect, changing the challenged policies, paying *PLN* damages and its attorney fees. *PLN* was represented by Mickey Gendler of Seattle and Marc Blackman of Portland, Oregon. See: *PLN v. Schumacher*.

**Alabama Gift Subscriptions:** The Alabama DOC prohibited its prisoners from getting gift subscriptions to publications. Prisoners were forced to buy subscriptions from their prison trust accounts. Publishers were not notified when their publications were censored. *PLN* filed suit in 1999 challenging the practice. The case settled in 2000 while a ruling was pending on the party's cross motions for summary judgment. Under the terms of the settlement the Alabama DOC changed its policies to allow prisoners to receive subscriptions and to provide notice to the sender if mail was censored. *PLN* was represented by Rhonda Brownstein and Catherine Smith of the Southern Poverty Law Center. See: *PLN v. Haley*.

**Washington Nazi Guard Censorship:** The May, 1999, issue of *PLN* was censored in all Washington prisons because it contained an investigative expose of Nazi and white supremacist guards employed by the Washington DOC. *PLN* filed suit in late 1999 and the district court dismissed the case soon afterwards. In an unpublished decision, the Ninth circuit reversed and remanded for consideration of the equitable relief claims. On remand the district court quickly dismissed the case on the merits, disregarding *PLN*'s extensive evidence and pleadings that the censorship was a self serving ploy by the Washington DOC to keep racist guards on the payroll. The 9th circuit, in an unpublished opinion, affirmed the dismissal. *PLN* was represented by Frank Cuthbertson (now a Pierce county



superior court judge), Darrell Cochran and Jongwon Yi of Gordon, Thomas, Honeywell in Tacoma, Washington. See: *PLN v. Washington DOC*.

**Nevada Ban:** In 2000 the Nevada prison system banned all copies of PLN claiming that the magazine constituted "inmate correspondence." PLN filed suit and obtained a preliminary injunction requiring delivery of PLN's mail and materials to Nevada prisoners. The defendants settled shortly afterwards by entering into a consent decree, that remains in effect, agreeing to deliver PLN and pay damages. The court awarded PLN its attorney fees in the case. PLN was represented by David Fathi of the ACLU National Prison Project and Don Evans of Reno, Nevada. See: *PLN v. Crawford*.

**Washington Public Records Case I:** In the course of investigating stories I frequently file Public Disclosure Act requests with various state agencies. The Washington DOC has a long record of refusing to comply with state disclosure laws in its attempts to cover up its misfeasance and misconduct. After being denied documents relating to staff misconduct and prison industries PLN filed suit. In this first case the court ordered the Washington DOC to disclose documents relating to the closing of a private prison

industries telemarketing company and awarded PLN its attorney fees and penalties in the case. PLN was represented by David Bowman of Davis, Wright and Tremaine. See: *PLN v. Washington DOC*.

**Washington Public Records Case II:** In our second public records suit, a Pierce County superior court judge ordered the Washington DOC to provide PLN with records relating to environmental contamination and safety issues at the McNeil Island Corrections Center. The DOC was ordered to pay PLN's attorney fees, costs and statutory penalties. PLN was represented by Shelley Hall of Davis, Wright and Tremaine. See: *PLN v. Washington DOC*.

**Censorship by US Military Prison:** In 2003 the U.S. Disciplinary Barracks at Ft. Leavenworth, Kansas, censored an issue of PLN due to our advertising content. A federal district court held the censorship was unconstitutional and ordered it delivered to prisoner Craig Waterman who litigated the case pro se. See: *Waterman v. Commandant*, 337 F.Supp.2d 1237 (D KS 2004).

The following lawsuits are still pending as we go to press:

**Utah Bulk Mail Suit:** In 1997 the Utah DOC attempted to ban third class mail. PLN sued and the ban was quickly rescinded

with an agreement to settle. The case was dismissed by the court in 2004, holding that PLN had failed to state a claim on the issue it has won in five published opinions elsewhere. The case is on appeal to the 10<sup>th</sup> circuit. PLN is represented by Brian Barnard. See: *PLN v. Haun*.

**ADX Ban:** In 2003 PLN sued the warden of the US Penitentiary in Florence, Colorado after the Administrative Max (ADX), the "super max" prison of the federal Bureau of Prisons, began censoring PLN under a local policy that banned all publications that discuss prisons or prisoners. The case has withstood a motion to dismiss by the defendants and is current in discovery. PLN is represented by Mickey Gendler of Seattle and Bill Trine of Colorado. See: *PLN v. Hood*.

**Kansas Ban on Gift Subscriptions:** In 2002 PLN sued the Kansas DOC over its policy requiring that prisoners purchase all subscriptions and publications from their prison trust accounts, a policy limiting such expenses to \$30 per month, a ban on publications being sent to certain levels of prisoners and the fact that Kansas DOC policy did not provide for notice to be sent to the publisher when mail was censored. The district court dismissed the suit, after consolidating it with



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## PLN in Court (Contd)

the complaints filed by two Kansas prisoners, see: *Zimmerman v. Simons*, 260 F. Supp. 2d 1077 (D KS, 2003). On appeal, the Tenth circuit reversed and remanded, holding PLN had produced sufficient evidence entitling it to a trial on the matter. As a matter of law, the appeals court held PLN was entitled to judgment on its due process claims and ordered the lower court to enter an injunction on the matter. See: *Jacklovich v. Simmons*, 392 F.3d 420 (10<sup>th</sup> Cir. 2004). The case is currently scheduled for trial in September 2005. PLN is represented by Kansas attorneys Bruce Plenk and Max Kautsch.

**Florida Ad Ban and Writer Pay Suit:** Beginning in 2002 the Florida DOC began to censor *PLN* allegedly due to our discount phone service ads, later expanded to include our pen pal ads as well. The Florida DOC also prohibits its prisoners from receiving payment for writings submitted to the publications. PLN filed suit challenging these policies and the case is currently set for trial, after denial of summary judgment motions, on June 6, 2005. PLN is represented by Mickey Gendler of Seattle and Randall Berg and Cullin O'Brien of the Florida Justice Institute. See: *PLN v. Crosby*.


## From the Editor

by Paul Wright

This issue marks PLN's 180<sup>th</sup> consecutive issue and our 15<sup>th</sup> anniversary. When I first started *PLN* in 1990 I didn't think it would last this long. I am pleased to report that it has and should continue to do so for the foreseeable future.

This month's cover story is a history of PLN and what we have done over the years. I hope that in five years I can report a lot more progress in terms of what we have been able to accomplish.

In addition to thanking PLN's many volunteers, writers and contributor I would like to thank our readers and subscribers. With over 4,200 subscribers we now have the highest circulation in our history. We hope to continue increasing our circulation. With more than 2.2 million imprisoned Americans, our readership is far lower than what it should be.


We have a lot of news and information in this issue so I will keep this brief. If you believe in an independent, prisoner rights press please make a donation so we can continue our work. Enjoy this issue and please encourage others to subscribe. 

**Washington Bulk Mail, Catalog and Legal Materials Suit:** In 2001 PLN filed suit against the Washington DOC challenging its censorship of PLN's book and subscription flyers, renewal notices and mail sent via standard rate mail. Also challenged was the DOC's propensity to censor court rulings, legal pleadings, settlements and verdicts when sent to Washington prisoners. The trial court entered summary judgment in the claims against the Washington DOC and enjoined the bans on bulk mail and catalogs and required that due process be given when these items were censored. The court set for trial those claims relating to the censorship of legal materials. See: *PLN v. Lehman*, 272 F.Supp.2d 1151 (WD WA 2003). The defendants filed an immediate, interlocutory appeal, which they lost. See: *PLN. Lehman*, 397 F.3d 692 (9<sup>th</sup> cir. 2005). The remaining claim is set for trial. PLN is represented by Jesse Wing, Carrie Wilkinson and Tim Ford of McDonald, Hogue and Bayless in Seattle.

**Washington Public Records Case III:** In 2000 I filed a public records request seeking extensive information on the discipline of medical staff for the maiming and murder of prisoners through medical neglect as well as how many medical staff had suspended medical licenses or had been subjected to medical discipline. The DOC refused to provide the materials claiming that doing so would hinder its law enforcement functions. PLN filed suit and has lost at the trial and appeals court levels. The case has been argued before the Washington state supreme

court and we are currently awaiting a ruling. PLN is represented by Andy Mar and Alison Howard of Davis, Wright and Tremaine. See: *PLN v. Washington DOC*.

**Utah Jail Publications Ban:** In 2004 PLN sued the Cache County Jail in Utah over its policy banning all publications from being received by jail prisoners as well as catalogs. That case is pending. PLN is represented by Brian Barnard. See: *PLN v. Cheshire*.

PLN has achieved impressive results over the years in court. More so when one considers that PLN has no litigation budget. We rely on counsel willing to represent us on contingency or pro bono. Our court room success has been due to the excellent lawyers who represent PLN and PLN's staff who are able to marshal the facts necessary for our lawyers to prove and win our claims. The cases we file directly impact the free speech rights of *PLN* and our subscribers as well as all other publishers and prisoners alike. In most cases we are attacking broader censorship practices that have a wider impact beyond the immediate parties to the suit. We are committed to the principle that any prisoner in the US who wishes to receive *PLN* or the books we distribute should be able to do so. Sadly, we are the only publisher who consistently steps up and asserts these important free speech and public records rights. We report the filing and conclusion of our lawsuits in *PLN*. Unfortunately; we have more in the works around the country. 

## \$600,000 Awarded to Paraplegic Prisoner Hurt by Riding in Non-Handicap-Accessible Vehicle


A paraplegic jail prisoner who was transported to a hospital in a non-handicap accessible police car was awarded \$600,000 by a federal jury on November 12, 2003 for injuries he claimed resulted from that forced mistreatment.

Philip Munoz, a 36 year-old T-10 (wheelchair-bound) paraplegic was incarcerated at the Robert Presley Detention Center in Riverside, California. On September 13, 2001, he was transported to a local hospital to treat a urinary infection. Sheriff's Deputy Michael Mansholt refused Munoz's request to be taken in a wheelchair-accessible vehicle, and instead forced Munoz to ride to and from the hospital in the rear seat of Mansholt's police cruiser.

The next day, Munoz complained his leg had been injured during transport. After 45 days more complaining to Presley doctors, he was sent to the hospital where

doctors operated to remove an abscess on his leg. Following that, he remained hospitalized for four months - in isolation - to treat a highly contagious and life-threatening blood-borne infection, directly attributable to his leg trauma.

Defendants claimed Munoz's injury was not due to the rough transportation. Munoz countered it was an aggravation to a pre-existing leg fracture that was still healing at the time of his transport.

In pre-trial motions, U.S. District Judge Jeffrey Johnson granted defendants' summary judgment motions as to Munoz's Americans with Disabilities Act claims and medical malpractice. A jury awarded \$600,000, finding that Mansholt was negligent, but had not violated Munoz's civil rights. Munoz was represented by Montebello, California attorney Humberto Guizar. See: *Munoz v. Mansholt*, USDC CDCA, Case No. CV-017881. 

# Prison Legal News at 15

by Mumia Abu-Jamal

I know a little something about newspapers.

As a teenager, I worked on the staff of *The Black Panther* newspaper. By “worked,” I mean, I did whatever I was told to do; whatever was needed to help get the paper ready for printing. That meant writing articles, typing out others articles, justifying them, proofreading texts for errors, giving graphic arts to physically doing layout of the text or graphic on the page, to punching out headlines for articles.

Members of the BPP Ministry of Information did *everything* – but actually print the paper. The Black Panther Party did this every week, for over a decade, and sold over 100,000 copies weekly!

That was no small feat.

But, neither is this.

That *Prison Legal News* has survived for 15 years is utterly remarkable. That it is written, edited, collated and prepared for publication by men and women who are themselves prisoners, is all the *more* remarkable.

It would be a Herculean feat all by itself – and then we consider the content.

Articles, mostly written by jailhouse lawyers, on the maddening warp and woof of the law; written accurately, almost (but not quite!) dispassionately, on cases won and cases lost. It is the truest record of the reality of the proverbial “prison industrial complex,” not from the “top of the heap” (as most law is written), but from the bottom of the pyramid. Consider this analogy: In Pharaonic Egypt, the glories of Kings adorned the faces of the temples, and emblazoned the red faces of the pylons, and the bases of obelisks.

But, as with every Kingdom, this was history, often mixed liberally with myth. Indeed, it was often war propaganda, (kind of like the “news” that led the modern American nation into the mad adventure in Iraq) or recitations of the royal line.

Meanwhile, in the dark, unsmoothed and usually unseen warrens of the temples, workers wrote accounts that were truer, uncensored glimpses of Egypt, not in the language of the priests and the nobles, but in the tongue of common people.

*PLN* is the underside of the pyramid, and this is the voice of “the builder,” the worker, the prisoner, who labors for freedom or justice while bearing the weight of the pyramid.

The reader can learn not only what’s happening around the nation, but learn of

events worldwide as well.

*PLN* has blazed a unique trail in its coverage of the legal aspects of life in “the Prison Voyage of Nations.”

*PLN* has also proven, by its coverage, the class and ideological bias of the corporate press.

Several years ago, the national media was inundated with reports of “silly suits” – cases brought by prisoners claiming that the denial of chunky peanut butter violated the Eighth Amendment’s prescription on cruel and unusual punishment, for example.

Stories such as these ran on the news wires, were picked up by the so-called news shows, flipped to the talk show circuits, and probably pumped up the laugh tracks on Leno and Letterman.

Unfortunately, it also provided the impetus to prod Congress to pass the Prison Litigation Reform Act; an act of Congress based on lies.


It was in *PLN* that readers read the words of Chief Judge Jon Newman, of the Second Circuit Court of Appeals, who gave an entirely different spin on the “silly suits”.

He also noted that the claimed litigation “explosion” was hardly that. Judge Newman also related how many *pro se* suits were common, in fact, instrumental in changing clearly unconstitutional prison conditions, ones that prison officials routinely ignored.

While there clearly were some “silly suits,” judges hardly needed an act of Congress to deal with them. Judges simply dismissed them.

*PLN* told the right story; the true story. If more folks subscribe to it, it might have been able to turn the tide.

But it’s doing OK.

It’s reporting the legal news of the nation’s prisons and prisoners; state by state; joined by joint; case by case, it is a helluva job; but somebody’s gotta do it. 

*Mumia Abu. Jamal is a columnist for PLN, and a jailhouse journalist and lawyer. His latest work is We Want Freedom: A Life and the Black Panther Party (Cambridge, MA. South End Press, 2004), which recently won the Choice Award for Outstanding Academic Title, 2005.*

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# Interview with Leonard Schroeter

by Todd Matthews

It's difficult to talk about Leonard Schroeter's law career without discussing one topic in particular: civil rights. After graduating from Harvard Law School in 1951, Schroeter went to work for the National Association for the Advancement of Colored People (NAACP), then headed by the late Supreme Court Justice Thurgood Marshall. Decades later, in Russia during the Soviet era, Schroeter assisted the "Samizdat" movement -- namely, underground writers of "forbidden" literature and political criticism. He also served as the Principal Legal Assistant to the Attorney General of Israel, and founded the Seattle law firm Schroeter, Goldmark & Bender.

For many years, Schroeter has been a friend of *Prison Legal News* (PLN) and an advocate for the rights of prisoners. To mark its 15<sup>th</sup> anniversary, I recently met with Schroeter at his Seattle home to discuss his career, observations of prisoners' rights issues, and PLN's role in this cause.

**PRISON LEGAL NEWS: What is your impression of the current state of prisoners' rights?**

**LEONARD SCHROETER:** I think it's horrible. Nobody gives a shit about people in prisons. But of course, nobody ever did. There never was any decency. See, I believe at this point everything is worse in America on basically anything you can tell me about. I think the United States is a dying country. We're hated everywhere in the world. It's going to get worse -- much worse -- particularly in the core economic power. The power of the world is in China, not the United States. And the possibilities of what could happen to prisoners are going

to get worse and worse. Nobody has ever much cared about them. I mean, this is the most miserable and sordid part of life. So, naturally, I worry about prisoners.

**PRISON LEGAL NEWS: Do you recall the first time you discovered *Prison Legal News*?**

**LEONARD SCHROETER:** I'm certainly sure that I have been familiar with it very close to when it started. Criminal issues were not a part of my early career. But I have always, literally since I was a child, been very committed to civil rights. I mean it. Even when I was eight, nine or 10 years old. I was a very kooky kid (laughing). When I was 14 years old, I tried to get my parents to let me join the Spanish Civil War (laughing). That's how political I was at the time. Anything related to civil rights and civil liberties, which of course means anyone who's put in jail, I was interested in. Because of that connection, I've always followed PLN. I probably have every issue somewhere here in my house.

**PRISON LEGAL NEWS: You mentioned that your involvement in civil rights started at a young age. Do you remember what sparked your interest in the issue?**

**LEONARD SCHROETER:** Well, first of all, civil rights wasn't even a term. Civil liberties, but not civil rights. When I was young I went to Indiana over Christmas. School was out. My parents, brother, and I went down there. At certain places, there were toilets for white people and toilets for black people. I was furious. I remember this vividly. There were other things, too. There weren't black kids in my school. Growing up middle-class, there weren't any black kids around at all. I don't think I knew any black kids until high school, and I didn't really have any black friends.

**PRISON LEGAL NEWS: Did your experience working with Thurgood Marshall at the NAACP launch your law career?**


**LEONARD SCHROETER:** Maybe. I'm not sure. That was a great time in New York. If I would have stayed there instead of moving out here to Seattle, I'm sure I would have continued to work for Thurgood -- particularly until after *Brown v. Board*.

I have always felt, in some way, maybe I should have stayed. On the other hand, I would never have had all of this experience with the Samizdat, or the fascinating work in Israel. From time to time, you make a break. I made a break and wound up forming a law firm. Ultimately, that firm -- Schroeter, Goldmark & Bender -- which is still here, was probably the largest plaintiff's firm in the United States.

**PRISON LEGAL NEWS: Describe your work with the Samizdat movement.**

**LEONARD SCHROETER:** Samizdat was an underground communication taken out of the Soviet Union. It was the written opposition underground. For many years, I represented some of the Samizdat writers. I had to have specific people in different parts of the world that I could send the manuscripts to underground. Usually I sent them in little canisters. That's something that I never wrote about because I couldn't do it until the middle of the 1980s. People would get into trouble, even if they were out of the Soviet Union, the Soviets would still harass them. I couldn't say anything about it. I had all these books, but I couldn't say anything. Finally, in the middle of the 1980s, I could write about the Samizdat. But I just didn't have the time to do it. Still, that was an incredible part of my life.

**PRISON LEGAL NEWS: As someone who has worked as an attorney your entire career, what is your impression of PLN?**

**LEONARD SCHROETER:** As far as I know, there's nothing else like PLN. It is much more professional than other publications. Paul [Wright] is very smart, and PLN is his thing. There's still nothing like it. I can't think of anything quite like it. Sure, there are a lot of publications about criminology and civil rights, but this publication is unique. There's no question about it. I know of nothing else like it. I've always tried to help it as much as I could. 

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See Page 45 for more information

# Alabama Prisoner Awarded \$90,000 For Work-Related Eye Injury

by Michael Rigby

On February 5, 2004, the Alabama Department of Corrections (ADOC) agreed to pay \$90,000 to a prisoner who was refused safety glasses and later suffered an eye injury while working at a prison recycling center.

Plaintiff Brian Dodd, a Gulf War veteran serving a short sentence for a drug-related conviction, was assigned to work at the Elmore Correctional Facility's recycling center. Prisoners at the facility are forced to work for free processing garbage from Alabama prisons, government offices, and other sources.

Soon after beginning his job at the recycling center in March 2002, Dodd requested safety glasses from his supervisor, Howard Robinson. Robinson refused Dodd's request and threatened him with disciplinary action if he did not get back to work.

Robinson's action contradicted an earlier class-action settlement regarding protective gear. That lawsuit, brought by Ty Alper and Marion Chartoff, attorneys with the Atlanta-based Southern Center for Human Rights, alleged unsanitary and dangerous work conditions. Despite being exposed to used syringes, medical waste, and other hazardous debris, prisoners at the recycling center were not provided protective equipment or clothing. The case settled on January 7, 2002, with the Alabama DOC agreeing to, among other things, provide workers with protective gear, including eye goggles, safety gloves, and aprons. [See *Brinkley v. Harrelson*, USDC MD AL, Case No. 01-A-1287-N.]

Several days after Robinson denied his request for safety goggles, a piece of glass flew into Dodd's eye as he labored at the recycling center. Dodd was taken to the prison infirmary and examined by a nurse, who referred him to an outside specialist. An ophthalmologist later removed glass debris from Dodd's eye and prescribed medicated eye drops.

Dodd sued Robinson in the U.S. District Court for the Middle District of Alabama under 42 U.S.C. § 1983 claiming that Robinson violated his Eighth and Fourteenth Amendment rights by failing to protect him from harm.


Dodd specifically alleged that the glass caused "severe and permanent injury, including persistent irritation, sensitivity to light, a blind spot, and blurry vision." Because of this Dodd asserted that he cannot read for more than 30 minutes, suffers extreme headaches,

and will be unable to return to his job as a welder, which requires precise vision. Dodd further claimed that the treatment he received was inadequate.

The ADOC defended by claiming that Dodd was never injured because it had no records of the incident. In fact, in a sworn affidavit to the court, Elmore warden John E. Nagle stated that Dodd "outright lied." The ADOC still claims this is the case even though interns at the Southern Center tracked down medical records relating to the incident.

"So often prison officials think that no one will listen to what inmates say, and they can get away with calling them liars," said

Alper, who represented Dodd. "What we were able to do in this case is prove Mr. Dodd wasn't lying."

Before the case proceeded to trial--but after its motions for summary judgment and dismissal were denied--the ADOC settled with Dodd for \$90,000. The ADOC also agreed to have Dodd evaluated by a licensed ophthalmologist within 30 days and to pay for any necessary treatment. See: *Dodd v. Robinson*, USDC MD AL, Case No. 03-F-571-N. 

Additional sources: *Daily Mountain Eagle*, *Birmingham News*

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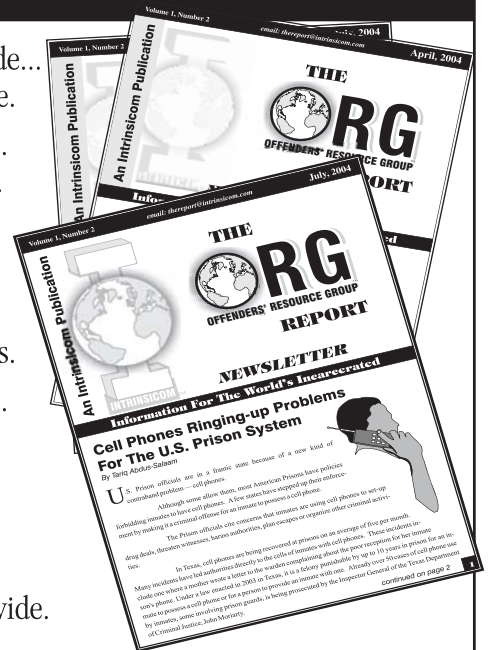
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# Pro Se Tips and Tactics

by Daniel E. Manville

## Exhaustion of Administrative Remedies

### Introduction<sup>1</sup>

If you are confined and are suing in federal court prison or jail staff for an incident that occurred while locked up, you are required to exhaust the administrative grievance system that exists. There are no exceptions to exhaustion of the grievance system if the incident you are suing occurred while confined and you bring the lawsuit while still confined. This requirement was imposed in 1996 by what is known as the Federal Prison Litigation Reform Act (PLRA).

“No action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted.”

42 U.S.C. § 1997e(a). Many states now have imposed a requirement of exhaustion of the administrative grievance system prior to filing in state court.<sup>2</sup>

### Prison Condition Defined

The question faced by most prisoners is what does the term “prison conditions” mean. Recently, the United States Supreme Court defined the term “prison conditions” very broadly, as applying “to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”<sup>3</sup> This means that any incident involving your confinement in a prison or jail must be presented through the grievance system if a lawsuit is going to be filed and litigated. Your failure to exhaust the available grievance process will likely result in the lawsuit being dismissed.

### Available Relief Defined

Most prison and jail grievance systems do not authorize an award of money damages as one of the reliefs available. When money is not available to resolve a grievance, many prisoners believe that they don’t have to exhaust the grievance system since the relief they seek is not provided. The United States Supreme Court held that regardless whether the grievance system will provide the relief sought by the prisoner, such as money damages, exhaustion is mandatory.<sup>4</sup> The Court stated that exhaustion is required to provide an opportunity for jail or prison staff to handle the complaint.

### “Inmate” Defined

An “inmate” is “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary programs.”<sup>5</sup> A prisoner released from prison on parole or discharged when filing the lawsuit will not have to exhaust administrative remedies as to claims that arose while confined.<sup>6</sup> Further, if a prisoner has started the grievance process and is then released before it is completed is no longer subject to the exhaustion requirement since they are no longer confined and thus need not complete the grievance process.<sup>7</sup> Those who are civilly committed are not required to comply with PLRA’s exhaustion requirements.<sup>8</sup> If you are close to being released from prison and the statute of limitation will not expire prior to that release, you may want to consider waiting until released to file your lawsuit since the provisions of the PLRA will not apply to you.<sup>9</sup> Further, if your lawsuit is dismissed without prejudice for failure to exhaust pursuant to § 1997e, you can file the lawsuit once released from prison if the state statute of limitation has not expired.<sup>10</sup>

### Exhaustion Defined

Prior to filing the lawsuit you must have completed the exhaustion requirements of the jail or prison system. You cannot file your lawsuit while your grievance is pending. Most courts have placed on prison staff the burden of proving that the prisoner failed to exhaust prior to filing the lawsuit.<sup>11</sup> The exception for this is the Sixth and Tenth Circuit, which requires the prisoner to “plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint, or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome.”<sup>12</sup>

You are required to follow the procedures set forth in the prison policy as to exhausting administrative remedies.<sup>13</sup> Generally, a letter written to the prison inspector, to prison officials or to the Attorney General are not sufficient methods to “warrant considering a matter ‘effectively grieved.’”<sup>14</sup> However, complaints that are reviewed at the highest levels of the agency may satisfy

the exhaustion requirement even if they were not processed through the grievance system.<sup>15</sup> When prison staff have prevented a prisoner from filing a timely grievance, the court will either remand, requiring the state to allow a late filing of a grievance, or will find a waiver by prison staff.<sup>16</sup>

A prison grievance system may be deemed unavailable to a prisoner. Courts have found unavailability when “(1) an inmate’s untimely filing of a grievance is because of a physical injury and (2) the grievance system rejects the inmate’s subsequent attempt to exhaust his remedies based on the untimely filing of the grievance.”<sup>17</sup> If the state has a system where a prisoner can seek to file an out-of-time grievance, failure of the prisoner to try and use that procedure will be found to be a failure to exhaust available remedies.

Once a prisoner has won at any level of the grievance process, it is over and the prisoner has exhausted.<sup>18</sup> Further, if the prisoner has won as to the issues raised in the grievance and staff then ignore or fail to comply with the grievance, the prisoner need not grieve the noncompliance – otherwise prison staff could keep prisoners out of court indefinitely by saying “yes” to the grievance and “no” in practice.<sup>19</sup>

### Tolling of Statute of Limitations Defined

Most courts have held that the statute of limitations is tolled during exhaustion, though it is not certain whether that conclusion holds independent of state rules tolling the limitations period during exhaustion.<sup>20</sup> Some states also have tolling provisions that give a litigant whose case is timely filed, but is then dismissed for reasons other than the merits, a certain period of time to re-file.<sup>21</sup>

### Three-Strikes Defined

Most federal courts have held that a lawsuit is frivolous that is filed prior to exhausting administrative remedies and will count the dismissal of the lawsuit as a strike.<sup>22</sup> Since a prisoner is only allowed three strikes and then must pay the full filing fees, you should exhaust administrative remedies prior to filing a civil rights lawsuit.<sup>23</sup>

### Conclusion

You should wait until the grievance process has been exhausted before you file a lawsuit. When filing the lawsuit, the



author's advice is that your complaint should contain a paragraph stating the steps taken to exhaust the grievance process and you should also attach the exhausted grievance to the complaint. The next column will discuss the "three-strike provision" of the PLRA.

### Notes:

<sup>1</sup> This article is authored by Daniel E. Manville. He is the author and publisher of the recently released Disciplinary Self-Help Litigation Manual and is presently working on a rewrite of the Prisoners' Self-Help Litigation Manual with John Boston. Mr. Manville is presently an Adjunct Professor and Staff Attorney for Wayne State University Law School Civil Rights Clinic, Detroit, Michigan. Neither the Clinic nor Attorney Manville are able to handle lawsuits in other states.

<sup>2</sup> Remember, many states have adopted similar procedures to what is contained in the PLRA so you will need to check your particular state statute and case law. See, e.g., *State ex rel. L'Minggio v. Gamble*, 667 N.W.2d 1, 5 (Wis. Ct. Ap. 2003) ("exhaustion of administrative remedies is required pursuant to Wisconsin's Prisoner Litigation Reform Act, Wis. Stat. § 801.02(7)(b), and Wis. Admin. Code. § DOC 310.04"); cf., *Bugely v. State*, 464 N.W.2d 878, 880 (Iowa 1991) (Exhaustion of administrative remedies is not required if an inmate proves by a preponderance of the evidence that prison officials interfered with the appeals process and that such interference prevented the completion of the process in a timely manner.). But see *Cole v. Isherwood*, 653 N.W.2d 821 (Neb. S. Ct. 2002) (exhaustion of administrative remedies was not jurisdictional prerequisite to commencement of prisoner's § 1983).

<sup>3</sup> *Porter v. Nussle*, 534 U.S. 516, 532, 122 S.Ct. 983 (2002); see *Castano v. Nebraska Dept.*

*of Corrections*, 201 F.3d 1023, 1024 (8th Cir. 2000) (holding the failure to provide interpreters for Spanish-speaking prisoners is a prison condition), cert. denied, 531 U.S. 913 (2000); *Salaam v. Consowoy*, 2000 WL 33679670 at \*4 (D. N.J., Apr. 14, 2000) (holding that failure to provide proper parole hearing is a prison condition); *Cruz v. Jordan*, 80 F. Supp. 2d 109, 116-17 (S.D. N.Y. 1999) (applying provision to medical care claim).

<sup>4</sup> *Porter v. Nussle*, id.

<sup>5</sup> 42 U.S.C. § 1997e(h). Courts have held that military inmates are included under the PLRA, *Marrie v. Nickels*, 70 F.Supp.2d 1252, 1262 (D. Kan. 1999), as are persons held in privately operated prison facilities and juvenile detention facilities. See *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 994 (8th Cir. 2003) (holding that juveniles are prisoners under PLRA); *Herrera v. County of Santa Fe*, 213 F.Supp.2d 1288, 1293 (D. N.M. 2002) (holding the exhaustion requirement applicable to persons held in private prisons).

<sup>6</sup> See, e.g., *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999) ("litigants--like *Greig*--who file prison condition actions after release from confinement are no longer 'prisoners' for purposes of §§ 1997e(a) and, therefore, need not satisfy the exhaustion requirements of this provision."); *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (PLRA provision barring inmate from bringing suit for mental or emotional injury without prior showing of physical injury did not apply to suit filed by inmate after he was released on parole).

<sup>7</sup> See *Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir. 1996) (holding with respect to another part of the PLRA that the court must determine the inmate's status on the date the suit or appeal is "brought" rather than at some other time).

<sup>8</sup> See *Page v. Torrey*, 201 F.3d 1136 (9th Cir. 2000).

<sup>9</sup> See, e.g., *Ahmed v. Dragovich*, 297 F.3d 201, 210 (3rd Cir. 2002).

<sup>10</sup> *Harris v. Garner*, 216 F.3d 970, 980 (11th Cir. 2000) ("dismissal under this statutory provision of a claim that is filed during confinement should be without prejudice to re-filing the claim if and when the plaintiff is released").

<sup>11</sup> See *Ray v. Kertes*, 285 F.3d 287, 293, 295 (3d Cir. 2002) (holding that the PLRA exhaustion requirement is an affirmative defense and that an inmate need neither plead nor prove exhaustion to proceed under the PLRA, noting that the Second, Seventh, Ninth and D.C. Circuits have so held). See also *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) (noting that defendants' affidavit does not state whether inmate exhausted his appeals; their "Appeal Record" lacks a foundation and is not shown to be complete); see also *Livingston v. Piskor*, 215 F.Supp.2d 84, 86 (W.D. N.Y. 2003).

<sup>12</sup> *Knuuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000); *McAlphin v. Morgan*, 216 F.3d 680, 682 (8th Cir. 2000) (per curiam) (complaint properly dismissed without prejudice where plaintiff prisoner "did not satisfy his burden of showing" exhaustion). The Sixth Circuit has also held that an inmate may not amend his or her complaint to cure the failure to plead exhaustion and the complaint must be dismissed. *Baxter v. Rose*, 305 F.3d 486, 488 (6th Cir. 2002).

<sup>13</sup> *Hemphill v. New York*, 198 F.Supp.2d 546, 549-50 (S.D. N.Y. 2002) ("Prison officials are entitled to require strict compliance with an existing grievance procedure.").

<sup>14</sup> See *Yousef v. Reno*, 254 F.3d 1214, 1221, 1222 (10th Cir. 2001) (Attorney General); *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) (dismissing case of inmate who was told by the warden that he would "take care" of a medical

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## Tips & Tactics (Contd)

the officer); *Lavista v. Beeler*, 195 F.3d 254, 257 (6th Cir. 1999) (holding that Americans with Disability Act procedures did not meet PLRA exhaustion requirement); *Hemphill*, at 546.

<sup>15</sup> *Camp v. Brennan*, 219 F.3d 279 (3rd Cir. 2000) (holding that use of force allegation that was investigated and rejected by Secretary of Correction's office need not be further exhausted); *Perez v. Blot*, 195 F.Supp.2d 539, 542-6 (S.D. N.Y. 2002) (holding requirement might be satisfied where inmate alleged he complained to various prison officials and to Inspector General, whose investigation resulted in referral of officer for criminal prosecution).

<sup>16</sup> See *Brown v. Croak*, 312 F.3d 109, 113 (3d Cir. 2002), citing to *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (holding that "a remedy that prison officials prevent a prisoner from 'utilizing' is not an 'available' remedy under § 1997e"); *Rivera v. Goord*, 253 F.Supp.2d 735, 747 (S.D. N.Y. 2003), and cases cited therein.

<sup>17</sup> *Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003). But see *Ferrington v. Louisiana Department of Corrections*, 315 F.3d 529, 532 (5th Cir. 2002) (court concluded that blindness could not have prevented inmate from exhausting his

available remedies due to blindness when such blindness had not prevented inmate from filing a § 1983 suit, appealing a disciplinary hearing, or filing other grievances).

<sup>18</sup> *Ross v. County of Bernalillo*, 365 F.3d 1181, 1187 (10th Cir. 2004), and cases cited; *Dixon v. Goord*, 224 F.Supp.2d 739, 749 (S.D. N.Y. 2002) ("The exhaustion requirement is satisfied by resolution of the matter, i.e., an inmate is not required to continue to complain after his grievances have been addressed."); *Gomez v. Winslow*, 177 F.Supp.2d 977, 984-5 (N.D. Cal. 2001) (allowing damage claim to go forward where inmate had stopped pursuing the grievance system when he received all the relief it could give him); *Brady v. Attygala*, 196 F.Supp.2d 1016, 1020 (C.D. Cal. 2002) (holding plaintiff had exhausted where he grieved to see an ophthalmologist and was taken to see an ophthalmologist before the grievance process was completed).

<sup>19</sup> *Kaplan v. New York State Dept. of Correctional Services*, 2000 WL 959728 at \*3 (S.D. N.Y., July 10, 2000); *McGrath v. Johnson*, 2002 WL 1271713 (3rd Cir. 2002). But see *Dixon v. Page*, 291 F.3d 485, 490 (7th Cir. 2002) (observing that "[r]equiring a prisoner who has won his grievance in principle to file another grievance to win in fact," risking the prospect of a "never-ending cycle of grievances," "could not be tolerated"; but accepting prison staff's claim that the inmate

could have taken a further appeal to the Director if the situation had not been resolved after 30 days).

<sup>20</sup> In *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000), the court simply stated that the limitations period was tolled during exhaustion because the plaintiff was unable to bring suit until exhaustion was completed.

<sup>21</sup> See *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (holding action timely because a state statute provides that a litigant who timely files and is dismissed has a year to commence a new action). The same result may follow from the application of equitable tolling. See also *Wright v. Hollingsworth*, 260 F.3d 357, 359 (5th Cir. 2001).

<sup>22</sup> See, e.g., *Rivera v. Alin*, 144 F.3d 719, 730-1 (11th Cir.), (dismissal without prejudice under *Heck v. Humphrey*, 512 U.S. 477 (1994)--counted as a strike), cert. dismissed, 119 S.Ct. 27 (1998); cf., *Patton v. Jefferson Correctional Center*, 136 F.3d 458, 464 (5th Cir. 1998) (Excusing a prisoner's frivolous § 1983 actions "from the reach of the PLRA's 'three strikes' proviso simply because the cases included unexhausted habeas claims" would allow "litigious prisoners [to] immunize frivolous lawsuits from the 'three strikes' barrier by the simple expedient of pleading unexhausted habeas claims as components of § 1983 suits.").

<sup>23</sup> The next article will discuss the "Three Strikes" provision. ■

## Summary Judgment Reversed in Louisiana Jail Conditions Case by Robert H. Woodman

The Court of Appeal of Louisiana, First Circuit, reversed summary judgment granted by the Twenty-Third Judicial District Court of Ascension Parish (Louisiana) to the Ascension Parish sheriff in a case involving conditions of confinement at the Ascension Parish jail. The appeals court ruled that the Louisiana Prison Litigation Reform Act (LaPLRA), La.Rev.Stat. Ann. § 15:1184(E) did not apply retroactively to the prisoners' claims for damages.

In 1997, eighteen prisoners of the Ascension Parish Jail, in Donaldsonville, Louisiana, sued Sheriff Jeffrey F. Wiley and numerous other defendants under 42 U.S.C. § 1983, claiming that jail conditions were unconstitutionally unsanitary. Specifically, Plaintiffs complained that cells had no running water or toilets. Prisoners had to relieve themselves through a grate-covered hole in the middle of the floor. The hole could only be flushed by a guard outside the cell, and the hole regularly overflowed, spreading

sewage across the cell floor. Further, each cell had two prisoners who had to share a one-gallon plastic jug of water, which was irregularly provided by guards. The water was used for drinking, washing hands, and washing feces off the grate covering the sewer hole in the cell. Moreover, Plaintiffs complained that the cells lacked windows, that food was passed through a slot in the cell doors, and that cell lights were often left on around the clock. They sought damages for physical pain and suffering, mental anguish and distress, and all necessary medical expenses.

The federal district court dismissed the suit on authority of 42 U.S.C. § 1997e(e), without prejudice to state law claims, holding that the prisoners had shown only *de minimis* physical injuries, had not identified a single human need of which they were deprived, and were unable to bring claims solely for mental and emotional distress. The prisoners then filed the same claim for damages in state court. Defendants moved for summary judgment, citing LSA-R.S. 15:1184(E) of the LaPLRA, citing the same reasons for dismissal in state court that the federal court gave for dismissing the case. The state district

court granted the motion and dismissed the case. The prisoners appealed.

The appeals court held that the LaPLRA is substantive in nature, not procedural. Accordingly, under LSA-R.S. 1:2, LSA-R.S. 15:1184(E) could not be applied retroactively unless the Louisiana legislature explicitly so directed. The court found no explicit directive to apply the LaPLRA retroactively. Moreover, the LaPLRA took effect on July 9, 1997. Plaintiffs' claims arose before that date. Consequently, while Louisiana prisoners cannot file claims for damages solely for emotional and mental damage distress on facts arising after July 9, 1997, Plaintiffs could file such a claim. Moreover, Plaintiffs clearly stated a proper claim for damages under the pre-LaPLRA law. Accordingly, the trial court committed legal error in granting Sheriff Wiley summary judgment.

The district court grant of summary judgment to Defendants was reversed and the cause remanded for further proceedings. Costs of the appeal were pretermitted. This is not a final ruling on the merits of the claim. See: *Bourgeois v. Wiley*, 849 So.2d 632, (La.App. 1 Cir. 2003). ■

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procedural aspect of litigating a disciplinary guilty finding in that particular state court. The DSHLM was recently denied a grant that would have provided free copies to prison law libraries because it **speaks the truth** of how the prison disciplinary process works.

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# Crime Lab Problems Continue In Texas, Elsewhere

by Michael Rigby

More than two years after the closure of its DNA division, the Houston Police Department (HPD) crime lab remains a lesson in how not to run a forensics unit. Recent developments include the discovery of 280 boxes of misplaced evidence and a revelation that an analyst from a private laboratory consulted with police and prosecutors on how to report the results of DNA testing in a capital murder case.

The HPD crime lab debacle exploded in November 2002 after news reports exposed the lab's sloppy work and shoddy procedures. An outside audit later found that technicians were poorly trained, routinely misinterpreted data, and kept records in disarray. The lab was shut down for a time (the DNA division is still closed), its work given to outside laboratories, and retesting ordered in over 400 cases. Several top administrators eventually resigned or were fired, though all escaped criminal prosecution. Three months later Josiah Sutton, a prisoner serving 25 years for a 1999 rape, was released after being exonerated by a retesting of DNA evidence originally analyzed by the HPD crime lab. [See *PLN*, July 2003, p. 26].

On January 4, 2004, state lawmakers and city officials met to discuss the lab's ongoing problems. One of the problems addressed was the August 2004 discovery of 280 boxes of mislabeled evidence from 8,000 cases dating back to the 1970s. During the meeting Democratic Senators Rodney Ellis and John Whitmire questioned Harris County District Attorney Chuck Rosenthal's refusal to back a moratorium on executions following the discovery—an action both senators support (possibly because Harris County imposes more death sentences than any other county in the nation). "We know that nothing in any of these boxes pertains to any death penalty cases," Rosenthal replied, adding that he is confident enough to sleep. Days later Houston Police Chief Harold Hurtt announced that the mislabeled boxes included evidence from 28 capital cases. Defendants in 20 of the cases have already been executed. It's unclear how this has affected Rosenthal's sleep.

Present at the meeting were two men recently released from prison because of problems with evidence analyzed by the HPD and Texas Department of Public Safety (DPS) crime labs. George Rodriguez of Houston was released in October 2004 after he was exonerated of rape by a retesting of blood evidence originally processed by

HPD. Rodriguez served 17 years in prison. Brandon Moon was freed in December 2004 after serving 16 years for rape based on a DPS serologist's testimony that blood-type testing indicated he was the culprit. Recent retesting cleared him.

Barry Scheck, co-director of the New York-based Innocence Project, who sat between the two men, commented that, "There is a proven legacy of serious negligence and misconduct among many who conduct forensic analysis in Texas that has led to conviction of the innocent and, undoubtedly, execution of the innocent." Scheck said that a third client, Ernest R. Willis, released from death row after his corrupted arson conviction was overturned, was "afraid to come into the state."

The lawmakers also outlined plans to try to guard against further problems, including bringing in the Texas Rangers to monitor laboratory operations. Ranger oversight was tentatively set to begin on February 1, 2005. Several lawmakers also said they supported separating crime labs from police departments to ensure independent findings. Unfortunately, problems also abound with independent labs.

On December 3, 2004, Victor Alpizar, a DNA analyst for Identigene—one of three private laboratories checking HPD's DNA work—testified that he consulted with police and prosecutors before drafting a report about evidence in the capital murder case of Sheldon Thompson. Thompson is charged with murder of a man found shot to death in his driveway on November 1, 2001.

The collaboration with police and prosecutors took place after another Identigene analyst, Jennifer McCue, botched the results of DNA retesting in the case by confusing two samples. The error was caught by an HPD official and led to a third round of testing. Alpizar performed the final tests which analysts claim link Thompson to the murder. According to his notes, Alpizar drafted three different reports on the results and talked with Assistant District Attorneys Colleen Barnett and Lynne Parsons before releasing the final version. Rosenthal said he was "a little bit surprised" that the prosecutors consulted with Identigene, but said there was no reason for concern.

Others disagree. Stanley Schneider, a member of the Harris County Criminal Defense Lawyers Association and critic of investigations of the HPD lab, said such consultations were the group's "worst

nightmare." "There is no independence if the DAs are telling the scientists how to write reports," said Schneider. "Who is controlling the lab, the scientists or the DAs?" Schneider also raised concerns about the quality of work performed by HPD, commenting on McCue's faulty test results. "Everyone makes mistakes but not when you're retesting the screw-ups," he said. "It certainly calls into question the quality of the lab."

But the problems in Houston are just part of the story. When the HPD imbroglio kicked off in 2002, scandals involving other crime labs in Texas, Virginia, Montana, Ohio, Oklahoma, and Washington were also making headlines. This continues to be the case. On November 19, 2004, the *Los Angeles Times* reported that Maryland-based Orchid Cellmark—the world's largest private DNA testing firm with labs in Maryland, Texas, Tennessee, and Britain—fired one of their analysts for mishandling DNA evidence in 11 Los Angeles Police Department investigations.

Cellmark officials said analyst Selma Blair was fired for "professional misconduct." Blair reportedly substituted control samples with actual DNA evidence, prompting a retesting of all her past work. Blair handled 27 cases for the LAPD, 11 of which showed evidence of faulty analysis, said Steve Johnson, head of LAPD's Scientific Investigations Bureau. Blair's conduct was "unacceptable in any laboratory," he said.

Los Angeles prosecutor Lisa Kahn espoused the typical prosecutorial line saying that Blair's conduct will have no bearing on the cases because the DNA evidence itself was not compromised. "There is nothing wrong with any of the evidence in any of these cases," said Kahn. "These cases will proceed to trial and I don't expect for them to be affected in anyway."

That all the "errors" and "mistakes" that occur benefit prosecutors and police is not a coincidence. The crime labs are run to ensure criminal convictions with a veneer of scientific certainty. Even if the science and methods need to be played with in order to ensure the results necessary to gain a conviction. Until crime labs are run as truly independent facilities, by professionals with no links or funding by police and prosecutors, these issues will continue.

Jennifer Friedman, forensic science coordinator for the Los Angeles County public defenders office said, however, that the case illustrates larger issues and potential

deficiencies as the use of DNA in criminal cases grows. "People have to understand that this was human error and there are lots of human components to DNA testing," she said. "There always will be errors, no matter how automated these systems become." The

only question is, who will pay the price for those errors? 🐞

Sources: *Houston Chronicle*, *New York Times*, *Los Angeles Times*, *Associated Press*, *Dallas Morning News*, *WB39 News*

## Three California Prisons Ration Water Due To Contaminated Wells

by John E. Dannenberg

When wells at the California Rehabilitation Center (CRC), Salinas Valley State Prison (SVSP) and Sierra Conservation Center (SCC) state prisons became contaminated, water was severely rationed until repairs could be made.

In June, 2004, when maximum-security SVSP's well water was determined to be contaminated, the 4,500 prisoners there were restricted initially to three six ounce cups of water per day for all purposes. Toilet flushes were reportedly delayed for up to ten hours. Following complaints, water rations were increased to 64 ounces per day and toilet flushes to every three hours, according to SVSP spokesman Lt. Eloy Medina, who reported morale "pretty good." Three-minute showers were added later.

The problem began when one of the 1996 prison's two wells became contaminated with nitrate pollution from leaking septic systems and regional agricultural fertilizers leaching into the groundwater. An emergency hookup to adjacent Soledad State Prison brought some relief, but not enough to quench SVSP's daily thirst for 700,000 gallons. An interim solution was to permit the contaminated water to be used for showers and toilets only. The long term solution will be a water filtration system, anticipated to be installed by the end of 2004.

In August, 2004, about 20 prisoners at CRC (southern California) complained of stomach illnesses and were diagnosed as suffering from *Helicobacter pylori*, a bacterium found in the stomachs of about 50% of the population. *H. pylori* is known to cause ulcers, gastric distress, bloody stools and stomach cancer. The prisoners complained that it came from the brown water that flowed from prison pipes. The prison tests its water twice weekly for *H. pylori* and has always tested negative. Staff sent a memo to the prisoners advising that they needed to have good personal hygiene, eat properly prepared food and drink from a clean, safe water source. But some of CRC's 4,600 male and female prisoners still resorted to filtering the brown water coming from the taps, using socks on the

showerheads, while other prisoners refused to wash at all, to prevent rashes.

Spokesperson and regular prison visitor Judy Greenspan of prisoner advocacy group California Prison Focus said that "thousands of inmates statewide ... are infected with *H. pylori*," adding, "I think it's coming from the prison kitchens and dirty cells." Prison Doctor Sary Grover opined that the infected prisoners carried the disease since childhood. He added that when prisoners see discolored water, they think it's bad, but CRC Lt. Tim Sherlock said the water is treated with chlorine. A year ago, an old well supplying CRC was abandoned when the prison hooked up to the city of Norco's water system.

In January, 2005, upon record winter storms hitting the Sierra Nevada mountains, silt roiled up in Tulloch Reservoir (which supplies SCC) and clogged the prison's filtration system. As a result, the 600,000 gallon daily flow was reduced to 400,000, according to SCC Lt. Jim Hurtado. To compensate, showers were canceled for two days, disposable food trays were used, laundry was sent to other prisons, truckloads of drinking water were brought in and 90 portable toilets were installed. 🐞

Sources: *San Francisco Chronicle*, *Press Enterprise*, *Sacramento Bee*.

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# Two Pennsylvania Prisoners Win \$1.2 Million For MRSA Skin Infections Contracted County Jail

by John E. Dannenberg

An uncontrolled and untreated chronic infection of Methicillin Resistant Staphylococcus Aureus (MRSA), a highly contagious, stubborn, disfiguring and sometime fatal bacterial disease, has permeated the Bucks County Correctional Facility (BCCF), unabated, for at least four years. BCCF officials have refused to treat the infections, inform prisoners of the outbreak or sanitize the facility. In the first of what may prove to be a landslide of lawsuits on behalf of injured and killed prisoners, two former prisoners were awarded \$1.2 million in damages by a jury in the U.S. District Court (E.D. PA) in a suit brought under 42 U.S.C. § 1983 alleging First, Eighth and Fourteenth Amendment violations.

Kevin Keller contracted MRSA between July 10 and August 28, 2002, from his cellmate Gary Brown, who had a huge, open, draining MRSA boil on his back. After one month of cohabitation, Keller developed painful boils under his armpits, which grew to the size of golf balls. He was denied his request for sick call, and received no treatment. Keller popped the abscesses and they eventually went away. He was not told of an MRSA outbreak or that he should not touch his infections. Throughout this period, Keller continued to work in the BCCF kitchen, handling food for all 600 prisoners and for staff.

On August 27, 2002, Keller popped a small purple infection on his scrotum. Two days later, it began to drain, with "long white things" protruding from the open wound. His written requests (over days) for medical treatment were denied. Guards told him when he demanded treatment that he would be inflected for misconduct. On August 28, when he signed up for sick call, he was told no medical aid was available for four days over the Labor Day weekend. Bleeding profusely and in excruciating pain, he snuck down to the dispensary where he was excoriated for showing up. The nurse then told him "It'll be alright," and he could see a doctor after Labor Day. He was then

locked up in punitive segregation without seeing a doctor, and given ibuprofen for his pain. But to relieve pain, he was forced to drain the wound on his scrotum every two hours over the toilet.

Keller continued to send in sick call slips and grievances for failure to give him medical care. When his scrotum was the size of a grapefruit, he was hospitalized at Doylestown Hospital, where he was operated on and remained for a month. Upon his return, having lost considerable weight, he still suffered from chills and high fever. Although the hospital ordered bandages and access to hot water for cleansing and soaking, BCCF staff denied this to him. Keller was released from BCCF on November 8, 2002.

Benjamin Martin was incarcerated at BCCF in 2001, where he developed a major abscess on his leg, causing nausea and sleeplessness. Dispensary staff told him it was a spider bite. He repeatedly requested help, but Head Nurse Joan Crowe told him, "I have no time for you." A week later, the abscess burst, exposing a huge MRSA infection. When he was finally taken to Doylestown Hospital, he was told that the delay in treatment caused the infection to go up into his hip and bones, threatening amputation of the leg. Today, Martin still suffers nerve damage on both legs where infectious boils had to be removed. When he came back from the hospital, the warden suddenly decided to parole Martin.

BCCF prisoner Virginia Brejak wasn't so "lucky." For several months before her death, she suffered from painful, itchy, erupting boils on her head and body. She was diagnosed with MRSA, but died of a massive brain hemorrhage, believed to be caused by an MRSA abscess.

BCCF medical staff intentionally suppressed disclosure of the MRSA outbreak, then known to infect 50 of the 600 prisoners. Defendants Gordian Ehrlicher, Director of the Bucks County Department of Health, Dr. Lewis Polk, Medical Director of Bucks County Health Department and Joan Crowe, RN, BCCF Health Director instead falsely informed the infected prisoners that the boils were "bedsores," "spider bites," "folliculitis," "pimples," and "allergies," and not communicable infections. Thus, the willful nondisclosure of the contagious health hazard prevented the hapless prisoners from protecting themselves.

But even if they had known, BCCF had no medical isolation facilities or segregated housing for infected prisoners. Instead, upon seeking medical aid, they were punished by being put in "the hole." As a result, many infected prisoners, fearing retaliation, suffered in silence while uncontrollably spreading the disease.

Pennsylvania Code 37 § 95.242(2)(xii) requires reporting of an infectious disease outbreak. But the ghouls running BCCF remained silent even at the end of August, 2002, when four prisoners and one guard had MRSA symptoms; the prisoners received no treatment. As of the 2003 filing of Keller's and Martin's civil rights complaint, there were 25 known new cases of MRSA since January, 2003, still not being treated.

Needless to say, it wasn't hard to prove to a jury the deliberate indifference to plaintiffs' rights. On January 10, 2005, the federal jury returned verdicts of \$800,000 to Keller and \$400,000 to Martin. But this is just the tip of the iceberg. Not only are there pending other individual suits by prisoners and guards, but in December, 2004, the U.S. District Court (E.D. PA) certified a class action suit against Bucks County on behalf of all current BCCF prisoners. The suits note not only the illegal suppression of notice of infectious disease and the cruel, callous denial of medical treatment, but also complain that the jail's known rain leaks for twelve years have resulted in chronic mold buildup, which, coupled with grossly inadequate cleaning, have nurtured the perfect environment for entrenching MRSA into the air, water, food, walls and floors of BCCF.

Plaintiffs are represented by Doylestown attorneys Martha Sperling and Anita Alberts. Former BCCF prisoners who may have suffered from MRSA should seek representation for their injuries. *Keller v. County of Bucks*, US DC ED PA, Case No 03-4017.

PLN previously reported on MRSA outbreaks nationwide. (See: PLN, Dec. 2003, p. 10.) Prisoners experiencing MRSA symptoms should practice clean hygiene to minimize co-infection. If custody staff balk at treatment, prisoners should complain through family to public health officials or to the Center for Disease Control in Atlanta, Georgia. MRSA can be deadly. ■

Additional Sources: *New York Times*, *phillyburbs.com*.

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# California Parole Condition Prohibiting Computer Access For Molester Ruled Unreasonable

The California Court of Appeals granted habeas corpus relief sought by a paroled child molester who complained that the condition of parole forbidding him from either using a computer or getting on the Internet was unreasonable. Ramon Stevens was convicted in 1997 of lewd conduct on a child. When arrested, he had a photo album of naked boys and a video recording of him having sex with an adult male. A search of his home computer revealed he had not used the computer for pornography, for contacting the victim, or for any criminal activity. When he was released onto parole in 2002, a special parole condition was "You shall not possess or have access to computer hardware or software including the internet."

Stevens' proper petition contended that the restrictive condition which impeded his ability to earn a living bore no relation to his crime or to conduct that was inherently criminal, nor was it tethered to any reasonably foreseeable criminal conduct. After the court issued an order to show cause, respondent California Board of Prison Terms (BPT) modified its restriction to allow Stevens limited use of the Internet now just forbidding computer access to pornographic web sites or communication with minors. The BPT then moved to moot the petition, but the court elected to retain jurisdiction because the question was of great public interest, was "especially novel" by developing new case law involving cyberspace, and could potentially recur with every California parole—i.e., 115,000 times per year.

The court first reviewed the Legislative

intent of parole, finding that they recognized the initial period following release as highly significant to a parolee's successful reintegration into society. The court cited precedent holding that conditions of parole are a proper tool to bar a parolee from his prior bad associates and aim him away from a "former crime-inducing lifestyle." The court concluded that existing precedent would uphold the restriction of a parolee from otherwise lawful conduct if it were reasonably related to his underlying conviction or to prevent future criminality.

Presiding Justice Gilbert then reviewed cyberspace law. Noting the mass appeal of the Internet and its integration into the mainstream of modern society, the court noted First Amendment protections attaching to its availability (citing *Clement v. California Dept. Of Corrections*, 364 F.3d 1148 (9th Cir. 2004) [prisoners have right to receive Internet-generated mail]).

The court then focused on child molesters and their abuse of the Internet, observing that the U.S. Supreme Court held (*Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) that society has a strong interest in protecting the Internet's use from the harmful effects of obscene material. The court approved decisions that had restricted Internet use by paroled molesters where it had been used in their crime, but cautioned that such restrictions ought not be overbroad.

Applying these principles, the court characterized the BPT's general concern regarding future criminal conduct as legitimate.

But because the prohibition of any computer use was inherently inconsistent with Stevens' employability and thus his successful reintegration into society, the parole restriction was anomalous. As an alternative, any concerns of computer abuse could be monitored by random inspection of Stevens' hard drive, or by using an automatic link from Stevens' computer to the parole office.

The court concluded that "Rehabilitation of a felon entails integration into society where he or she can be self-supporting. In appropriate cases, access to the Internet assists parolees to become law-abiding citizens." Accordingly, the court discharged its order to show cause and declared the petition now moot based upon the BPT's intervening modification of its restrictions. See: *In re Stevens*, 120 Cal.App.4th 881 (2004). ■

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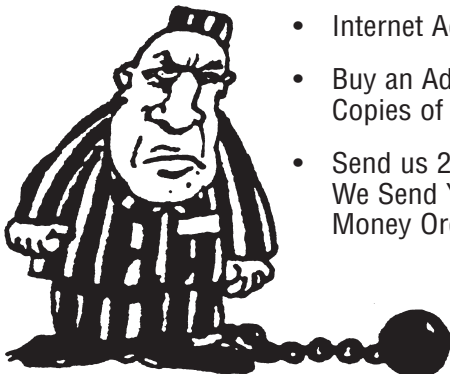
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# U.S. Supreme Court Holds California Policy Of Double-Celling By Race During Prison Intake Must Pass “Strict Scrutiny,” Not “Rational Relationship” Test

The U.S. Supreme Court ruled that the strict scrutiny test, not the more deferential legitimate penological interest test, applied when determining the constitutionality of the California Department of Corrections’ (CDC) policy to require double-celling based upon race during the first 60 days intake processing in state prison. As such, CDC’s 25 year-old policy was found suspect, and the case returned to the Ninth Circuit U.S. Court of Appeals to determine if that policy in fact violates the Equal Protection Clause.

Garrison Johnson, a black prisoner serving 36-life since 1987 for murder, robbery and assault with a deadly weapon, has been moved to five of CDC’s 33 prisons. Each time, he began with 60 days intake processing, where he was required to double-cell with another black prisoner. Johnson complained that he was humiliated by this racial segregation and that it violated his Equal Protection rights under the Fourteenth Amendment.

The Ninth Circuit had upheld CDC’s policy. See: *Johnson v. California*, 321 F.3d 791 (9th Cir. 2003); *PLN*, Apr. 2004. It noted that CDC’s initial racial segregation isolated numerous potentially warring groups by preemptively separating them. The net result was that “birds of a feather” wound up sharing the same cage - at least for the initial 60 days intake processing. Thereafter, CDC policy was to permit all prisoners to seek cellmates of their own preferences.

The Ninth Circuit had applied the four part “reasonable relationship to a legitimate penological interest” test of *Turner v. Safley*, 482 U.S. 78 (1987), to decide the merits of Johnson’s complaint below. The court found that prisoners’ safety (before they were classified), based upon even only anticipated violence, was a common sense rationale sufficient to affirm the policy, and that harm, if any there be in the 60 day period, was minimal and did not amount to an “exaggerated response.”

The U.S. Supreme reversed. The high Court determined (5-3) that *Turner*’s reasonable relationship test had never been applied to racial classification and that the only acceptable standard was the more stringent “strict scrutiny” test. The Court is always suspicious of “reasons” advanced to support a racial classification scheme, even when the classification is supposed to be benign.

Fearing motivation for a repugnant purpose, the Court warned that with CDC’s race-based *housing* policy [yards, dining, showers and medical clinics were not segregated], “it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions,” i.e., exacerbating the very problem they purport to control. “When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers,” wrote Justice Sandra Day O’Connor for the majority.

Justices Ginsburg, Souter and Breyer concurred, but noted that strict scrutiny might not always apply in racial classification questions, such as where one aims to expressly relieve entrenched racial discrimination (e.g., minimum “quotas”).

The majority did not decide what CDC should or even could do to pass “strict scrutiny” muster - leaving that thorny question to the Ninth Circuit on remand. Justice Stevens dissented from this limited holding, writing separately to say he would flatly declare CDC’s policy unconstitutional.

Also dissenting, but calling the question the other way, Justices Thomas and Scalia wrote that the *Turner* standard should be applied in all circumstances where the needs of prison administration intersect prisoners’ constitutional rights. They believed that CDC’s policy passed the *Turner* test and should be left alone. Justice Thomas, the court’s sole black justice observed that the majority was concerned with sparing prisoners the indignity and stigma of racial discrimination, while CDC is concerned with their safety.

By returning the case to the Ninth Circuit, the Supreme Court changed the legal test, but not necessarily the outcome, for Johnson. Indeed, CDC commented that the new ruling will not cause them to abandon the policy. “A Japanese inmate will kill a Chinese inmate” when housed together, an associate warden testified. “The same with Laotians, Vietnamese, Cambodians and Filipinos.” CDC spokeswoman Margot Bach added that they cannot put Northern and Southern Hispanics together. Abandoning the race-based pre-classification intake housing policy would be “catastrophic,” said another high-ranking CDC official.

The ACLU applauded the ruling. In their *amicus* brief to the Court on behalf of Johnson,

they had argued that racial segregation is not the solution to the problem of prison violence, according to legal director Steven R. Shapiro. The ACLU National Prison Project’s Elizabeth Alexander hailed the decision a “triumph for the disproportionate number of minority men and women that this country chooses to incarcerate.”

Prior to the new *Johnson* decision, the Riverside, California *Press-Enterprise* had interviewed guards and prisoners who claimed that segregation is rampant throughout the system-not just in the first 60 days-and sharply criticized state officials who had testified otherwise to the Supreme Court. California’s Attorney General Bill Lockyer stated that beyond the first 60 days, the prisons are “fully integrated.... There is no distinction based on race or jobs, meals, yard, recreational, vocational or educational assignments.”

Spokesman Lt. Charles Hughes at CDC’s Lancaster prison and six guards strongly disagreed, noting that racial segregation is demanded by prisoners, who are ruled by gang leaders divided among racial lines. “It’s all about segregation. It’s all we do,” said Hughes. “We separate permanently and use race for job placement and everything, and for them to say otherwise is an absolute lie. And for them to lie to the Supreme Court is appalling.”

Johnson’s attorney Bert Deixler told the Court that racial segregation has abandoned the prisoners to the control of the prison gangs, “a practice which is rooted in racial stereotypes and the belief that all persons of a race think alike and act alike.” True, but this applies equally to CDC *staff* segregation. For example, local chapters of the California Correctional Peace Officers Association, the prison guards union, have active sub-chapters for Black guards, Asian/Pacific Islander guards, and Hispanic guards, where the sole criterion for membership is ethnicity. Animus reportedly runs high between these groups.

The Ninth Circuit will have its hands full on remand to scrutinize CDC policy details under the higher bar set by the Supreme Court. Ultimately, the question may come down to “how many lives must be sacrificed to honor the Constitution?” Or will people learn to live together? See: *Johnson v. California*, 125 S. Ct. 1141 (2005). ■

Additional Sources: *Washington Post*, *Los Angeles Times*, *New York Times*, CNN.com.

# U.S. Department of Justice Reports Soaring Justice Expenditures

by Matthew T. Clarke

In a recently-published report, the Bureau of Justice Statistics (BJS) of the U.S. Department of Justice documented the soaring costs of the justice system in the United States.

The BJS report is for the year 2001 and includes statistics on expenditures and employment in the justice system at the local, state, and federal levels from 1982 through 2001. The report encompasses police, jails and prisons, judicial and legal activities. The outstanding feature of the report was the dramatic increase in overall expenditures to \$167 billion in 2001. This represents an increase of 366% (165% in constant dollars) over the \$36 billion in justice system expenditures in 1982.

The federal government bore the brunt of the change, increasing its expenditures by 583% from 1982 through 2001 compared to 446% for the states and 298% for local governments. At each level of government, jails and prisons were the main reason for the increase. The "corrections" component of the federal budget increased 861% from 1982 through 2001 compared to an increase of 538% for the states and 455% for local governments. Seen another way, the cost of the justice system rose from \$158 per person in 1982 to \$586 per person in 2001. During the same time period, the costs of the "corrections" component of the justice system rose from \$39 per person to \$200 per person, as in every person in the United States.

In March 2001, 2.3 million people—2% of the national labor force—worked for the justice system in the United States. Over half worked at the local level and 63% of the local level employees worked in police protection. A third of the justice system employees were State employees. 63% of the State employees worked in corrections. Only 9% of the justice system employees worked for the federal government. Over half of the federal workers were employed in police protection. The March 2001 justice system payroll was \$8.1 billion. This is 59% of the overall justice system expenditures.


63% of the overall corrections expenditures were made by the States. 70% of the overall police protection expenditures were by local governments. Local governments made 42% of the overall judicial and legal services expenditure; the States paid for 36% of those expenditures.

Seen as a percentage of State and local budgets, expenditures on the justice system

increased from 4% in 1981 to 7% in 2001. This compared with the percentage of the budget spent on education dropping from 31% to 30%.

At 68%, police protection had the highest percentage of expenditures for payrolls. Corrections had 50%, the lowest rate. 17.4% of all Nevada State employees worked in the justice system, the highest of any State. West Virginia was the lowest at 7.8%. The average per capita employment rate for justice system workers in the State and local governments was 70 per 10,000 residents. New York had the highest per capita rate at 94 per 10,000 (D.C. was higher at 118 per 10,000, but may be skewed by the presence of the national government). West Virginia had the lowest per capita rate at 42 per 10,000. Ver-

mont had the fewest State and local police per capita at 15 per 10,000 residents. D.C. had the highest rate at 62 per 10,000. D.C. also had the highest corrections employees rate per capita at 35 per 10,000 residents, closely followed by Texas and New York with 33 per 10,000 residents. West Virginia had the lowest per capita rate of corrections employees at 9 per 10,000 residents.

Overall, the report shows skyrocketing costs of the justice system in the United States. What is not shown and is more difficult to quantify is whether the people of the United States are getting more justice for the greater costs. The report is titled *Justice Expenditure and Employment in the United States, 2001*. BJS Bulletin NCJ 202792 (May 2004). 



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# Contraband Cell Phones On The Rise In U.S. Prisons

Though drugs and weapons have long been a bane to prison officials everywhere, prisons around the country and the world are now experiencing a new contraband problem: cellular telephones.

Texas prison officials learned how serious the problem was during a months-long undercover investigation that began in the fall of 2003. Electronic monitoring by the FBI had revealed that a member of the Texas Syndicate, a violent prison gang, was making and receiving wireless calls from the Darrington prison near Houston.

In the spring of 2004, investigators decided to raid the prisoner's cell—but they forgot to turn off the water. As they entered, the prisoner flushed the cell phone down his toilet. Prison officials, determined to recover the phone, quickly shut down the water lines and ordered several unlucky prisoners into the sewer traps with rakes to drag the bottom.

What happened next must have surprised everyone. "They were pulling up cell phones like they were going fishing," said Lt. Terry Cobbs of the prison system's inspector general's office. "And you'd think they'd be those inexpensive disposable phones like you buy at Wal-Mart. But we've even been seeing camera phones."

Other states are experiencing similar problems. In Pennsylvania, a 2002 sweep of Philadelphia's three jails turned up 61 illegal phones, said a law enforcement official who requested anonymity. Three guards were subsequently indicted for smuggling in phones, cigarettes, and drugs in exchange for money.

In Washington, three cell phones were found between mid-2002 and mid-2004. One was discovered when an escaped prisoner was caught in a wooded area near the prison.

In other parts of the world, contraband cell phones are old hat. But the problem may be worsening. In 2002, prisoners in Brazil used cell phones to organize simultaneous uprisings in 29 prisons. Fifteen people were killed and 8,000 guards and visiting relatives were held hostage.

In Ontario, Canada, a prisoner was charged with running a drug operation from prison. Prisons in Britain, Sweden, Thailand and India have also reportedly experienced problems with prisoners obtaining illegal cell phones.

In Mexico (which has almost as many prisoners as Texas, despite having over five times as many people), the problem has become so severe that authorities are planning to

spend \$1 million on cellular phone jammers to block clandestine calls from Mexico City's four biggest prisons, where officials have confiscated around 500 cell phones in recent years. However, the plan may face legal challenges. Cellular carriers in Mexico—like those in the U.S. and around the world—are loathe to countenance any disruption in service.

To stem the tide of illegal cell phones in U.S. prisons, lawmakers are going with what they know best: criminalization. Three states—Iowa, Pennsylvania and Texas—have enacted laws making it a felony for prisoners to possess cell phones. The Texas law, which is punishable by 10 years in prison and a \$10,000 fine, also made it a felony to provide a cell phone to a prisoner. John Moriarty, the inspector general of the Texas Department of Criminal Justice (TDCJ) said his office is currently prosecuting 50 cases involving cell phone use by prisoners, most with multiple defendants. Forty-seven of those cases originated at Darrington, he said.

Prison officials cite security concerns as the main reason for cracking down on cell phones, saying the prisoners use them to carry out illicit activity on the outside. "[T]hey're not getting the phones so that they can call their mothers on Mother's Day," said Cobbs. "They're getting them to keep their communications open on the outside with their organized criminal activities and to make sure they're getting all the drugs that they need."

However, though ignored by prison officials, prisoners covet cell phones for other reasons as well, like maintaining family ties.

In Texas, for instance, when prisoners are assigned to one of the 100-plus prisons in the state's penal archipelago, family residence is not a factor. A prisoner can easily end up nearly 1,000 miles away from home—too far for regular visits. (Even in Mexico, with its notoriously inhumane prisons, authorities recognize the rehabilitative value of strong family ties, which they foster by allowing the prisoner to meet personally with up to 60 visitors 4 days each week, including conjugal visits.)

And the phone situation is no better. Texas prisoners may only request one 5-minute phone call every 90 days—providing they have no disciplinary cases and the prison is not short-staffed, which is the norm. (Phone calls take place in a prison office and are directly monitored by a guard.) If the phone call occurs during a peak time—such as Mother's Day—it may be limited to three minutes. The

situation is so oppressive that many Texas prisoners forego phone calls altogether.

In light of this situation, House Corrections Committee Chairman Ray Allen has proposed installing pay phones in Texas prisons, though a similar bill was killed in 2003. However, Allen's suggestion may not be wholly altruistic. Many states have generated enormous sums of money by entering into exclusive contracts with telephone service providers, then gouging prisoners and their families on the phone rates. *PLN* has reported extensively on prison phone kickbacks. Obviously, prohibitively high phone rates provide prisoners with an economic incentive to use cell phones as well.

Of course, most contraband, including cell phones, would never be introduced into prisons if not for corrupt guards.

In the Darrington case, prison guard Fula May Johnson, 22, was a "major supplier" of cell phones to members of the Texas Syndicate, said Moriarty. Johnson was arrested in April 2004 in a Houston parking lot as she met with an associate of a gang member imprisoned at Darrington. According to investigators, Johnson was in possession of a cell phone, a quarter-ounce of heroin, and \$250 cash that gang members had paid her to smuggle the contraband into the prison. She was charged with drug possession and bribery.

Prison officials admit that corrupt guards are a big part of the problem. Cobbs said he believes the situation is more pronounced in Texas prisons than in other areas of law enforcement because TDCJ guards are poorly paid (starting salary is just over \$1,700 a month), inadequately trained, and undergo only minimal background checks.

Johnson's Houston attorney, Charles Gaston, agrees. "Here you've got a poorly educated black girl working in a prison, and her only qualification was that she applied for the job," said Gaston, who is also black. "They don't pay her (much) and she's got an illegitimate child. So you walk up to her and ask her, 'Would she take a cell phone into prison and also take a little heroin in there? And here's a couple hundred dollars for your trouble.' Do you think she'd take it?"

While prison officials debate the issue, the influx continues. In June 2004, guards at Darrington opened a large jar of sandwich spread after they were tipped off by a prison snitch. Inside was a cell phone and charger, sealed in a plastic bag. ■

Sources: *The Houston Chronicle*, *The Dallas Morning News*, *The New York Times*

# Sex Offenders Living In Nursing Homes

by Matthew T. Clarke

A recent study revealed that hundreds of sex offenders live in state-regulated nursing homes nationwide.

An Oklahoma-based advocacy group, A Perfect Cause, performed a computer search of the nation's sex-offender registries and cross-matched it with the addresses of the nation's state-regulated nursing homes. This revealed that 380 sex offenders live in 289 state-regulated nursing homes in 32 states. Five states had no sex offenders in nursing homes and the records in thirteen states could not be checked. The study found 70 registered sex offenders in Texas state-regulated nursing homes, 144 of them in the Dallas-Fort Worth area.

Although state and local officials were surprised at the results of the study, they were unable to say how much of a threat the sex offenders were to other nursing home residents. If the number of new crimes committed is any measure, they are little threat indeed. No new offenses by sex offenders living in Texas nursing homes have been reported. Although there were recent re-offenses in New York and Minnesota, such crimes are very rare nationwide.

Sex offenders end up in nursing homes the same way other residents do: they get old and/or infirm. Most nursing home residents rely on Medicaid coverage; so do the sex offenders among them. According to Jason Cupps, administrator at the Carrollton, Texas, Kirby Manor, nursing homes are required to accept qualified Medicaid patients. This means that nursing homes will have people with criminal backgrounds as residents just as people with criminal backgrounds reside in society in general.

"Those people get sick and get old need help, too," said Cupps. "It puts the facilities in a kind of a quandary. We can't turn those people down."

Texas sex offenders who are on parole or probation must get permission from their parole or probation officers to move into a nursing home. They remain under supervision there.

"Those individuals have to live somewhere," said Texas Department of Criminal Justice spokesman Mike Viesca. "If someone on supervision is placed in a nursing home, I would think the parole officer would work with the staff at the facility and make whatever accommodations needed to be made so that person would be supervised and would not be a safety concern to other residents."

Noting that offenders haven't been accused of any crimes in Texas nursing homes, Viesca said, "That's not to say we need to wait for that to happen, but I think our parole staff would be vigilant and make sure they're supervising people correctly."

Nursing homes do not notify residents or their families about sex offenders living there. The reason, as noted by the Texas Department of Human Services spokeswoman Rosemary Patterson, is the high privacy standards for health care that are enforced by state and federal laws.

"We're not allowed to release anyone's personal information to other residents or families, which would include any criminal background," according to Cupps. "State and federal regulations say our residents have a right to privacy about their history or health issues. The question is at what point that right ceases versus the right of others who may be in danger."

Tela Mange, spokeswoman for the Texas Department of Public Safety disagrees. She noted that, while there may not be a law requiring nursing homes to divulge whether registered sex offenders reside there, there are no privacy laws forbidding it either.

"Sex offender registration is public even for juveniles and little old men and little old women," said Mange. "There's not any privacy right to that."


Ms. Patterson maintains her position, noting that the standard of privacy in health care is higher than the standard of privacy in law enforcement.

Mostly, the nursing home residents depend upon the staff and administration to protect them from dangerous individuals, whether they are registered sex offenders or not. This is sufficient, according to Preferred Care Vice President Gary Anderson. Anyone who was dangerous would not be accepted as a resident. If a resident proved to pose a danger, he or she would be immediately discharged, according to Anderson. When asked about two registered sex offenders living at two different Preferred Care nursing homes, Anderson noted that both were disabled, requiring daily medical care and that the staff was aware of their status as registered sex offenders.

"If we thought there was a potential risk, we certainly wouldn't take a person with this on their record," said Anderson.

Darold Feller, one of the registered sex offenders living at a nursing home,

was convicted of sexually assaulting a 10-year-old boy in 1991, noted that the staff has always been aware of his history and that one other resident yelled insults about it at him.

"My God, the thing happened a long time ago, and I'll be paying for it for the rest of my life," said Feeler. "I'm not going to be a threat." 

Source: *Dallas Morning News*.

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# Ohio Supermax Placement is “Atypical & Significant Hardship”; Supreme Court Grants Review

by Bob Williams

The United States Court of Appeals for the Sixth Circuit has ruled that Ohio state prisoners have a liberty interest under the *Sandin* “atypical & significant hardship” analysis in placement in the state Supermax. The Court, however, reversed the district court’s specific modifications of substantive Ohio prison regulations as beyond the power of the federal court.

In January 2001, Charles Austin and 28 other prisoners filed a class action 42 U.S.C. § 1983 suit against Reginald Wilkinson, director of the Ohio Department of Rehabilitation and Correction (ODRC) and 10 other defendants concerning conditions of confinement at the Ohio State Penitentiary (OSP) supermax. The prisoners’ claims included Eighth Amendment violations in the areas of inadequate medical and psychiatric care, inadequate outdoor recreation facilities, and harsh restraints, including the use of “black box” wrist restraints during non-contact visitation. The Fourteenth Amendment claim concerned due process in the selection and retention of prisoners at OSP under ODRC policy 111-07.

The prisoner class was certified and a bench trial was held in January 2002. The prisoners’ Eighth Amendment claims were settled before trial. See: *Austin v. Wilkinson*, No. 4:01-CV-71 (N.D. Ohio Apr. 5, 2002) (order approving settlement agreement). After hearing class objections, the final stipulated settlement provided for injunctive relief prohibiting placing certain mentally ill and chronically ill prisoners at OSP. The ODRC must also construct outdoor recreation facilities and eliminate the use of “black box” restraints during visitation. The injunction is in effect for two years with an award of \$150,000 in attorney fees and \$10,000 per year in monitoring fees.

On the eve of trial, the ODRC issued a new 111-07 policy which became the focus of trial. On February 25, 2002, the district court issued its post-trial findings and conclusions finding the new 111-07 lacking in that prisoners do not receive notice of all the evidence relied upon in their classification hearings; they are not allowed to call witnesses; placement criteria gives insufficient notice of the amount of drug possession sufficient to trigger OSP placement; the criteria is unnecessarily vague regarding

gang activity that would trigger OSP placement; as final decision maker, the Bureau of Classification was not required to describe the facts and reasoning used in its decision; lack of adequate notice before reclassification hearings; and a lack of notice of what conduct is necessary in order to qualify to leave OSP. See: *Austin v. Wilkinson*, 189 F.Supp.2d 719 (N.D. Ohio 2002). [For more on the conditions at OSP and the district court’s ruling see: *PLN*, Feb. 2003, P.6.]

On March 26, 2002, the district court issued its injunction for specific relief under 18 U.S.C. § 3626(a)(1)(A) prohibiting further placement of prisoners at OSP until a rewritten and court approved 111-07 was issued. The court ordered specific changes to be made to this policy. The state appealed.

On appeal the Court addressed three issues: 1) Liberty interest and due process under *Sandin v. Conner*, 115 S.Ct. 2293 (1995); (2) what process is due; and (3) remedial relief under the Prison Litigation Reform Act (PLRA).

**Liberty Interest:** *Sandin* mandates that a state creates a liberty interest in avoiding certain prison conditions only where those conditions are an “atypical and significant hardship on then[prisoner] in relation to the ordinary incidents of prison life.” Reviewing for abuse of discretion, the Court found the district court properly compared conditions at OSP with other segregation units of maximum-security Ohio prisons in determining whether the conditions combined to create a significant and atypical hardship.

On appeal, the ODRC challenged the district court’s comparison with other Ohio prisons. Citing *Olim v. Wakinekona*, 103 S.Ct. 1741 (1983), the ODRC maintained that the prisoners have no constitutional liberty interest in classification. They also maintained that the proper baseline for determining atypicality is conditions at other supermax prisons around the country. While the Third, Fourth, Seventh, Ninth and DC circuits have split on what type of prisons and conditions to use as a baseline for *Sandin* purposes, none have adopted the novel and restrictive practice of using only other similar prisons across the country. The Supreme Court will no doubt settle this issue on certiorari which was granted

on December 10, 2004, and will be reported in an upcoming issue of *PLN*.

Distinguishing *Olim*, the Court found *Olim* dealt with interstate transfer as a common occurrence and suggested the prisoners had no reasonable expectation of serving time within Hawaii’s borders. In contrast, Ohio has 44,000 prisoners with only 20-30 transferred out of state and not one to a supermax facility. The Court found an *Olim* analysis would be limited to comparing conditions at other facilities in which Ohio prisoners were transferred.

**Due Process:** With a liberty interest established, the Court approved the district court’s use of the three-factor due process balancing test of *Matthews v. Eldridge*, 96 S.Ct. 893 (1976). Factor one is the private interest at stake; two is the risk of erroneous deprivation of this interest through the procedures used and the probable value of any additional procedures; and three is the government interest, including function, fiscal, and administrative burdens.

Of the district court’s 15 specific modifications to policy 111-07, 12 concerned classification procedures the Court upheld on appeal. These include proper notice of classification proceedings, opportunity to call witnesses and present documentary evidence where not restricted for security reasons, and a record made of the proceeding, including disclosure of as much confidential information as possible. Also required are administrative appeal procedures including a written classification decision, notice of appeal opportunity, and described method of appeal. The Warden must engage in an independent review and if relying on confidential information not already made known to the prisoner, he must allow the prisoner to respond in writing. There must be a similar process for review by the Bureau of Classification. No class committee member shall partake in the review process.

Under the first *Matthews* factor the Court found the private interest is substantial since placement in OSP is indefinite with annual reviews, unlike other forms of segregation which either last up to 30 days (punitive) or are reviewed every 30 days (administrative). OSP prisoners are also deprived of all significant human contact,



have restricted movement and personal privileges, and are ineligible for parole while at OSP. These are the “atypical & significant hardship” conditions of *Sandin* which give rise to a liberty interest.

Under the second *Matthews* factor, the previous system resulted in erroneous and haphazard placement at OSP and thus the risk of error is reduced under the new system. Moreover, the procedures are not unduly burdensome.

The third *Matthews* factor is satisfied in that while ODRC has an interest in guaranteeing the safety of guards and prisoners, this can be accomplished with the “easily and swiftly reversible” administrative segregation system.

The Court reversed the three substantive modifications to policy 111-07 which included the criteria for contraband and drug activity, security threat group predicates, and time limits on using past behavior to determine retention at OSP. These changes alter the “substantive grounds for placement at OSP, rather than the process used in determining that placement” and thus “limit the substantive discretion of ODRC Officials.”

At issue in this case was not substantive due process but procedural due process. And since the “power of the federal courts to order modifications in state prison policies extends only as far as is necessary to protect federal rights,” only the “federally mandated process in a substantive inquiry otherwise governed by the state” could be modified.

**PLRA:** Finally, the PLRA modifications to 18 U.S.C. § 3626 govern prospective relief. § 3626(a), as relied upon by the district court, governs initial relief. The Court rejected as without merit ODRC’s claim that the district court failed to make specific findings that the remedial orders are necessary to correct “current and ongoing” federal violations. This applies only to the termination of relief under § 3626(b)(3). See: *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004), cert. granted *sub nom. Wilkinson v. Austin*, 125 S.Ct. 686 (2004).

In April, 2005, the Ohio prison system announced plans to move all death row prisoners from the prison in Mansfield to the OSP, ostensibly to save money. Counsel for the prisoners in *Austin* have filed contempt motions before the trial court arguing that such a wholesale transfer of all death sentenced prisoners violates the court’s injunction and no substantive predicate exists for the transfer. As this issue of *PLN* goes to press that motion is pending. ■■■



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# Guantanamo: Nine Months after the Supreme Court Victory, the Island Remains a Prison Beyond the Law

by Rachel Meeropol

Consider the situation of Moazzam Begg. He is a 35 year old man with dual British and Pakistani citizenship. In early 2002, he was seized from his apartment in Islamabad, Pakistan, by Pakistani and U.S. agents. He was arrested without explanation in the middle of the night, in front of his wife and his two young children and thrown into the trunk of a car. He managed to call his father, Azmet Begg, from his cell phone in the car trunk, and whisper that he had been kidnapped.

According to Azmet, Moazzam had been in Afghanistan doing humanitarian work. He had traveled there with his family planning to open a school, but when he couldn't get a permit from the Taliban government, he began working on a water purification project in a small village. After the US bombardment started, he fled to Pakistan with his family, and that is where he was when he was arrested. In February of 2002, Moazzam was transferred from Pakistani custody to the custody of the U.S. military, and detained at Kandahar air force base, in Afghanistan. He was detained on the base for a year, without access to a lawyer, his family, or any process whatsoever. On February 11, 2003, Azmet was informed by the U.K. foreign office that his son had been transferred to Camp Delta, at Guantanamo Bay. Moazzam spent years in solitary confinement at Guantanamo Bay and was recently released.

The most unusual part of Moazzam's story, is not his night-time kidnapping, his prolonged detention, his interrogation and torture, or his inability to write, see, or speak to his parents, wife, or children for three years. Rather, it is that Moazzam is one of the few Guantanamo detainees who was lucky enough to speak to a lawyer and to be released. His release came after years of outcry by the public in Great Britain, led by his father Azmet, and pressure by British officials. The public cannot know how many other detainees at Guantanamo have similar stories, because the vast majority of the detainees, who come from countries without close relationships to the United States, have not yet had any chance to tell their side of the story, or even the opportunity to hear the evidence the Government purportedly has against them.

There are still about 540 detainees at Guantanamo. Approximately 200 have been

released, but they have been replaced by several hundred new ones. Others are still arriving. We know that there have been, and perhaps still are, children detained at Guantanamo as young as 13, and there are quite elderly people there too. In October 2002, one Afghani man was released from Guantanamo who said that he was 105 years old. A *New York Times* reporter described the man as "babbling, partially deaf, and unable to answer the simplest question." When asked if he was angry with American soldiers, he said that he did not mind because they took his old clothes and gave him new clothes.

None of these hundreds of men held at the prison have the opportunity to challenge their detention before a neutral tribunal. They have been taken away from their friends and family without justification. Years of their lives have been stolen from them. We hold these people, and yet, the majority of the American public doesn't have a clear understanding of who these men are, or why they being held. While many of the Guantanamo detainees were probably detained in the course of the U.S. campaign against Afghanistan, many others were arrested far from the battlefield. They were encountered by U.S. forces in Pakistan, Algeria, Bosnia, Gambia and other far flung locations. Others were turned over to the U.S. military by foreign bounty hunters. *[Editor's Note: It also appears, from recent news reports, that at least some have been kidnapped off the streets of Europe by CIA abduction teams.]* At the time of the initial transfers to Guantanamo, the government released little specific information about who the detainees were, and why they had been detained. They merely characterized them as "the worst of the worst" -- as exceptionally dangerous terrorists determined to kill American wherever they could be found.

We couldn't really know who these men are, because the Bush administration refused to tell us. From the earliest moments of the Guantanamo detentions, the Bush administration unapologetically operated outside the law. Their only explanation, that the men are "enemy combatants," and thus have no rights and are not entitled to protection under the Geneva Convention, has no basis in international or domestic law. Before this administration, "enemy combatant" was just a descriptive phrase; it was the beginning of an inquiry into one's legal status. The

Bush Administration, however, has used it to mean everything: to describe someone, arrested anywhere in the world including the United States, perhaps a citizen, perhaps not, whom an administration official swears is somehow involved in terrorism. They claim it is enough to allow them to arrest and detain the individual, to interrogate him, and to hold him indefinitely, with no right to challenge the fact or conditions of his detention. According to Government attorneys, the definition of "enemy combatant" is broad enough to include a Swiss Granny innocently donating to an Afghani charity, should her money somehow be funneled to al Qaeda. An enemy combatant could be a British citizen who teaches English to the children of terrorists, or a brother who doesn't turn in a sibling he suspects of terrorist leanings. According to the Bush Administration, each of these people could be labeled an enemy combatant, and detained at Guantanamo indefinitely, with no access to counsel or the courts.

They can only defend this position by completely ignoring U.S. Military provisions, and international and domestic law. While the Bush administration is correct that prisoners of war, captured on the battlefield, may be detained until the end of hostilities, international and domestic law requires certain procedural protections before these actions may be taken. The law of war distinguishes between individuals encountered on or near the battlefield and those captured half the globe away. Individuals engaged in hostilities may be lawful or unlawful combatants, or they may be civilians who are simply in the wrong place at the wrong time. The Geneva Conventions and the U.S. military's own regulations require that any individual who contests his status as a lawful or unlawful combatant must be treated as a POW until a determination of his status by a competent tribunal. Individuals arrested outside the theater of war are not combatants of any kind, and must be treated as civilians, and brought up on charges and tried before a court of law, to be detained. The Geneva Conventions leave nobody out; all individuals, lawful or unlawful, are entitled to certain protections and guarantees.

Some progress has been made in defining what rights the detainees have, but the battle is far from over. In February of 2002 the Center for Constitutional Rights filed a

*habeas corpus* petition on behalf of three detainees at Guantanamo: David Hicks, an Australian citizen; and two British citizens, Shafiq Rasul and Asif Iqbal. The Petitioners alleged that prolonged and potentially indefinite detention in Guantanamo violated the Due Process clause of the Fifth Amendment, as well as other provisions of domestic and international law. They requested an evidentiary hearing to the extent Respondents contested the facts, a declaratory judgment that the current detention is unlawful, an order permitting them to confer privately with counsel, and an order releasing them from unlawful custody.

On March 18, 2002, the Government moved to dismiss the Petition on various grounds, including lack of jurisdiction. On May 1, 2002, while the Government's motion was pending, twelve Kuwaiti prisoners on the base, through their next friends, filed *Al Odah v. United States*, No. 02cv00828 (D.D.C.), as a related case. The Government moved to dismiss that suit as well, and the cases were consolidated for the consideration of the motions to dismiss. On July 30, 2002, the district court dismissed *Rasul* and *Al Odah* for lack of subject matter jurisdiction, by holding that a petition for *habeas corpus* is not available for non-U.S. citizens detained outside of United States jurisdiction. Had this ruling stood, it would mean that no detainee at Guantanamo could ever challenge his detention or his treatment; he could be tortured or even summarily executed, and the government would never be held accountable in U.S. courts.

The D.C. Circuit affirmed the dismissals on March 11, 2003, holding that the detainees have no enforceable rights, "under the due process clause or otherwise." *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003). The consequence of this conclusion, the Court held, is that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees..." *Id.* The court ignored the fact that the detainees had not been declared "enemies" of the United States by any lawful international or domestic tribunal and were therefore languishing in U.S. military captivity without any legal basis. On November 10, the Supreme Court granted certiorari. See: *Rasul v. Bush*, 124 S.Ct. 534 (2003).

On June 28, 2004 in a 6-3 opinion, the Supreme Court reversed the D.C. circuit court, and held that each detainee was entitled to his day in court. The ruling was 6-3, with Rehnquist, Scalia and Thomas dissenting. Writing for the majority, Justice

John Paul Stevens found that federal courts do have jurisdiction to hear detainees' challenges to their detention. The court based its decision almost entirely on the status of Guantanamo, a territory completely under the control of the U.S. military. See: *Rasul v. Bush*, 124 S.Ct. 2686 (2004)[*PLN*, Oct. 2004].

The Supreme Court's reversal of the D.C. Circuit's opinion was monumental, and cannot be explained by legal analysis alone. Much had changed in the years since September 11, 2001. One of the biggest changes, of course, was the Abu Ghraib prison abuse scandal. At the oral argument before the Supreme Court in the case of U.S. citizen Jose Padilla, the so-called dirty bomber whom the government has claimed to be an "enemy combatant," one of the justices asked the government attorney defending Padilla's indefinite detention about the implications of the Bush administration's stance that, once the president designates someone an enemy combatant, the courts can't get involved. The justice asked if the unavailability of judicial review meant that enemy combatants could be subjected to torture or summary execution without recourse to the U.S. courts. The attorney responded that the U.S. government would never do such a thing, but yes, even victims of such lawlessness would have no right to relief in the federal courts. The very next day, the Abu Ghraib photographs of US soldiers torturing naked detainees were on the front page of every paper, and the implications of the government's stance was that much harder to ignore.

Unfortunately, despite victory in the Supreme Court, this story does not yet have a happy ending. As I write this, it has been over nine months since the Supreme Court decision, and precious little has changed. The vast majority of the detainees are still rotting in Guantanamo, without lawyers, and without access to the courts. Despite the Supreme Court's decision, the Bush Administration has been able to maintain the status quo at Guantanamo.

Instead of arranging for the detainees to have access to attorneys and the courts, the Government has instead created and held hundreds of military tribunals, called "Combatant Status Review Tribunals." These are three person tribunals, made up solely of military officers, designed to determine whether or not each detainee is an "enemy combatant." The detainee has a personal representative, who is a military officer, not a lawyer, to explain the process and help him present evidence to the tribunal. The tribunals provide no means for the

detainee to present or find evidence outside of the control of the military and there are no rules excluding hearsay, or even statements produced by coercive interrogation or torture. Moreover, the order creating the tribunals actually begins with a paragraph reciting the fact that each detainee at Guantanamo has gone through several levels of military reviews, and has been judged to be an enemy combatant by the U.S. military. In the next paragraph it states that the tribunal, comprised of military officers, will review information provided by the military and presented by the military, and then will decide whether or not the detainee is in fact an enemy combatant. If the tribunal holds that a detainee is not an enemy combatant, that decision is basically a finding that the government has been wrong for the past three years. It is no surprise that very few individuals were determined not to be "enemy combatants."

When the Supreme Court decided *Rasul*, they did not order the detainees released, or even lay out what kind of judicial review was appropriate. Instead, they sent the case back down the D.C. District Court for more litigation, where the case was joined by a dozen other habeas petitions brought by a coalition of private and public interest lawyers on behalf of over seventy detainees. Each of these petitions was filed, not by a detainee himself, but through a "next friend." Because the Guantanamo detainees have spent the last three years in incommunicado detention, without access to visitors, phone calls, or legal materials, and with only very limited ability to contact their families by mail, they have had no way to contact a lawyer or to file a challenge on their own. Instead, the Center for Constitutional Rights filed challenges on their behalf through next friends. This means that a family member of a detainee, usually a parent, sibling, or wife, went into Court to challenge the detainees' detention for them. Over one hundred detainees were lucky enough to have family members with the ability and inclination to retain attorneys for their loved ones. These detainees now have *habeas* petitions pending in the D.C. District Court. Attorneys have been able (slowly, and under many restrictions) to meet with these detainees, and their cases are moving forward. Even with respect to these detainees, however, the Administration is dragging its feet.

Last fall, the Government filed a motion to dismiss all the then pending *habeas* petitions that the Supreme Court had sent back down to the DC District court. The Bush administration argued that because they are

## Beyond the Law (Contd)

not citizens, and have no connection to the U.S., the detainees don't have any actual rights. In other words, the Supreme Court decision gave them the right to FILE a habeas petition, and the court had the power to review that petition, but that review would be empty of meaning; because there can be no unlawful detention, if no law cabins the government's power over the detainees. The fallback government position is that the combatant status review tribunals provide all the process the detainees are due and the courts must defer to the military's determination.

The motion to dismiss was briefed and argued before two different district court judges, Judge Green and Judge Leon. Their decisions, which both came out in January of 2005, are exactly opposed.

Judge Leon, whose opinion came out first, toed the government's line exactly and ordered the petitions dismissed. He stated that no law, domestic or international applies and is enforceable on Guantanamo, and that even if due process concerns did apply, the CSRTs provided all process due. See: *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). Judge Green, on the other hand, found that the constitution does apply at Guantanamo, and that the detainees have the right to due process accorded by the Fifth Amendment and other substantive and procedural rights under the Geneva Convention. See: *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). She relied heavily on the famous "footnote 15" from the Supreme Court's opinion, in which the court stated that petitioners' allegations "unquestionably describe custody in violation of the Constitution or laws or treaties of the United States." Judge Green went on to hold that the CSRTs denied due process because they allowed the Government to rely on classified evidence not available to the detainee. This failing is compounded by the prohibition of counsel for the detainee, who could have gained clearance to review the classified information on the detainee's behalf.

The two cases have gone up to the DC Circuit, and it is not unlikely that the Supreme Court will once again have to speak to this issue. So the battle continues, and it seems clear that another year will go by before the facts regarding each detainee's arrest and detention are heard by a federal court.

Also troubling is that the hundred in court are the lucky ones. Hundreds of detainees remain at Guantanamo whose family members haven't come forward on their behalf, who

thus have no case pending in the courts, and have absolutely no way to file one. For these 450 to 500 detainees, the victory in *Rasul* is yet to have any meaning. Immediately after the *Rasul* decision, Department of Defense officials stated that each of the detainees would be given notice of their right to challenge their detention, and that the DOD would put into place procedures to allow the detainees to get lawyers, and get their cases before the courts, should they so chose. The DOD did give notice of sort to the detainees; military officers told them that the Supreme Court had ruled that the U.S. courts have jurisdiction over habeas corpus proceedings by detainees at Guantanamo and that they could get an attorney, ask their family for help, or send a petition themselves to the D.C. District Court. The notice told the detainees the address of the court, but it did not provide any information on how to get a lawyer, how to contact family members, how to write their own petition, or even what a "petition" is. We at the Center for Constitutional Rights advised the government that we did not feel that the notices would allow detainees any real access to the courts. You can imagine that to many detainees, this looks like just another interrogation tactic, especially given reports that some interrogators have impersonated civilian lawyers. To deal with the hundreds of unrepresented detainees at Guantanamo, CCR expressed our willingness to represent these people, and asked for their names and other information about them, so we could try to get authorizations to represent them from their family members. When the government refused, we responded by filing a law suit called *John Doe 1- 570 v. Bush* on February 11, 2005. This is a habeas corpus petition on behalf of each of the currently unrepresented and unknown detainees at Guantanamo. In other words, CCR currently represents over 500 Guantanamo detainees with whom we have been unable to meet or communicate.. The Government has already moved to dismiss this petition, based not only on the arguments raised above, but also on their allegations that we don't have the authority to represent the individuals. We will fight this issue out on the courts in the coming months.

While the Bush Administration is delaying, we are learning more and more about the horrendous conditions and abusive interrogations facing the hundreds of human beings at Guantanamo. It is clear that conditions and interrogations at Guantanamo are not simply harsh, but actually amount to torture. We now know that as early as 2002, long before the Abu Ghraib prisoner abuse scandal broke, FBI agents assigned to Guantanamo began complaining about the harsh tactics

and abuse they were witnessing. [Editor's Note: The role of the FBI, ostensibly a law enforcement agency charged with enforcing the law, which includes laws against torture and maltreatment of prisoners is readily apparent when federal agents witness crimes and do nothing. Guantanamo is truly a lawless zone. If this is what military interrogators do in front of FBI agents we can imagine what they do when alone.] In emails, agents described detainees sitting on the floor, draped in an Israeli flag and subjected to loud music and strobe lights. Another agent explained:

*"I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated and defecated [sic] on themselves and had been left there for 18, 24 hours or more. On one occasion [sic] ... the temperature was so cold in the room, that the barefoot detainee was shaking with cold.... On another occasion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night..."*


Despite the Bush Administration's insistence that conditions at Guantanamo are humane, evidence continues to mount showing that these harsh techniques were ordered or condoned by individuals at the highest levels of the Bush Administration. Moreover, the Administration's initial decision not to apply the Geneva Conventions to the detainees clearly paved the way for this sickening abuse. Each day that the Bush Administration delays the detainees' ability to access attorneys and the U.S. courts is another day that these individuals may be, and are, tortured with impunity.

This kind of torture and coercive interrogation is not only morally repugnant, but also ineffective. Asif Iqbal and Shafiq Rasul, for example, two of the original plaintiffs whose case went up to the Supreme Court, were released from Guantanamo in early 2004. They are currently in their 20s, and are living free back in England. They were never charged with any crime by the U.S. or the British. The young men were captured by a Northern Alliance warlord in Afghanistan, and turned over to U.S. forces, probably for money. They were then transferred to Guantanamo, where they were subjected to repeated interrogations, and



held in extremely restrictive conditions. In a detailed public report, they describe how they were threatened by dogs, shackled into painful positions for hours at a time, harassed and humiliated, and witnessed other detainees severely beaten. After months of this treatment, they eventually "confessed" to being members of al Qaeda, and training with Osama Bin Laden. Fortunately for them, British intelligence agents had documentary evidence proving that Iqbal and Rasul were in England during the period that they admitted to training with terrorists. They were released into British custody, and set free, having lost years of their lives, without explanation or apology from the US government. What valuable intelligence did the US gain by their detention? *[Editor's Note: It shows the world that the US has the power to kidnap, torture and kill anyone it pleases with total impunity. That in itself is an important political goal for all imperialist powers.]*

This fight has only just begun. Recent press reports indicate that the Bush Administration is planning to build yet another permanent facility at Guantanamo, with hundreds of cells where detainees will be held indefinitely, without charges. On the most basic level, we will not have won until we shut down Guantanamo, and all the detainees are either charged or released. But the problem does not end there. We hear reports in the media that the Bush administration plans to release over half of the detainees, however, there is no indication of where these detainees will be released to. Many may be handed over to foreign officials for continued detention and interrogation, a practice known as "rendering." Others may end up in U.S. controlled facilities across the globe. The truly scary fact about Guantanamo is that it is not even the worst place to be held in executive detention. There have been numerous media reports during the last year confirming the existence of CIA detention facilities located around the world, including in an off-limits corner of the Bagram air base in Afghanistan, at Camp Cropper, a detention center on the outskirts of Baghdad International Airport, on ships at sea, on Britain's Diego Garcia Island in the Indian Ocean, and in a secret facility in Jordan. [See June, 2004, issue of *PLN* for more on this phenomenon, *Welcome to Guantanamo World*.] Furthermore, government officials have admitted that even within known facilities, CIA officials have employed a policy under which "ghost detainees" captured in Iraq and Afghanistan have been interrogated by CIA agents and

have had their "identities and locations withheld from relatives, the International Red Cross and even Congress." Finally, reports have stated that CIA agents have spirited detainees in Iraq to third countries for interrogation under conditions which violated the requirements of international humanitarian law. If shutting down Guantanamo proves hard, bringing justice and the rule of law to these other secret facilities and is going to be even harder. 

*Rachel Meeropol is a staff attorney at the Center for Constitutional Rights which represents many of the prisoners at Guantanamo. She is contributing editor on a new book on Guantanamo and other related forms of executive detention called "America's Disappeared: Secret Imprisonment, Detainees and the "War on Terror." You can order the book, or learn more information about the cases described above, by visiting CCR's website, at [www.ccr-ny.org](http://www.ccr-ny.org).*

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# PHS Responsible For Deaths Of New York Prisoners

by Michael Rigby

Prison Health Services (PHS) has killed another patient. According to a highly critical 10-page report released by the New York State Commission of Correction on June 23, 2004, the 2001 death of Brian Tetrault, a prisoner in the custody of the Schenectady County Jail, was the result of grossly inadequate and incompetent treatment of his Parkinson's disease. Health care at the jail was provided by PHS, a private, for-profit company based in Tennessee.

Tetrault, a long time sufferer of Parkinson's, was arrested for burglary, larceny, and harassment on November 10, 2001, and placed in the Schenectady County Jail. At the time of his imprisonment, Tetrault, 44, was taking a total of seven drugs to control the psychiatric and physical symptoms associated with the disease. Under the care of the Albany Medical College Parkinson's Disease and Movement Disorders Center (AMCH), the drugs had kept Tetrault alive for a decade.

But when Tetrault arrived at the jail, his medication regimen was drastically altered. Dr. W. Duke DeFresne, a PHS physician, discontinued all but one of Tetrault's medications, and even that was reduced. (Notably, none of the discontinued medications were found in the jail's pharmaceutical formulary.) Unthinkably, DeFresne made these changes without examining Tetrault--a violation of state law--and without consulting AMCH.

Severely under-medicated, Tetrault began a rapid decline that went unchecked by jail medical personnel. From November 13 to November 17 Tetrault languished in his cell, unable to sit up or maintain his personal hygiene, experiencing episodes of incontinence, suffering from skin breakdown, and exhibiting changes in behavior. Unbelievably, the nursing staff observed and recorded. Tetrault's deteriorating condition but failed to notify a physician until November 15--and even then he was not seen. In fact, Tetrault was not seen by DuFresne or any other physician after November 11, and was never seen by a psychiatrist, notes the report.

The neglect continued up until the time Tetrault was admitted to the hospital. On the November 16-17 nightshift, notes the report, a nurse "claimed that Tetrault was 'uncooperative' with medication administration, 'resistant' to sitting up, [and] 'refused' to swallow...." This assessment was totally ludicrous, however, because by this time Tetrault's condition had so deteriorated that

he was unable to cooperate with medication administration, could not sit up, and was incapable of swallowing. The report concluded that, "The nurse's documentation of this as resistance and refusal is unprofessional to the point of misconduct."

On November 17, at 12:30 p.m., Tetrault was finally transported to Ellis Hospital where he was admitted to the Neurological Critical Care Unit. Tetrault was verbally unresponsive, had a large 2-inch decubitus ulcer on his left buttock, and suffered from severe dehydration. Sadly, Tetrault's one week in the "care" of PHS turned out to be a death sentence. At the hospital Tetrault's condition continued to decline; he died at 2:55 p.m. on November 20, 2001.

The report blasted PHS and its employees for Tetrault's death and strongly suggested that they were directly responsible. According to the report, the "abrupt reduction and withdrawal [of Tetrault's medication] was medically reckless, was directly implicated in the neuroleptic malignant syndrome that caused Mr. Tetrault's death, and represents flagrantly inadequate medical care by PHS, Inc. and its employees."

The report recommended, among other things, that PHS fire DuFresne for malpractice and gross incompetence; discipline six of the jail nurses for failing to adequately assess Tetrault's deteriorating condition and failing to provide basic supportive nursing care; require a doctor to be at the jail at least 4 hours a day, 3 days a week; and conduct a quality assurance inquiry into the mental health staff's failure to maintain a continuity of care.


The report further recommended that the Sheriff consider terminating the contract with PHS for its "inability or refusal to oversee and require their employees to provide adequate care to a patient with a life threatening neurological disorder whose condition had deteriorated to a medical emergency." Obviously under pressure, the jail administrator, Major Robert Elwell said the county would not renew its contract with PHS when it expires in October 2004.

Also criticized by the report was the attempt of jail administrators to evade the reporting requirements of Tetrault's death. Although the Sheriff's Department received by fax a "Release of Prisoner" order at 6:13 p.m. on November 20, the official record had been altered to show a false release time of 2:45 p.m.--10 minutes before Tetrault's death. What's more, jail administrators did

not report the death until 20½ months later when it was ordered by the Commission.

For its part, PHS claimed that Tetrault's death was an isolated incident and not indicative of the company's health care. But the truth is, PHS is a sleazy company with a terrible track record. PHS has been investigated for providing shoddy medical care and for suspicious deaths in Pennsylvania, Tennessee [PLN, May 2002, p. 21], Florida, and Ohio [PLN, March 2001, p. 12]. PHS and its subsidiary, EMSA Correctional Care, have also been the subject of numerous lawsuits in New York, New Jersey [PLN May 2004, p. 20], Nevada [PLN, February 2003, p. 20] and Florida. [PLN, July 2003, p. 16]. At present, PHS and EMSA are mired in over 1,100 lawsuits. Including one for Tetrault's death.

The death of Victoria Smith, another New York prisoner, further illustrates the decrepit care of PHS. Smith died on February 16, 2002--less than three months after Tetrault's death--while under the care of PHS at the Dutchess County Jail. Her death was also the subject of a Commission report. That report concluded Smith's death resulted from "a systemic breakdown of health care delivery services." Not only did Smith's arthritis go unmanaged, noted the report, but despite the detection of an "abnormality" in her EKG, Smith's medication was not changed and she had to wait five days to see a doctor. According to the report, Smith wrote in a note to her father, which was found in her cell the night she died, "that she had been evaluated by nursing five times relating to 'chest tight and burns,' and she 'needed to get out of jail to get help.'" As in the Tetrault case, the Commission recommended that the jail administrator consider terminating the services of PHS.

It should be noted that the care provided by other prison health care contractors is no better than that of PHS. These companies exploit the public's ill will towards prisoners while sacrificing quality care in order to save a buck and pocket the profit. The horror stories of prisoners who have suffered at the hands of these greedy corporations are too numerous to mention here. However, as part of an ongoing effort to expose the actions of these companies to public scrutiny, PLN has reported extensively on this issue. For more information, see PLN indexes or visit online at [www.prisonlegalnews.org](http://www.prisonlegalnews.org). 

Additional source: [www.corrections.com](http://www.corrections.com)

# Veteran California Prison Official Promoted Despite Checkered Past; Folsom Lieutenant Fired After Being Convicted Of Lying

In June, 2004, Jonathan L. Cobbs was promoted to the \$97,000/yr. Chief Deputy Warden position at the California Correctional Institution in Tehachapi. But this honor seemed incongruous with disparaging court papers filed against Cobb by his employer, the California Department of Corrections (CDC), which accused him of misconduct and for refusing to pay for his defense against two prisoner lawsuits that were eventually dismissed by the federal courts.

Cobb's history goes back to 1995, when he led a group of masked guards on "Ninja Day" to storm cell blocks under the guise of a fire drill injuring seven prisoners with alleged excessive force. In 1997, Warden George M. Galaza recommended Cobbs be fired for his role in the raid. Cobbs cut his losses on administrative appeal to a 5% pay cut for six months, when Administrative Law Judge Shawn P. Cloughesy ruled that Cobbs had no reason to believe that using masks was forbidden because CDC had no rules on their use. Cobbs' only error was determined to be failing to file the required "use of force" reports.

Cobbs was then promoted twice in 2001. CDC spokesperson Terry Thornton could not explain CDC's inconsistent treatment of the 24-year veteran employee, whom she praised as a detail-oriented team player with no other disciplinary actions. But despite this record of advancement, he is accused by CDC in court papers stemming from the suit brought by a 1995 raid-injured prisoner, of actions "committed with a deliberate wrongful intent" motivated by "actual fraud, corruption and/or malice." For these reasons, the California attorney general's office refuses to pay the \$20,000 that Cobbs and another guard, F.A. Rodriguez, owe for the state's defense of the prisoner's suit, or for the other \$100,000 of their attorney bill that was paid by the prison guards' union (CCPOA). (Cobbs has since sued CDC to recover his legal expenses, but CDC has replied that it was not under a mandatory duty to provide him a defense.)

Tom Quinn, a private investigator who specializes in prisoner civil rights cases, felt the 2,500 hour criminal probe by the California attorney general (which resulted in no charges being brought) was hindered by the prison guards' legendary "code of silence." State documents show that Cobbs planned the raid to search for drugs and weapons. But another guard confided that the raid was a

"show of force" against Crips gang members who were rumored to be planning attacks on Corcoran staff. The seven hour raid on June 11, 1995 was conducted by Cobbs and 55 other guards many of whom wore ski-mask style face coverings on Cobbs' instructions. The raid turned up weapons, drugs and other contraband.

From the internal review, Warden Galaza placed Cobbs on administrative leave on January 31, 1997, followed by a notice of dismissal on March 27, 1997. Galaza wrote that the use of the masks "led to an atmosphere in which excessive force was more likely to occur," adding that Cobbs "brought discredit to [CDC], the institution and [his] status as a peace officer." Yet records show that a scant two weeks before the dismissal notice, Galaza had rated Cobbs "well qualified" for the position of associate warden.

State Senator Gloria Romero, chairwoman of the Senate Committee on Prisons on initial review of the facts commented that CDC was sending a "schizophrenic message" about Cobbs, adding that Cobbs' case shows that CDC lacks enough guards with unblemished records to fill the vacant spots needed for prison reform. "To some extent, we've got slim pickings," she said.

In a separate incident, a Sacramento Superior Court jury acquitted a Folsom prison guard in August, 2004 of brutality and assault on a prisoner but convicted him of lying about the incident. Former Lt. Stephen Luke Scarsella was fired from his job of 20 years and faces one year in jail for filing a false police report a felony. He was convicted for saying he used an open palm to push the prisoner when it was proved that he instead used a closed fist. Deputy District Attorney Steve Secrest said the jury's verdict vindicates three fellow guards who ignored the "code of silence" and testified against their supervisor, Scarsella. Senator Romero commented: "This is more than just lying on a piece of paper his is covering up. Filing a false report is inherent to the 'code of silence.'"

Trial evidence showed that prisoner Mel Edward was pepper-sprayed in his cell, and then dragged by five guards down a stairwell with his legs chained and his hands cuffed behind his back. Scarsella admitted dragging the 250 pound prisoner by the leg, but denied punching him twice while he was face-down on the gurney. Apparently Scarsella's defense that Edwards had an extensive record

of threatening to injure and sue staff made points with the jury.

Senator Romero further noted that the assault charge here, and virtually every other prosecution charging excessive force by CDC guards, is lost when Sgt. George Arquila a CDC training officer testifies as an expert against CDC. Romero calls this a conflict of interest. Special Master John Hagar, a federal court CDC overseer, asked "Why hasn't Arquila been disciplined?"

Scarsella's co-defendant, Sgt. Richard Saunders, pleaded guilty earlier to lesser charges to avoid a trial and received 300 hours community service and 18 months informal probation. ■

Sources: *Sacramento Bee*; *Associated Press*, *Los Angeles Times*.

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# Battle Over Judicial Secrecy Continues

by Michael Rigby

As the trend towards secrecy in the U.S. judiciary continues to grow, so does the constitutional debate over such practices as sealing cases, hiding proceedings, and conducting clandestine searches. Recent decisions by the D.C. and Second Circuits have been favorable, but a lawsuit involving a controversial provision of the Patriot Act--and the super-secret court charged with overseeing it--has yet to be resolved.

In Washington, D.C., the Superior Court's practice of sealing cases led the District's Public Defender Service (PDS) to obtain an appellate court ruling condemning the practice. PDS asked the D.C. Circuit Court of Appeals (COA) to elaborate on the conditions under which cases could be sealed after one of its attorneys, Janet Mitchell, was ejected from a criminal proceeding. Mitchell, who was representing a defendant in a murder case, had planned to attend a hearing in which a co-defendant was expected to plead guilty. The co-defendant had agreed to testify against her client in exchange for leniency. Mitchell sought to evaluate the plea agreement, but prosecutors objected. Alluding to the co-defendant's safety, they asked the judge to order Mitchell out of the courtroom. The judge, citing only his supervisory authority and making no specific findings, had Mitchell removed and ordered the door locked behind her, according to documents filed by Sandra K. Levick, an appellate lawyer for the PDS.

After the PDS petitioned for review in the COA, a partial transcript of the hearing--ending at the point where Mitchell was removed--was released. Apparently the judge, John H. Baly Jr., considered sealing the hearing unexceptional. "I understand that there's a practice of this courthouse," Bayly told Mitchell at one point. In their appeal, the PDS complained about an "endemic" disregard for "the public's right of access" to court proceedings. Research by the PDS revealed that nearly 200 D.C. Superior Court cases were totally under seal, and that an unknown number of other cases had been sealed to varying degrees.

On July 22, 2004, in a three-page ruling, the COA reaffirmed that the Supreme Court has already set "strict conditions governing any request to seal a criminal record or close a criminal courtroom." See: *Nellson v. Bayly*, 856 A.2d 566 (DC App. Ct. 2004). Under the Supreme Court's standard--which held that open court proceedings are essential in ensuring the integrity and accountability of

the criminal justice system--judges can only consider sealing a case when a compelling, competing interest, such as the right to a fair trial, would be compromised by openness. One advocate for First Amendment rights hailed the decision as a brief but unmistakable rebuke of the lower court's practices. "It's short and to the point," said Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press. "It makes it absolutely clear that it was an untenable, unconstitutional practice."

D.C. courts are not the only ones attempting to circumvent the First Amendment by shrouding proceedings in secrecy. This practice is common in cases involving celebrities. So common in fact that media experts and scholars are now warning that the U.S. may be developing a two-tiered justice system: one for the rich and famous, and one for everybody else. The cases of Martha Stewart, Michael Jackson, and Kobe Bryant are typical. In New York, the judge in Stewart's case closed jury selection to the press and the public. In California, the judge in Jackson's child molestation case sealed virtually all documents and imposed a sweeping gag order. In Colorado, the judge in Bryant's rape case also imposed a gag order and held many hearings on the accuser's sex life in secret. "The idea that you have justice and then you have celebrity justice is really offensive," said Dalglish. "Does the public understand what preferential treatment these people are receiving from the system?" "If they decide celebrities are entitled to a different kind of justice," Dalglish continued, "we have lost press oversight of the system. Without that, we will never know if the rich and famous are getting the same justice as the rest of us."

The judges in all three cases cited fears that sensational publicity would taint the jury pools and adversely affect the defendants' right to a fair trial. Laurie Levenson, a Loyola University law professor, conceded these are extraordinary cases, but said "the actions taken in high-visibility cases end up defining the law" for everyone.

In the Stewart case, 17 news organizations challenged the judge's decision to select the jury in secret. The Second Circuit held that the judge had erred in excluding the media and the public. "To hold otherwise would render the First Amendment right of access meaningless," the Court said. It further noted that openness of the court process "acts to protect, rather than to threaten, the

right to a fair trial."

Even more troubling than closed hearings and proceedings is the near total secrecy under which the Foreign Intelligence Surveillance Court (FISC) operates. Established in 1978 as part of the Foreign Intelligence Surveillance Act, this covert court approved more than 1,700 searches and seizures in 2003, according to documents provided to Congress by the Department Of Justice (DOJ). Currently, the FISC is charged with overseeing one of the most controversial provisions of the Patriot Act--Section 215--which authorizes the FBI to obtain "tangible things" from businesses during counterintelligence and counterterrorism investigations. Librarians are particularly outraged by the broadly worded section because it allows the FBI to seize library records while prohibiting the library from disclosing the search. Former U.S. Attorney General John Ashcroft contended in September 2003 that the section had never been utilized, but recent court filings indicate the FBI may have since sought to use it.

In a Michigan lawsuit brought by the American Civil Liberties Union (ACLU), DOJ attorneys argued that anybody targeted under 215 would be able to contest the issue. "If and when a Section 215 order is served on these plaintiffs, they will have ample opportunity to challenge it before the court that issues the order [i.e. the FISC]," the attorneys wrote in a July 2004 brief. However, a five-page list of rules released to the ACLU in August 2004 indicates that only attorneys authorized by the attorney general or government agents may appear before the court, and no mention is made of accepting outside briefs or motions. Patrice McDermott, deputy director of government relations for the American Library Association, said the government's arguments "appear to be a red herring." "They keep saying you can challenge it, but they have never indicated how anyone could actually do so."

Unfortunately, in the wake of 9/11 and the consequent "war on terror," secrecy has become the watchword of government agencies and the judiciary. No doubt the battle for openness and transparency will be a long one. See *PLN*, December 2003 for more on the trend toward secret court hearings and proceedings. ■

Sources: *Washington Post*, *FindLaw*, *Associated Press*.

# California State Auditor Criticizes Prison Outside-Hospital Contract Costs

In a detailed 98 page report to Governor Arnold Schwarzenegger and the California Legislature, the California State Auditor criticized the California Department of Corrections' (CDC) lax management of contract outside-hospital medical services for CDC prisoners. The July 27, 2004 report observed that CDC's costs rose at a rate of 21% per year between 1999 and 2003, versus the national average hospital services consumer price index growth of 8% per year. The growth in in-patient hospital costs was attributed to the need for more expensive services, while the growth in out-patient costs was driven by both more expensive and more numerous hospital visits.

It should be noted that this report pre-dates any effect from the recent *Plata v. Schwarzenegger* settlement agreement to remedy CDC's constitutionally inadequate health care services statewide. *Plata* requires implementing more stringent (and expansive, e.g., HCV treatment) standards for prisoner health care estimated to add hundreds of millions of dollars exposure per year. The report concludes with twelve recommendations to CDC [and reports CDC's invited response] on how better to manage procedures in contracting with outside healthcare facilities. But it does not even address the overriding cost driver: a rapidly aging population of over 30,000 condemned, lifer and long-term prisoners whose temporally declining health will impose skyrocketing requirements for major medical treatment, including organ transplants. CDC already spends 20% of its \$6.2 billion budget on medical care.

As the report is presented, it provides detailed tables of actual outside hospital cost breakdowns for each of California's 33 prisons, showing both the in patient and out-patient care components. Some prisons, such as the California Medical Facility (CMF), California Men's Colony and Corcoran State Prison, contain their own limited accreditation hospitals. Indeed, medically needy prisoners are often transferred there to treat chronic medical problems. CMF, for example, has therapeutic whirlpool baths and an AIDS unit. And for over ten years, CMF has maintained a modern hospice for the terminally ill, where they receive the dignity of 24-hour comforting provided by prisoner volunteers.

But before the onset of terminal care lies the vast need for constitutionally adequate medical care in the far-flung corners of the


state where California prisons have migrated. A natural disconnect results from such isolation that makes unavailable a local pool of the cross-section of medical specialties needed to support 5,000 bed prisons. CDC compensates for this by authorizing "medical transfers" from outlying facilities to urban prisons such as San Quentin State Prison, located close to top-notch San Francisco Bay Area clinics and hospitals. While the prisoners benefit from gaining needed care, the relative costs go up to match the high cost of living that the Bay Area is noted for. This "reverse migration" effect has provided an unintended opportunity for the hospitals and clinics thus employed, by spawning a steady flow of state-paid business whose rates are often not closely pre-negotiated as are those of Medicare, Medicaid, HMOs and private insurance companies. As a result, CDC often pays top dollar for its "urgent" hospital services compared to that charged for regular managed-care clients. The back side for the hospitals is that the state is a notoriously slow bill payer. (See, e.g., this issue of *PLN*, [dental infection death caused when unpaid local hospital was avoided in favor of fatal 76 mile ambulance transfer to gain emergency care].)

Often caught in the squeeze are desperately ill prisoners, for whom rapid medical response can actually minimize overall costs. But in a system where minimally qualified doctors and nurses are frequently the only staff available to CDC at its outlying facilities, the problems and eventual costs become magnified by the delay of appropriate early medical intervention. And that's without considering the pain and suffering of prisoners clawing their way through lengthy administrative appeal processes just to have their complaints even aired. In short, CDC is often shooting itself in the financial foot with its inherent bureaucratic inertia. Prisoners rushed in Code-3 ambulance runs to outside hospitals' intensive care units cost enormous sums that could have been avoided or delayed by lowering the internal barriers

to good preventive care inside the walls in the first place.

That having been said, it is not at all surprising that the State Auditor found widely varying cost histories at different CDC prisons. The contract management skills that inhere in metropolitan prisons whose labor pools are rich in college educated employee candidates may well be unavailable at isolated prisons. This is borne out in the auditor's observations that variations on cost controls seem more consistent with local prison auditing skills than with prison-unique medical needs. Overall, the auditor's comments go towards CDC's central office to better train and install internal controls to gain uniformity in cost-control results.

But while auditing can steer CDC towards better management controls of health care costs, the ills complained of in this audit report simply pale in light of the staggering cost increases that will flow, controls or not, from the improved medical care driven by *Plata* as well as the exponentially increasing needs of the endlessly aging population of life prisoners who are being denied their statutory expectation of parole by a politically driven "no parole" policy.

See: *California State Auditor Report on CDC*, publication 2003-125, July, 2004. Bureau of State Audits, 555 Capitol Mall, Suite 300, Sacramento CA, 95814 (up to five copies are free). 

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# Colorado Settles Mail Censorship Lawsuit with Due Process Guarantees

by Bob Williams

Guaranteeing due process, training, and a centralized review committee for appeals, the Colorado Department of Corrections (CDC) has settled a 2000 lawsuit brought by publishers and prisoners challenging a system-wide practice of unconstitutional censorship.

The 42 U.S.C. § 1983 suit was originally filed on March 22, 2000, by eight publishers, the Association of Alternative Newsweeklies, and seven Colorado state prisoners. [See: *PLN* Sep. 2000, p. 25] At issue was the “arbitrary, erratic, inconsistent and irrational regime of censorship that repeatedly violated the constitutional rights of publishers as well as prisoners,” according to Colorado ACLU legal director Mark Silverstein.

The suit challenged censorship of eight publications of the publisher plaintiffs, 11 additional magazines, and six books including a sign language book intended for a prisoner to use to communicate with a hearing-impaired visitor. This was only a sampling of censored material which also included “political commentary from both the left and right; religious periodicals and music magazines; critiques of the criminal justice system; publications that advocated for prisoner’s rights” and even a report by the European Parliament or a book criticizing hate groups by the Southern Poverty Law Center.

“Publishers have a First Amendment right to reach their audiences, including prisoners,” said Gwen Young, an ACLU volunteer attorney who served as co-counsel. “Although prisoners have violated the law, they still have a First Amendment right to read and obtain access to ideas and information.”

The First Amendment claims included a vague and over-broad Administrative Regulation (AR) 300-26 and improper censorship against the publishers and prisoners. The Fourteenth Amendment claims included due process for both the publishers and prisoners.

In practice, under the old AR, materials were confiscated with the prisoner and not the publisher sometimes notified but not always told the reason for the confiscation. Next, the material was sent to a reading committee that met sporadically or, alternatively, the material was just passed around several staff members. If rejected, the entire material was shipped out or destroyed. A prisoner could file a grievance, but the material was gone and the grievance answered without any review of the censored material. During the pendency of this suit an appeal process was added to the confiscation form but was nothing more than a prisoner making a feeble attempt to write to an administrator at the CDC’s Colorado Springs Central Office. These were routinely denied and again, without the benefit of actually viewing the Material. The whole futile process took many months.

Under the new AR 300-26 “No reading material may be rejected solely because its content is religious, philosophical, political, social, or sexual or because of its religious, philosophical, political, or social views, its sexual content, or because its content is unpopular, repugnant, or critical of the [CDC] or other government authority.”

Material that can be rejected include those dealing with the design and manufacture of firearms or explosives; or advocating hatred or violence against an individual or group based on race, religion, nationality, sex, or ethnicity; or advocating gang activity (sign languages or style of dress alone may no longer form the basis for rejection); sexually explicit material; and material advocating a facility disruption or non-compliance with prison rules.

It’s troubling to note that the former AR specifically permitted “sexually-oriented magazines and periodicals” (with mental

health approval where necessary) while the new AR allows for the blanket rejection of “sexually explicit material.”

Once rejected, the prisoner must be notified within ten days of the material’s arrival. The reason for the rejection must be specifically identified, though this is still only sporadically done as of February 2005. The local facility reading committee must meet at least bi-weekly with each member independently reviewing the material. Within five working days of the committee’s decision the facility administrative head independently reviews the material and the committee’s recommendation.

If still rejected, the prisoner is provided with a one-time appeal within 12 working days. The material must be preserved throughout the appellate process and copies for up to five years, regardless of any pending litigation. This appeal also exhausts all administrative remedies (no grievances allowed). The publisher must also be notified at this point. The prisoner has ten days to appeal and the publisher 30 days. The appeals go to the Central Reading Committee at the CDC Central Office. This committee is composed of two wardens plus representatives of legal services, Sex Offender Treatment & Monitoring Program, religious services and intelligence office. This committee is to meet monthly and provide publishers and prisoner with written decisions within 30 days.

The material may be allowed in its entirety or up to four objectionable pages may be removed if not approved; five or more pages require rejecting the entire material.

Additional settlement points include guard training with ACLU input, application of the settlement and new AR to state and private prisons under state contract, a two-year ACLU monitoring period and no substantial modifications to the AR for two years without ACLU consent. The settlement became effective August 10, 2004, and the new AR effective October 06, 2004. The CDC agreed to fees and costs but, according to Mark Silverstein, the fee awards will be “many moons away” (*PLN* will report on the award). In addition to Gwen Young, the plaintiffs were represented by Hugh Gottschalk, an ACLU cooperating attorney at Wheeler Trigg Kennedy who led the litigation team. See: *New Times, Inc. v. Ortiz*, USDC D CO, Case No. 00-F-612. ■

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# Chicago Jail Still Rife With Prisoner Abuse, Crimes By Guards

by Matthew T. Clarke

The Cook County Jail in Chicago, Illinois, remains the scene of controversy involving beatings of prisoners, stealing of drugs held for evidence, and guards having sex with female prisoners.

## Prisoners Beaten

As reported in the February, 2004, *PLN*, the Cook County Jail has been a dangerous place for prisoners. Two particularly egregious incidents made headlines in the spring of 2003 as the result of suits filed by prisoners.

The first was a 1999 incident in which a 40-member squad of guards (the SORT team) beat and terrorized prisoners in a maximum-security unit of the jail, apparently for no other reason than to show that they could. The second was a separate incident in 2000 in which five handcuffed and shackled prisoners who were laying on the floor were beaten by at least 20 guards.

When the stories about prisoner abuse in Cook County jail broke, Sheriff Michael Sheahan denied that the abuse took place, then said he would appoint a panel to study the allegations. He also suspended guard Sgt. Richard Remus, who led the 40-man squad and Lt. Edward Byrne, who led the 20-plus-man squad, although Sheahan claimed the suspensions were unrelated to the allegations of prisoner abuse. Little has come of the "investigation" since.

On March 30, 2004, federal district judge Charles Norgle fined attorneys Edward Theobald, Alan Burnell and Anthony Pinelli \$5,000 each for attempting to be named "special state's attorneys" in state civil court. They were defending three former Cook County Jail guards accused of beating deceased prisoner Louis Schmude. The case had already been removed to federal court when, according to Norgle, the attorneys "acted improperly by seeking and obtaining numerous awards of attorney fees."

Schmude's family settled their civil suit against Cook County for \$550,000 in 1993. The suit against the guards is still pending.

On July 24, 2003, a federal jury in Chicago awarded Stanley Jones \$775,000 in damages for a beating he received from gang members in the jail's Division 9 in March 1999, while he was a pretrial detainee. The trial centered on the jail's failure to separate non-gang-affiliated prisoners (neutrons) from gang members. The award

included \$25,000 in compensatory damages and \$500,000 in punitive damages against Ernesto Velasco, the former director of the jail who had to resign from his post as head of the Illinois prison system when the jail beatings scandal broke in March 2003. Another \$250,000 in punitive damages was awarded against James W. Edwards, former Division 9 supervisor.

U. S. Magistrate Judge Sidney I. Schenkier denied the jail officials' motion for new trial, saying that the jail officials "set the stage" for gangs assaulting neutrons by housing them together. However, Schenkier reduced the punitive damage awards to \$100,000 against Velasco and \$50,000 against Edwards. In doing so, he noted that the U. S. Supreme Court had indicated disapproval of punitive damage awards that are ten times the size of the compensatory damages or more.

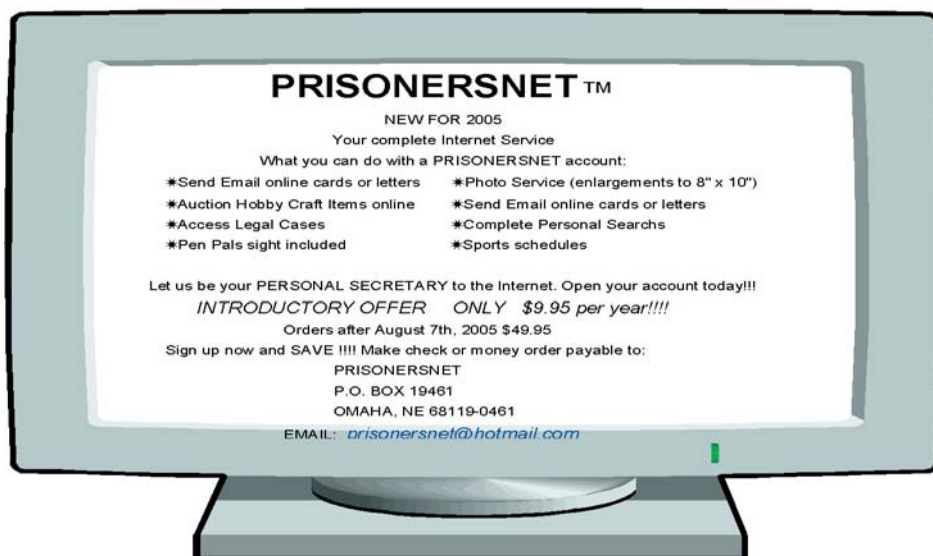
Schenkier noted that the jury may have intended to punish Edwards and Velasco for disrespecting the plaintiff and the trial process. During trial Edwards slouched at defense counsel table with a toothpick dangling from his mouth. He also called Jones a "heathen" when testifying. Velasco didn't show up for trial at all.

U.S. District Judge Robert Gettleman dismissed some of the claims in a lawsuit brought by Cello Pettiford over the beating he received from the SORT-2 Team in 1999. However, he let stand claims against Sheahan and Remus pertaining to the beating, an attempted cover up and denial of medical attention after the beating.

In the case of the July 29, 2000, beatings Sheahan has resorted to the time-honored tactic of blaming the victims. In a June 10, 2004, letter to Cook County State's Attorney Richard Devine, Sheahan alleged that Jean Maclean Snyder, an attorney at the MacArthur Justice Center at the University of Chicago, and five of the beaten prisoners whom she represents, planned in advance to stage an improper use of force at the jail so she could file suit. In the letter, Sheahan claimed to have three sworn statements from prisoners who claim one of the plaintiffs tried to recruit them to join the plan. Snyder said that the accusation was a ploy to "point people in the wrong direction." Snyder retorted, "Five inmates were severely beaten while handcuffed and shackled. That's a plan? I guess my crime was to bring these things to the public's attention."

Meanwhile, prisoners continued to be beaten at Cook County Jail. On January 10, 2003, four prisoners were stabbed and six others injured in a dayroom battle. On July 27, 2003, a fight involving prisoners and guards broke out. Seven prisoners were injured. They claimed they were abused by guards. On October 27, 2003, seven prisoners were injured in a dayroom melee that included the use of a shank. Three prisoners were hospitalized, one with stab wounds to the neck and chest. Bill Cunningham, spokesman for the Sheriff, conceded that the fight was gang related. No jail employees were injured in this incident.

Amid all the violence against prisoners, Devine announced that he would not prosecute any of the guards involved in the 2000



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## **Chicago Jail (Contd)**

beatings. He said the witnesses, which included some jail employees, made statements that were too contradictory. He has also failed to prosecute any of the SORT team members involved in the 1999 beatings.

### **Guards Charged With Felony Custodial Sexual Conduct**

While some guards were beating male prisoners, others were allegedly exchanging promises of special treatment for sex with female prisoners. On August 15, 2003, guards James Anthony III, 28, Iyare Egonmwan, 28, and Kenneth Swearingen, 41, were charged with felony custodial sexual misconduct as the result of an investigation that followed a female prisoner's letter to the superintendent of the jail's Division 4. In the letter, the prisoner complained of having provided the sex, but not having received the promised favors, which included food, makeup and cash.

Anthony, who is married and has five children, was charged with four counts in alleged sexual contact with four different prisoners between February and March, 2003. Egonmwan is charged with two counts resulting from sex acts with two prisoners simultaneously in one prisoner's cell. They face up to five years in prison per count.


Swearingen, who was accused of having sex with a prisoner in the shower room in 2002, was acquitted by Judge Vincent Gaughan on June 1, 2004. According to Swearingen's lawyer, the case was based upon the word of one prisoner who was unable to get Swearingen to say anything incriminating when she wore a wire. The prosecutor's office said it would continue to prosecute the other two guards. Swearingen resigned from his jail job in 2003.

### **FBI Busts Law Enforcement Personnel Stealing Drugs and Cash**

An additional scandal in Cook County involves plans to steal large amounts of cash and drugs from drug dealers. Jacques Polk, a former Cook County Forest Preserve police officer was busted by the FBI as he tried to rip off an FBI agent posing as a drug dealer. He then agreed to help set up three others. This led to the conviction of Anthony Brown, a former parole agent for the Illinois Department of Corrections (DOC) and Jerome Coleman, a former Cook County sheriff's deputy for stealing \$20,000 cash and a phony kilo of cocaine from the trunk of an FBI car they thought belonged to a drug dealer. Brown received a sentence of 8 years and 1 month

in prison. Coleman was sentenced to 7 years and 8 months in prison. Also convicted for the same offense was former DOC parole agent Jesse Kuykendol, who died of meningitis and AIDS before he could be sentenced. A total of seven current or former law enforcement personnel have been convicted in the sting operation referred to by the FBI as Operation Blue Steal.

### **One Guard's Puppy Love/Hate**

Although Devine has refused to prosecute any of the Cook County Jail guards for beating prisoners, the citizens of Cook County can rest assured that he is on the job. Devine did prosecute one guard whose victim died. The guard, Peter Stratigos, 37, was charged with felony cruelty to animals for kicking his three-month-old fifteen-pound female shepard-mix puppy to death. Stratigos was acquitted by Circuit Judge Garritt Howard in February, 2004, who ruled that, if Stratigos was telling the truth, he was "guilty of overreacting" to a perceived threat to the safety of his four-year-old son, "but he is not guilty of a felony offense," noting that Stratigos spent over \$200 on pet food and other expense in the week he owned the puppy. On May 18, 2004, Stratigos, who had been suspended since August, 2003, was reinstated as a guard at the Cook County Jail. After all, just because a man kicked a helpless puppy until it died of injuries that included three broken ribs, a fractured jaw, a fractured femur, and internal hemorrhaging, doesn't mean he would abuse the helpless men in his custody--does it? The reinstatement with time-served on the suspension as a disciplinary penalty amply demonstrates why the Cook County jail continues to be a hotbed of prisoner abuse and corruption. 

Sources: *Chicago Tribune*; *Chicago Daily Law Bulletin*.

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# President Bush Signs Mentally Ill Offender Treatment And Crime Reduction Act Of 2004

by Michael Rigby

On October 30, 2004, George W. Bush signed into law the Mentally Ill Offender Treatment and Crime Reduction Act of 2004 (Public Law No. 108-414). The Act provides \$50 million in grant money to promote various criminal and juvenile justice programs aimed at keeping mentally ill offenders out of jails and prisons.

For mentally ill persons in the U.S., needless imprisonment sometimes becomes a way of life. "All too often, people with mental illness rotate repeatedly between the criminal justice system and the streets of our communities, committing a [series] of minor offenses," said former Senator Tom Daschle in a statement attached to the bill. These offenders generally wind up in prisons or jails, where they receive little or no appropriate treatment, he said.

Not surprisingly, a 2003 Human Rights Watch report found that "jails and prisons have become the Nation's default mental health system," said Daschle. [See *PLN*, September 2004, p. 24 for a review of that report.] The report's first recommendation, he said, was that Congress enact this bill.

Daschle went on to say that more than 16% of adults and roughly 20% of youths in the criminal and juvenile justice systems are mentally ill, and that up to 40% of mentally ill adults will be caught up in the criminal justice system at some point in their lives. But despite these alarming numbers, state and federal governments have done little to address the problem.

Under the Act, the Attorney General is charged with dispensing grant money to eligible State and local governments, Indian tribes, and organizations. The money is to be used for the planning and implementation of programs that ensure mentally ill adults and juveniles are provided access to treatment services. These programs must be overseen cooperatively with a criminal or juvenile justice agency, or a mental health court

and a mental health agency.

In addition, the programs must specifically target nonviolent offenders who meet two requirements. First, the offender must be diagnosed with a mental illness or exhibit obvious signs of mental illness during arrest, confinement, or before a court. Second, the offender must have been criminally charged for an offense that resulted from their mental illness.


Programs eligible for grants include mental health courts and related court-based programs; specialized training programs for employees of criminal and juvenile justice agencies; cooperative efforts between criminal and juvenile justice agencies and mental health agencies that promote "public safety by offering mental health and substance abuse treatment services"; and collaborative efforts between State and local governments with regard to mentally ill offenders.

The Act further directs the Attorney General to develop a "list of best practices for appropriate diversion from incarceration of adult and juvenile offenders."

The Act's aims are laudable, but the current effort is like fighting a forest fire with a garden hose—it just isn't enough. The Act originally authorized \$100 million for fiscal year 2005, but funding was cut to \$50 million before the bill passed. By contrast, many state prisons operate with budgets in

the billions. Add to this the cost of operating jails and probation services and the numbers stagger. Human Rights Watch conservatively estimates that at least 300,000 prisoners are seriously mentally ill.

Lawmakers should realize that, as Daschle put it, "a dollar spent today to get mentally ill offenders effective medical care can save many dollars in law enforcement costs in the long run." It's also the right thing to do.

The current prison warehousing of the mentally ill is partially attributable to severe cut in federal funding to mental institutions in the early 1980's 

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# Prison Health Issues Affect Public

by Michael Rigby

Experts have long known that prisons are incubators for disease. Some diseases such as H.I.V. and hepatitis C are by some estimates ten times more common in prison than in the general population [*PLN*, June 2003, p.10]. Yet the health care of prisoners is typically of little or no concern to the public, many believing that prison health issues don't directly affect anyone but the prisoners. The harsh reality, however, is that prison health issues affect everyone, both inside and outside the walls.

## H.I.V./AIDS

The prevalence of confirmed AIDS cases in prison is three times that of the general population, according to the Bureau of Justice Statistics (BJS). The BJS cites the rate of H.I.V. infection as 1.9%, but that figure is questionable since only 19 states conduct mandatory H.I.V. testing. Most experts believe the rate is much higher. Moreover, in the decades that AIDS has spread, the prison population has also ballooned to more than 2.1 million. Now, with roughly 600,000 prisoners reentering society each year, scientists are beginning to view imprisonment rates and H.I.V. transmission as intertwined epidemics that require combined prevention and treatment strategies.

Many of these studies focus on African-Americans who, according to the BJS, represent 40% of the U.S. prison population. The Centers for Disease Control and Prevention (CDC) says that African-Americans now account for more than 50% of all new H.I.V. infections and that African-American women account for 72% of new cases among women. But this issue is not confined to the African-American community. In states where the majority of prisoners are white, the same scenarios play out.

According to researchers, high rates of imprisonment increase risk behaviors associated with H.I.V. because it worsens economic conditions, skews the ratio of men to women, and increases the social value of men who are not in prison. "H.I.V. is an opportunistic

disease that thrives on disruptions of social networks," says Dr. David Wohi, an infectious disease specialist at the University of North Carolina. "You can hardly get more socially disruptive than removing double-digit percentages of men from communities for extended periods of time."

The problem is exacerbated because the two factors known to increase the risk of H.I.V. transmission--unprotected sex and drug use--are not adequately addressed in prison. Sex between prisoners is not as common as many people believe, but it does happen. And since most prisons ban condoms, any sexual activity is risky. Add to the mix drug addiction, which frequently goes untreated in prison, and the risk increases exponentially, says Robert E. Fullilove, associate dean at the Mailman School of Public Health at Columbia University. "The war on drugs took the group that was at greatest risk for H.I.V. infection and made sure that they would be locked up, without ever considering what to do when they got out," said Fullilove.

## Hepatitis B

Hepatitis B is another potential killer lurking in the nation's prisons. In Georgia, for example, a study by the state Department of Human resources conducted between 1999 and 2002 found that 92 prisoners were infected with the disease. On closer examination of 57 of the cases, officials determined that 75% had been infected while in prison. Like H.I.V., the disease can be transmitted through unprotected sex, reused tattoo needles, and shared syringes. Most people fully recover from hepatitis B, but roughly 6% develop a chronic infection that can lead to liver cancer or end-stage liver disease, said Dr. Cindy Weinbaum of the CDC's viral hepatitis prevention branch.

Vaccinations are obviously needed. Not only might infected prisoners spread the virus upon release, but the expense of treating complications associated with the disease is passed on to the public. Thus, the CDC notes that, "Implementation of [vaccination] programs in correctional settings nationwide could result in a considerable reduction in the hepatitis B-associated disease burden."

Even so, most states have no program to vaccinate prisoners. Georgia is one example. Prison officials there said they would vaccinate incoming prisoners if the money was available. "Absolutely it's a good idea primarily because 350 inmates are released every week from a Georgia prison

and come back home," said Brian Owens, executive assistant to Georgia Corrections Commissioner James Donald. But apparently prevention is not a concept Georgia legislators are familiar with. In 2001 they turned down prison officials' request for \$1.3 million to vaccinate the 16,000 prisoners arriving annually and to vaccinate existing prisoners over a 3-year period.

## Botulism

Sometimes prison health issues affect the public in unexpected ways. In late June, 2004 five prisoners at the Ironwood State prison in California contracted botulism. Treating them wiped out antitoxin reserves for the entire southwestern United States. The prisoners apparently contracted the illness from a compromised batch of pruno, an alcoholic drink made by fermenting potato peels, fruit scraps, and bread crumbs.

Contracting botulism from food is rare but potentially lethal. However, early administration of botulism antitoxin--which is stored at U.S. Public Health Service quarantine stations at eight international airports, including Los Angeles International--can limit, though not reverse, neurological damage, according to the CDC. The Los Angeles station typically keeps at least 10 doses in stock, but had only 3 when Riverside County health officials called to request the 5 doses needed to treat the prisoners. The rest had to be ordered from the quarantine station at San Francisco International Airport.

Between 1990 and 2000, 263 people in the U.S. contracted food-borne botulism, resulting in 11 deaths, the CDC said. None of the Ironwood prisoners died, though one or two of the sickest had to be transported to the hospital by helicopter. All told, the prisoners' medical care cost more than \$352,000, said Ironwood Prison Lt. Dale Dorman.

## Hepatitis C

But at least they received treatment. For prisoners infected with hepatitis C, widely considered the most serious of a family of liver viruses, treatment is typically not available. Most prisons refuse to treat the disease due to the high cost, which typically runs between \$25,000-\$35,000 per prisoner [see *PLN* May 2004, p.1].

Fortunately, a vaccine for this often fatal disease may be on the horizon. According to researchers, roughly 20% of people with the virus spontaneously eradicate it from their bodies. One reason may be that their immune

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systems attack the virus quicker. So-called natural killer cells stand ready in the body to attack invading viruses. But between infections, inhibitory receptors called KIRs keep them in check, ensuring they don't attack healthy tissue. The researchers located a particular gene combination that controls one KIR receptor, then discovered that the molecule attached to it was twice as common in recovered patients than in those still infected. Researchers plan to exploit this gene in the search for a vaccine. Dr. Chloe Thio of John Hopkins University explains that when the body detects a viral infection it must activate the killer cells by turning off inhibiting receptors. This KIR combination appears weak, "so it's easier to overcome," she said.

The new research, reported in the journal *Science* on August 5, 2004, won't benefit patients anytime soon, but "It brings us closer to understanding how the virus works," said Thio, who coauthored the

study. "In the long term, whether we can use this information to modulate the body's immune system to improve therapeutics or vaccine design--that is the ultimate goal," she said.

Hepatitis C results in about 10,000 to 12,000 U.S. deaths annually. Currently, between 3 million and 4.5 million people in the U.S. and about 180 million worldwide remain chronically infected, at risk of eventually developing liver cancer or experiencing liver failure. Of the U.S. total, nearly one-third are prisoners. Most will simply be dumped back into society, untreated and uneducated about the disease, a ticking time bomb inside them. And society will pay the cost--in money, in misery, in lives. Obviously, prison health issues do affect everyone. 

Sources: *New York Times*, *Atlanta Journal-Constitution*, *Press-Enterprise*

## **"Mentally Disordered Offender" Treatment As Condition For California Parole Rejected Where Evidentiary Prerequisite Not Met**

*by John E. Dannenberg*

The California Superior Court rejected - in a pre-trial *in limine* motion - the request of the Board of Prison Terms (BPT) to require one year of mental health treatment as a condition of parole release where one of six prerequisite statutory factors for such a civil commitment had plainly not been met.


California state prisoner Billy Sheek was due for parole release. He had been under regular treatment for depression with the anti-depressant drug Zoloft. The BPT had Sheek examined by a psychiatrist prior to release to determine if Sheek should be civilly committed under Penal Code § 2960 et seq. (Mentally Disordered Offender (MDO) Act). Such commitment requires certification by a psychiatrist, followed by a jury trial, that the prisoner has a "severe mental disorder" and for which he has received treatment for 90 days within the preceding twelve months ("factor 5" of Penal Code § 2966).

The BPT's psychiatrist determined that Sheek had a depressive disorder which had been continually treated with Zoloft. But he also diagnosed pedophilia - a new diagnosis. Since Zoloft is sometimes prescribed for pedophilia, and pedophilia can be considered a "severe mental disorder," the doctor bootstrapped the prior Zoloft prescription (for depression) into a finding of "90 day

treatment for a severe mental disorder [pedophilia]" - to qualify Sheek for MDO certification.

On a court challenge, Sheek complained that there was no evidence - as required by factor 5 of Penal Code § 2966's six prerequisites - that he had *ever* been treated for the previously undiagnosed disorder, let alone, for the requisite 90 days. The court agreed that the evidence of "factor 5" was insufficient and granted Sheek's petition for exclusion from MDO status.

On the BPT's appeal, the court agreed that the evidence of the *new* diagnosis could not substitute for a *prior* 90 day treatment of a "severe mental disorder" just because the medication for both disorders might turn out to be the same.

The court further rejected the BPT's complaint that the decision had been made in a pre-trial *in limine* motion - thus depriving them of their right to a jury trial. "It is within the trial court's discretion to entertain and grant dispositive pre-trial motions under the court's inherent power to provide for the orderly conduct of proceedings before them." Indeed, the pre-trial determination that the BPT's offer of proof failed to meet "factor 5" "prevented what would have been an unnecessary and futile trial." See: *California v. Sheek*, - Cal.App.4th - (2004). 

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# Federal Court Orders Independent Evaluation, Training And Credentialing Of All California Prison Healthcare Practitioners

by John E. Dannenberg

Under pressure from U.S. District Judge Thelton E. Henderson, who earlier in 2004 threatened wholesale federal court takeover of the California Department of Corrections (CDC), the CDC stipulated to an order aimed at ending the use of untrained, unqualified and/or incompetent doctors, nurses and physician assistants in its \$1 billion per year prison health care program. The centerpiece of the September 17, 2004 Order is its requirement for CDC to hire an "independent entity" for these purposes within 60 days, thus wresting control of past questionable medical staffing practices from prison bureaucracy. The Order issued under the court's continuing oversight of prison medical care under *Plata v. Schwarzenegger*, wherein the prisoners are represented by attorneys Steve Fama and Alison Hardy of the San Quentin, California based Prison Law Office.

Designed to weed out incompetent physicians, the expected shake-up could result in 261 prison doctors being stripped of their ability to practice medicine in CDC's prisons until they complete a stringent medical training course. "This is a concrete step toward getting rid of those who have been harming patients," Hardy said.

While admittedly, the news of *proper* health care is rarely reported, the stories of improprieties reverberate because they are so disturbing. At one CDC prison, four of the eight physicians had criminal records, mental health problems or loss of privileges at local hospitals. When CDC tried to fire one of them, the State Personnel Board reversed the action.

In another prison, seven of twenty credentialed physicians had problems, including mental health issues, alcoholism, and loss of privileges or licenses because of substance abuse, incompetence, or both. In yet another prison, HIV care was managed by an obstetrician, and a neurosurgeon handled emergency room care for internal

medicine problems even though he was not trained in emergency medicine.

Perhaps more disturbing was that the internal oversight of prison physician credentialing was itself suspect in one prison where the vice-chairman of the credentialing committee was an obstetrician who had lost his license for 7 years because of incompetence and alcoholism. Plainly, the court's stripping of such internal abuse from CDC was central to its Order to transfer *all* medical staffing authority to an "independent entity."

The six-page stipulated Order addresses (1) evaluation of physicians, (2) treatment of high-risk patients, (3) classification and supervision of physicians and nursing, and (4) medical scheduling and tracking.

Of utmost importance is the 60-day time-fuse to engage the independent entity to credential CDC doctors - the number one priority. The Order calls for a roll-out beginning immediately, and to be completed by December 31, 2005. Physicians with clinical responsibilities shall be fully processed by June 30, 2005. The independent entity shall classify each doctor as Category 1 (competent to provide care without remedial training); Category 2 (competent to provide care upon completion of remedial training received from the independent entity); or Category 3 (not competent to provide care to class members, or failed remedial training). A special certification will be required for doctors assigned to treat high-risk patients. An important caveat is that CDC is forbidden from hiring independent contractor primary care physicians who are not board-eligible in internal medicine or family practice. Monthly progress reports to the court shall begin January 15, 2005. By November 1, 2005, a plan to assess and train nurse practitioners and physician assistants shall be submitted.

A plan shall be submitted to identify all high-risk patients. By November 1, 2004, independent physicians approved by court experts shall evaluate and treat all high-risk patients at California State Prison-Sacramento, California State Prison-Corcoran, Central California Women's Facility, and Salinas Valley State Prison. If the court experts deem such care is needed at other prisons, they shall so determine and provide.

By November 1, 2005, CDC shall submit a plan to reclassify all physician

categories plan for hiring regional medical directors is due December 1, 2004, whose duty includes revising the medical staff hiring process - to be effective January 15, 2005. By March 1, 2005, further plans are due regarding on-site clinics through a residency affiliation program, to aid prisoners with complex medical problems.

Finally, also due by March 1, 2005, is the funding and implementation of at least one position at each of the roll-out institutions to support execution of the medical schedule and tracking system. And to keep things honest, not less than nine Quality Management Assistant Teams (QMAT) shall be operating by March 1, 2005 to monitor compliance with the Order.

This Order was sorely needed. Overall, records show that 20% of all CDC physicians had seriously blemished pasts - a rate five times the figure statewide. In a recent legislative committee hearing, State Senator Jackie Speier commented, "To put it very bluntly and very simply, the healthcare system at the California Department of Corrections is sick." Senator Gloria Romero added, "The sad fact is California has been growing its inmate population but has failed to provide adequate healthcare for those locked away." The Senators referred explicitly to the recent tragedy of Solano State Prison prisoner Anthony Shumake dying of complications from an extracted abscessed tooth. [See: *PLN*, April, 2005.]

Recently appointed CDC Director Jeanne Woodford testified her concern. "We know we have many challenges in our efforts to provide quality healthcare. We want to fix what this committee has called a broken system... and become known as a state that uses the best practices in all aspects of its healthcare system." The Senators appeared impatient, wanting to know why the federal prisons have been able to reduce their prison healthcare costs while California's had soared. "The scratching of heads is no longer acceptable," Speier said, absent any good answer to her question.

But a fair statement of the challenge is that prisoners bring with them a sicker profile than the average population. One in five has serious mental illness (a probable carryover from the decision by former Governor Ronald Reagan to close most state mental hospitals...relegating those persons' fate to CDC); one-third are infected with

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hepatitis C [recent estimates put this at 40%]; and HIV/AIDS in prison is five times the national average.

Nonetheless, there is no excuse for roadblocks such as that reported by Dr. Scott Anderson of CDC's California Medical Facility, who testified that physicians there sometimes lack essentials as basic as an examining table, soap and towels with which to dry their hands. He also pointed to a severe shortage of nurses and medical technical assistants, as well as the absence of computers to track medical records, view X-rays and help with medical decisions.

The new competency testing for doctors may have the paradoxical effect of driving good doctors out of the system, Anderson testified. He considers his board certification in specialties such as rheumatology and geriatrics a sufficient validation of his skills. Ironically, these skills make him uniquely desirable today for California's prisons, where the greatest driver to medical cost growth is the aging of tens of thousands of parole-eligible "life" prisoners for whom the state abjectly refuses its duty to set a parole date. See: *Plata v. Schwarzenegger*, U.S.D.C. (N.D. Cal.), No. C-01-1351 T.E.H., *Stipulated Order re Quality of Patient Care and Staffing*, Sept. 17, 2004. 

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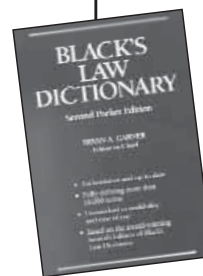
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# Georgia Sheriffs Illegally Profit From Captive Workforce

by Michael Righy

The great thing about being a county's top lawman is having a cadre of free labor for your own personal use. Or so many Georgia sheriffs think. Although it is a felony under state law to use prisoner labor for personal gain, no less than six Georgia sheriffs have been implicated in scandals involving just that since 1991.

Jenkins County Sheriff Bobby Womack, 69, improperly profited from prisoner labor for more than a decade, according to a May 2004 article in the *Augusta Chronicle*. In the course of its two month investigation, 31 prisoners and 2 former deputies related numerous instances of Womack using prisoners from the Jenkins County Jail for his timber business, his rental properties (he owns more than a dozen trailers and several houses), and his personal home.

The prisoners said the sheriff had them running chainsaws in the woods, patching holes in the walls of trailer homes, and laying sod and cutting grass at the sheriff's private residence. State prisoner William Oglesby said he drove a truck for Womack's "Red Acres" logging company for more than a month after being convicted of child molestation in September 2002.

Several prisoners worked in exchange for small amounts of cash and the opportunity to leave the jail on weekends. Former prisoner Thomas Bailey said he often bought beer for other prisoners and brought it back to the jail. Tim Sherrod, another former prisoner, said he smoked crack at the jail three or four times. The drugs were provided by a prisoner who went home for the weekend. "It's like a drug house," said former prisoner William Maguire, who was

in the jail in 2002. "It's the damndest thing you've ever seen."

Despite abundant evidence, the district attorney and the Georgia Bureau of Investigation (GBI) have been reluctant to pursue the allegations. Former policeman Richard Evans—who was fired in 2001 and has a civil suit pending against the city for wrongful termination, discrimination, and retaliation—said he told a GBI agent that soon after arresting a man on cocaine charges in the summer or fall of 2000, he saw him buying beer at a convenience store when he knew the man had not been released on bond. The GBI did nothing.

Former Jenkins County deputies James Chesser and Leroy Morgan also reported Womack's illegal use of prisoner labor. Chesser said he reported the improprieties to then-district attorney Joe Martin before Womack fired him in 1999. Again nothing was done.

Womack is not new to skirting the law. In 1999 the sheriff was investigated for illegally wiretapping his wife's conversations during divorce proceedings. The sheriff was also accused of lying about where he bought the equipment. Although wiretapping and lying to investigators are both felonies, Martin ordered the investigation dropped.

According to GBI records, Bonnie Womack, the sheriff's wife, told investigators that he had once fired a shotgun at her and her children, slapped her and threatened to kill her, and toyed with a gun in front of their 7-year-old daughter, which Mrs. Womack interpreted as a threat.

Elected sheriff in 1984, Womack has been embroiled in controversy for much of his tenure. In 1984 and 1985 questions arose as to whether the sheriff had lied about having a high school diploma when he ran for office and when he enrolled in the police academy.

In 1990, Womack was again in the spotlight after convicted child molester Luis Penaranda was spotted at an Augusta restaurant when he was supposed to be in jail. That same year Womack's wife shot him in the leg during a domestic dispute.

In 2004, a former janitor at the jail accused the sheriff of placing him in a choke hold and fracturing his neck because Womack was unhappy with the way he had cleaned a courthouse bathroom.

The GBI and FBI eventually decided to look into the allegations. Womack resigned in July 2004 citing health reasons. He remains

under investigation.

To be fair, other Georgia Sheriff's are just as corrupt as Womack. In Screven County, which neighbors Jenkins County, Sheriff Mike Kyle also thinks prisoners are his personal flunkies. A three month investigation by the *Augusta Chronicle* in 2004 found 32 former Screven County prisoners and at least 2 deputies who said that Kile ordered illicit work.

Prisoners contend they worked on Kile's campaign signs and performed tasks at his personal home and at area churches.

In 2001, prisoners say, they labored at the sheriff's home pouring cement for a patio and walkway, demolished a walk in closet, and installed a new shower. Prisoners received little or no compensation for their work. Some prisoners said Kile occasionally gave them small amounts of cash, but never more than \$20. Former prisoner Johnny Roundtree said he worked painting the sheriff's campaign signs in 2002 but was paid nothing.

The prisoners also worked at area churches in 2002 and 2003 paving driveways, cleaning up, sheet rocking, tiling floors, and installing sinks and commodes, among other things. The prisoners were not typically paid, they said, unless church members slipped them something.

On May 14, 2003, while working on a brick laying crew at the Hurst Baptist Church, prisoners Bo Hagan and Will Barrs took advantage of lax security and escaped. They were later captured and charged, but no action was taken against Kile. Reverend Scott Krug, the church's pastor, said Kile personally approved sending prisoners to his church and that it was common knowledge in Screven County that churches could use jail labor.

Former deputies also say the sheriff improperly used prisoners. Former Screven deputy Wayne Blackburn, who was fired in July 2004, said that when the heater at his home broke, the sheriff lent him a prisoner to fix it. Former deputy Gayla Reffner said it was generally known that prisoners worked at the sheriff's residence. She also said that the sheriff had twice allowed her to use a prisoner at her home, once when her air conditioner broke and again when she had to move a freezer. Reffner resigned in June 2004.

The worst consequence of Kile's work policy came in June 2004. While working at the Arnett Enrichment and Education Center cutting grass and clearing limbs, prisoner Harold Cannon escaped. Cannon made his way to the home of Richard Weaver and

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hacked him nearly to death with a machete. Months earlier, Weaver said, he'd had Cannon arrested for probation violation. Weaver suffered slashes to his back, arms, head, and legs, three broken ribs, and a punctured lung. He required roughly four hours of emergency surgery. Cannon was captured two days later.

Kile refused to hear the results of the investigation and accused a reporter of being unfair. "I think you're a complete (sic) biased, and I don't think you did it right, and I don't have any comment on your story," Kile said. "I think you're a racist and biased."

In a Savannah television interview on September 22, 2004, Kile denied that the work performed on churches and private property was illegal and said he had been using the labor for 12 years. Kile later admitted using prisoners at his house but said it was okay because he paid them for their work. But even if he had it was still illegal, said Richmond County District Attorney Danny Craig.

Craig said that if sheriffs Womack and Kile had been in his county, he would seek felony indictments for each time the sheriffs used prisoners for private gain. He also said he would pursue felony charges for aiding an escape in instances where prisoners were let out of jail unsupervised, and possibly racketeering charges. Craig noted that because the prisoners weren't in an equal bargaining position, the sheriffs violated their civil rights each time they were used on personal projects.

Like Womack, it appears Kile may not pay for his crimes. In a classic case of fox guarding the hen house, a review panel set up by the Georgia Sheriff's Association recommended that Kile be reprimanded but not suspended. In a November 8, 2004, letter to Governor Sonny Perdue, the three panel members--state Attorney General Thurbert Baker, Ben Hill County Sheriff Thurman Ellis, and Catoosa County Sheriff Phil Summers--wrote that "[Kile] appeared concerned about the allegations that have been made, and expressed regret for his past actions. He stated that he did not know that his past actions with respect to inmate labor violated state law."


Kile was reelected to a fourth term in November 2004. The GBI and the FBI are still investigating.

Apparently, the attitude that prisoners are the personal property of their keepers is rampant throughout the state. A number of other Georgia sheriffs have also come under scrutiny in recent years for allegedly using prisoner labor for their own benefit.

Currently, Coffee County Sheriff Rob Smith is being investigated by the state Ethics Commission for allegedly using prisoners to work on his campaign signs.

In 2003, the GBI investigated Early County Sheriff Jimmie Murkerson for using prisoner labor at a paint and body shop and on a building he owned. A grand jury declined to indict him.

In 2002, former DeKalb County Sheriff Sidney Dorsey was indicted on 19 charges, including plotting the murder of his elected successor, racketeering, and illegally using prisoners. Dorsey was sentenced to life in prison.

In 1991, Camden County Sheriff Bill Smith was investigated for, among other things, unlawfully using prisoner labor, theft, and falsifying documents. The investigation was launched after a prisoner escaped while washing a deputy's personal vehicle, got in a wreck while drinking, and injured two marines. Although Smith was indicted in 1992, the state Attorney General's Office dismissed the case citing a technicality--the grand jury wasn't sworn in again after a recess. Smith remains in office. 

Source: *Augusta Chronicle*

## **ATTENTION:** **WASHINGTON PRISONERS** **AND FORMER PRISONERS**

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# Qualified Immunity Granted to Doctor Who Failed to Order Interferon Treatments for HCV+ Prisoner

The Eight Circuit Court of Appeals has held that a doctor was not deliberately indifferent to a prisoner's medical condition by failing to order interferon treatments for his Hepatitis C virus (HCV). While imprisoned within the South Dakota corrections system, prisoner Jerry Bender tested positive for HCV. After his release from prison in February 2003, Bender sued Dr. Eugene Regier, a physician employed by the South Dakota Department of Health.

Regier's request for judgment was based on qualified immunity. The South Dakota district court denied that motion, holding Dr. Regier offered no evidence that he made a medical judgment to withhold interferon treatment.

In its opinion reversing that order, the Eighth Circuit detailed HCV treatment in general and the facts relevant to this case. The court noted that "about forty percent of Americans infected with HCV reside in correctional institutions." By January 2002, a combination of pegylated interferon and ribavirin was available to treat HCV. That treatment costs \$2,000 per month, involving a series of injections for six months to a year. Its success rate is only 40-50%.

Before beginning to treat prisoners in 1996, Dr. Regier practiced family medicine for thirty years. His treatment of Bender began in March 2000 until Bender's May 2000 release. After violating parole in December 2000 for using marijuana and methamphetamine, Bender landed in prison where Dr. Regier restarted treatment. Bender was sent to consultation and liver biopsy with Dr. Robert D. Meyer a South Dakota gastroenterologist and noted HCV specialist.

The liver pathology report found Bender's status was "Grade 3" inflammation and "stage 1" fibrosis. Despite that condition, neither Meyer nor Regier ordered interferon treatment for Bender. Regier testified that in retrospect Bender's report made him "somebody I would treat." It was this testimony that caused the district court to deny Regier qualified immunity.

The Eight Circuit said HCV is "unquestionably a serious medical problem." The question here, however, is "whether Bender had a serious medical need for prompt interferon treatment." The court said it need not reach that question because "Bender failed to prove Dr. Regier acted with deliberate indifference. The court held there was "confusion or miscommunication among the medical professionals while the Department of Health protocol was being developed" to set the criteria for treating prisoners with HCV. The court held this confusion established negligence, not deliberate indifference. As medical negligence cannot establish an Eighth Amendment violation, the district order denying Dr. Regier qualified immunity was reversed. See: *Bender v. Regier*, 385 F.3d 1133 (8<sup>th</sup> Cir. 2004).

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## Vermont DOC Settles PLN Writer's Suicide Suit for \$750,000

On October 14, 2004, the estate of *PLN* contributing writer James Quigley sued the Vermont Department of Corrections (V.D.O.C.) and several V.D.O.C. employees, alleging their mistreatment of Quigley resulted in his suicide death. Four months later the state settled the suit for \$750,000. In previous issues, *PLN* reported Quigley's death and two reports sanctioned by the commonwealth of Vermont into V.D.O.C. and a rash of prisoners' deaths. [See: *PLN*, January and September 2004]

On the 118<sup>th</sup> day of retaliatory and unjustified solitary confinement, Quigley hanged himself on October 7, 2003, at the Northwest State Correctional Facility in St. Albans. The lawsuit filed in Vermont Federal District Court in Burlington, alleged that Quigley's confinement was the result of retaliation for filing grievances and lawsuits against V.D.O.C. conditions. The suit, further, alleged that Quigley's confinement conditions constituted cruel and unusual punishment. Moreover, Quigley was deprived of adequate medical and mental health care, the suit charged.

The civil rights lawsuit was filed on behalf of Quigley's mother, Claire Quigley. The lawsuit was filed days after Ryan Rodriguez, a 25-year-old man awaiting trial, was taken off life support after hanging himself four days earlier in the Chittenden County Correctional Facility in South Burlington. Rodriguez's death was the first in a V.D.O.C. prison since Quigley's. Prior to Quigley's death, seven deaths – including two suicides – of persons under V.D.O.C. supervision occurred in 18 months.

The subsequent investigations into those deaths resulted in the superintendents of the prisons at Newport and St. Albans being replaced.

In February, 2005, after a five hour mediation session, the Vermont DOC agreed to settle the lawsuit by paying Quigley's estate \$750,000.00 in damages. Quigley's estate was represented by Vermont attorney David Sleight. *PLN* editor Paul Wright assisted Quigley's family in locating counsel and through the litigation. See: *Estate of James Quigley v. Lanman*, Vermont USDC, Case No: 1:04-CV0-277.

# ***American Gulag: Inside U.S. Immigration Prisons,*** **By Mark Dow, University Of California Press, 413 pages, \$27.50**

***Reviewed by Ashley Makar***

Mark Dow's *American Gulag: Inside U.S. Immigration Prisons* is an articulate call for public scrutiny, when 23,000 federal immigration detainees suffer in U.S. prisons—under most Americans' noses, on a given day. With the Abu Ghraib atrocities in the international spotlight, Dow illuminates the lesser known, more mundane brutality that characterizes the domestic detention of non-American prisoners of the United States. Published in August, 2004, by the University of California Press, *American Gulag* provides a timely account of the excessive incarceration, without due process, of non-citizens that makes automatic, often long-term prisoners out of asylum seekers, undocumented aliens, criminals who have already served their sentences and terror suspects alike.

Probably the most thorough and comprehensive account of immigration detention in the United States available, *American Gulag* is an accessible treatise, a tremendous source of information for human rights advocates, journalists, immigration lawyers, and the general public. Most readers will be surprised to find that immigration detainees are being held not far from their backyards—in private prisons in their boroughs or in their county jails, often in rural areas with no pro bono resources. This hardly visible, though extensive network of immigration prisons, Dow delineates, is the infrastructure of U.S. control of "certain non-Americans among 'us,'" a system of inevitable mistreatment.

In the first chapter Dow states that the book is about prisons and language. Though the federal government classifies the non-citizens it detains as "administrative detainees" and the places where they are confined "facilities," they are, Dow contends, prisoners in prisons. To make an otherwise inscrutable system more transparent, Dow translates convoluted bureaucratic jargon into what it means for people in detention, clarifies immigration law and its implications in intelligent laymen's terms, and demonstrates the power of political rhetoric in shaping immigration policy and the psyches of its enforcers: Those conditioned to believe they are responsible for controlling "criminal aliens" and "terror suspects" are bound to be brutal. Dow leaves the prisoners' English-as-a-second-language efforts to articulate their grievances to resonate, without interpretation.

The Bureau of Immigration and Customs

Enforcement (BICE, formerly the INS) has officially denounced *American Gulag* as a "distorted view of immigration detention under the guise of objective research." Dow doesn't purport to be objective about incarceration. But, researching the book, he said he had to revise his idea of good guys and bad guys: Out west, Dow found an authoritarian and thoughtful man in INS Colorado District Director Joe Greene, with whom he discussed Wittgenstein and poetry when they weren't talking about immigration detention. Dow said he's pleased that his readers differ over whom they find sympathetic and whom they find despicable in his account of U.S. immigration detention. It makes him feel that it's full enough: Different versions of reality co-exist in the gulag, and he thinks the book is completely fair.

*American Gulag* is based on fine investigative reporting, but it is a good narrative of a bad road trip. From the Everglades to Seattle, Dow connects the dots of his convoluted journey through the bureaucratic purgatory of immigration detention with incisive observations on the culture of repression and secrecy he discerns in the system. By integrating his critique with the voices of prisoners and their keepers, Dow humanizes the gulag from within. In one chapter, a Louisiana warden wonders out loud when enforcement becomes brutality and then elaborates on the predicament of prison and jail guards trying to establish authority among prisoners he fears. And Dow the narrator is shaken to conviction: "the only solution for jailor and jailed is the abolition of prisons as we know them."

While the liberal press has offered sym-

pathetic coverage of the excessive and often abusive detention of thousands of foreign nationals since September 11, 2001, Dow exposes such roundups, not as a post-9/11 phenomenon, but a systemic problem with a history and serious current implications. Codifying the use of detention as a deterrent to potential refugees that began in the eighties and the security-oriented approach to immigration that ensued after the first World Trade Center bombing, two immigration laws passed in 1996 mandated the detention of unprecedented numbers of non-citizens. Now, the international and domestic fronts of the war on terrorism are converging in Bush administration plans to detain terror suspects indefinitely.

*American Gulag* is on the Department of Homeland Security radar. The Office of the Inspector General has solicited information from government, NGOs, immigration attorneys and activists, including Dow, for an internal audit of the immigration detention system. The auditors are currently reviewing select facilities for compliance with BICE detention standards, which cover access to medical care, correspondence, recreation, religious practice, legal materials and counsel. ACLU Immigrants' Rights Project attorney Judy Rabinovitz has said that by refusing to make these standards regulations, the INS has ensured that they would be difficult to enforce. Of course Dow supports the DHS's overture at accountability, but maintains that "truly independent monitoring and reforms must come from outside." In *American Gulag*, Dow provides information necessary for those who want to rise to the occasion of promoting transparency in the U.S. immigration detention system. ■



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## News in Brief:

**Arkansas:** In April, 2005, an unidentified sergeant was fired by the state DOC after the February, 2005, death of Wrightsville Unit prisoner Victor Wright, 28, while on a work detail. Wright complained to the sergeant that he was not feeling well while on a work detail clearing weeds and chopping grass. Apparently the sergeant denied the prisoners water breaks and hurried them. Upon returning to the prison Wright went to the prison infirmary where he collapsed and died. The sergeant apparently violated prison regulations and then lied about it to investigators when questioned.

**California:** On April 11, 2005, federal prisoner Peter Scopazzi, 37, was in a fight with five other prisoners at the U.S. Penitentiary Victorville in Adelanto during which he was stabbed several times. Another prisoner was also hospitalized with injuries. On April 16 Scopazzi died. BOP officials had initially denied any altercation had occurred at the prison when contacted by media. Only later did they change their story and reveal the incident and injuries that ensued. No reason was given for the altercation. Scopazzi had been serving a 170 month sentence for possessing methamphetamine and a firearm.

**California:** On April 21, 2005, 75 black and Hispanic prisoners at the minimum security Oak Glen Conservation Camp rioted and fought each other, using broom sticks and chairs as improvised weapons. Two prisoners were hospitalized with head injuries and 13 others were injured. The three prison guards on duty required reinforcements from the California Highway Patrol and the San

Bernardino and Riverside county sheriff's departments to violently suppress the prisoners.

**California:** On April 23, 2005, Carolyn Suzanne Young, 48, the Yolo County chief probation officer was arrested on drunk driving charges after she slammed her corvette into the rear of another vehicle. She was arrested at the scene for driving under the influence and causing an injury. Young has been a probation officer for 15 years and became interim chief probation officer earlier in 2005 after the department's chief retired.

**China:** On April 3, 2005, She Xianglin was released from prison where he had been serving a 15 year sentence for killing his wife in 1994. She was released when his wife turned up alive and married to another man. She, a former part time policeman, was arrested and beaten into confessing he had killed his wife when a badly decomposed corpse turned up in a local reservoir after his wife disappeared after a domestic dispute. Originally sentenced to death, She had his sentence commuted to 15 years in prison after he appealed. She said he wanted to be compensated for his 11 years in prison and for justice to be done.

**Colorado:** On April 21, 2005, Manuel Torrez, 65, a prisoner serving a 14 year racketeering sentence from California, was beaten to death by other prisoners in the Administrative Segregation, or ADX, section of the US Penitentiary in Florence, Colorado. While the US Penitentiary section of the prison has been wracked by violence and murders since it opened, Torrez is the first prisoner to be murdered by fellow prisoners since the ADX opened in 1995 as the most secure federal prison.

**Florida:** On April 21, 2005, Wayne Myers, 24, was convicted by a Martin county jury of second degree murder in the stabbing death of Martin Correctional Center prisoner Richard Jones, 27. Myers was convicted despite the conflicting and recanted testimony of three prisoners. Jones' last words to a prison guard were "Wayne stabbed me." Myers' attorney argued dozens of other prisoners at the 1,200 bed prison could have been named "Wayne." Jones was stabbed from behind in the prison yard, no weapon was ever found. Myers had been due to be released on 2007 after serving a ten year armed robbery sentence.

**Indiana:** On April 19, 2005, a jury acquitted Indiana Women's Prison guards William Sanders and Demietrus Spencer of

allegedly raping prisoner Deana Lampitok while she was imprisoned at the facility. A third guard, Clifford Barlow, pleaded guilty to one charge of sexual misconduct, a class D felony, for his role in the assault that never occurred. Barlow will receive no jail time under his plea agreement. Lampitok accused the prosecution of dragging the case out for three years; she claimed she was intimidated into having sex with the three guards.

**Kentucky:** On April 20, 2005, Louisville Metro jail guards Sgt. Robert Arnold, 41, Joshua Spenton, 30 and Scott DeJarnette, 28, were arrested and charged with assault and official misconduct, misdemeanors, for beating, punching and kicking jail prisoner Adrian Garner for five minutes while he was handcuffed. The guards were also suspended from their jobs. The white guards also yelled racial slurs at Garner, who is black, while they beat him.

**Louisiana:** On April 22, 2005, Joseph Glasper, 64, died in the Orleans Parish jail in New Orleans nine days after his attorneys told a judge the bar owner was not receiving appropriate medical care. Glasper had been in jail less than 30 days, after being convicted of manslaughter for shooting a bar patron and while awaiting sentencing. Glasper's attorney Carol Kolinchak told media: "I think it would be inappropriate to draw conclusions right now. What I can say is he was a 64 year old man with health problems, none of which were life threatening at the time he was put in jail. The medications he had been prescribed over the years had been working, and within little over a month of being in jail, he's dead."

**Maryland:** On March 21, 2005, death penalty opponent Rachel Riffie, 34, was acquitted of electronic harassment charges for sending obscenity laced e mails to a website supporting the death penalty run by Frederick Romano, the brother of a homicide victim. Romano told police he felt threatened by the message which led to the charges against Riffie. Judge Barry Hughes held the messages were protected political speech and dismissed the charges.

**Massachusetts:** On April 18, 2005, 8 prisoners at the maximum security MCI-Cedar Junction prison seized control of their cell block for several hours after returning to their cells. The prisoners, who were apparently intoxicated, caused minor damage in the unit. Four hours later a tactical squad of 30 guards seized control of the unit and forced the prisoners to return to their cells in a matter of minutes.

# NewPolitics

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## NewPolitics

Vol 8 No 2 \$7.00 (US) Winter 2005

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**Michigan:** On April 1, 2005, Melissa LaHaie, 31, was sentenced to a month in jail and 30 months probation after pleading guilty to mailing marijuana to her boyfriend, David Vanalstine, 33, while he was serving a sentence at the Pugsley Correctional Facility in Kingsley. As a probation condition the court forbade LaHaie from having any contact, by phone, mail or visiting, with Vanalstine. LaHaie told the court she sent the marijuana to Vanalstine to be sold in prison to help her financial problems which included \$300 a month in collect calls from Vanalstine and sending him money each month.

**Nepal:** On April 10, 2005, Maoist guerrillas waging a people's war to free their nation from dictatorship and feudalism attacked an army base, a jail and government buildings in Charikot. The attack on the jail freed all 28 prisoners being held there, 15 of whom were imprisoned guerrillas, and left two policemen dead.

**New Jersey:** On March 31, 2005, Sean Higgins, 30, a guard at the Union County jail in Elizabeth, was charged with raping five women prisoners while on duty and groping himself and 11 other women in exchange for cigarettes, commissary items and candy. All told Higgins was charged with five counts of rape, 15 counts of sexual contact and 19 counts of official misconduct. Prosecutor Theodore Romankow told media: "Our investigation with Union County Police detectives uncovered evidence supporting charges that this corrections officer betrayed his badge and his uniform and took advantage of females entrusted to his care for his own selfish sexual gratification."

**New Mexico:** On April 20, 2005, Robin Rushlo, 49, president of a non profit group that distributes bibles to New Mexico prisoners was arrested on bigamy charges. Police claim he is married to a woman in New Mexico and a woman in Arizona as well. Rushlo was released from the New Mexico prison system in 2004 after serving approximately nine years for second degree murder.

**Ohio:** On May 7, 2004,

Becky Smith, 31, a nurse at the Pickaway Correctional Institution was arrested and charged with smuggling marijuana into the prison on three occasions.

**Ohio:** On October 12, 2004, a federal grand jury in Cleveland indicted Michael Budd, 43, a major and the second highest ranking officer in the Mahoning county sheriff's office, with civil rights violations for ordering or carrying out the beatings of three prisoners in 2000 and in 2001 who had assaulted jail guards.


**Pakistan:** On April 20, 2005, seven prisoners escaped from an overcrowded prison in March by breaking through a toilet window and using their turbans to fashion ropes which they used to scale the prison's outer perimeter walls. Most of the prisoners were serving lengthy sentences of more than 20 years.

**Tennessee:** On April 24, 2005, Keith Drinkard, 38, a prisoner at the Riverbend Maximum Security Institution in Nashville was stabbed to death while he, with two other prisoners, were cleaning common area of the super max prison where prisoners are otherwise confined to their cells some 23 hours a day.

**Texas:** On April 4, 2005, Ed Aparicio,

48, an Edinburgh district judge on the 92<sup>nd</sup> state district court shot and killed himself a few hours after resigning from the seat he had held for ten years. Aparicio had been the target of a federal corruption investigation and FBI agents had searched his home in January, 2004. In his resignation letter Aparicio said he was going to devote more time to his family.

**Turkey:** On December 26, 2005, former political prisoner Sergul Albayrak, 26, poured gasoline on herself and set herself on fire in a square in Istanbul to protest the country's maximum security prison system where torture, murder and other abuses and widespread and commonplace. She survived the ordeal with serious burns over a majority of her body. Albayrak had been imprisoned as a member of the Revolutionary people's Liberation Party-Front, a Marxist organization seeking social justice in Turkey.

**Washington:** On April 3, 2005, Lynn Johnson, 56, rammed her 1995 Nissan pathfinder into the doors of the Snohomish county jail after claiming she was being chased and needed to get into the jail. Johnson was promptly arrested at the scene, charged with malicious mischief and imprisoned. 

#### ATTENTION CALIFORNIA READERS!

*Prison Legal News* (PLN) is collecting information about the censorship of books, magazines, and newspapers in California prisons within the last two years.

- Do you know of any California Department of Corrections (CDC) facilities that prohibit prisoners in administrative segregation or reception centers from receiving books, magazines or newspapers sent by the publisher?
- Have you or anyone you know failed to receive copies of *PLN* or books shipped from *PLN* while in a CDC prison?
- Do you have any information about CDC prisons that require book vendors to be "approved vendors" before being permitted to deliver books to that facility?
- Do you have any information about CDC prisons that require books to be shipped with a special mailing label?

**If you answered yes to any of these questions, we would like to hear from you.**

Be specific as possible, and include the following information: your name and contact information, the CDC prison where the incident occurred, name of the censored publication, the date it was ordered, the date it was rejected, the reason it was rejected, and any other pertinent information. Please also send copies of the rules or policies at issue, as well as any grievances, appeals, rejection notices, or other documentation you may have. Thank you for your assistance.

**Send info to:**

**PLN, Attn: CA Censorship, 2400 NW 80<sup>th</sup> St. PMB 148, Seattle, WA 98117.**

# Los Angeles County Pays \$300,000 To Settle Public Defender's Legal Malpractice

On October 4, 2004, the Los Angeles County, California Claims Board agreed to pay \$300,000 to settle a claim by a prisoner for legal malpractice on the part of the Public Defender, wherein the prisoner had been incompetently advised to plead guilty to a "third strike" offense that had been committed before California's Three-Strikes law took effect.

Allen Rose was charged with assault with great bodily injury and making terrorist threats. He pled guilty to the assault charge and was sentenced to twelve years

state prison, a term calculated to include enhancement under the second strike consequences of California's Three-Strikes law. That enhancement meant doubling of the underlying term and doing 80% of that time before being paroled.

After approximately eight years, Rose discovered that he had been illegally sentenced under the Three-Strikes law because his crime had been committed prior to its enactment. The habeas corpus petition he filed with the sentencing court was granted and he was released after serving eight years, three months.

In evaluating the County's exposure on Rose's subsequent claim for over-detention of 5 years, 8 months, county counsel advised the Claims Board that they believed the over-detention was no more than one year, four months. Nonetheless, they estimated \$1 million in potential damages in a trial for emotional distress. Against this exposure,

counsel asked the Board of Supervisors for settlement authority of \$300,000, inclusive of Rose's damages, costs and attorney fees. County counsel noted that its own present defense expenses in the temporarily suspended trial were \$3,660 in attorney fees and \$2,680 in costs.

County counsel summarized the malpractice liability to the Board. "The Public Defender's Office acknowledges that the Deputy Public Defenders who handled Rose's case failed to recognize that the Three-Strikes law did not apply." In the Public Defenders Office's resultant Corrective Action Plan, it was noted that the Office had inadequate means to retain records on the 500,000 cases per year it handled, for which records must be retained indefinitely. The Office will seek funds to address such data storage and retrieval as a result of the Rose experience. See: *Rose v. County of Los Angeles*, Long Beach Superior Court case No. NC 034363. ■

## PLN Classifieds

**Resources for Prison Law Libraries**  
and Prison Activists 82pp. 2003  
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Contact about state and federal conditions of  
confinement affecting large numbers of pris-  
oners, and sexual assaults against prisoners.  
Write: ACLU National Prison Project, 733  
15th St. NW Ste 620, Washington, DC 20005.

### *Amnesty International*

Compile information about prisoner torture,  
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U.S. prisons distributed worldwide. Write:  
Amnesty International, 322 8th Ave., New  
York, NY 10001.

### *CorrectHELP*

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if you can't access programs or are not re-  
ceiving proper medication. Write:  
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wood, CA 90046. HIV Hotline 323-822-3838  
(Collect OK from prisoners).

### *Children of Incarcerated Parents*

Works to stop intergenerational crime. Good  
info in three areas: education, family reunifica-  
tion, and services for parents and children.  
Write: Center for Children of Incarcerated Par-  
ents, PO Box 41-286, Eagle Rock, CA 90041.

### *FAMM-gram*

Quarterly magazine of FAMM, that includes  
info about injustices resulting from manda-  
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#1400, Washington DC 20006.

### *Florida Prison Legal Perspectives*

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**Represent Yourself in Court: How to Prepare & Try a Winning Case**, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

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**The Blue Book of Grammar and Punctuation**, Jane Straus, 68 pages, 8-1/2 x 11. \$11.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

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**Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World**, by Danny Cox & John Hoover, 256 pages, \$14.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

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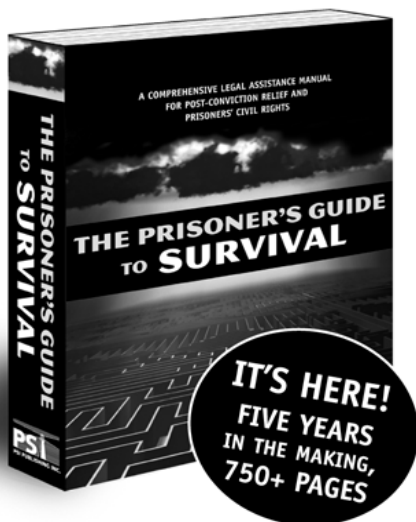
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# PRISON

## Legal News

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*Dedicated to Protecting Human Rights*

June 2005

### Shocked and Stunned: The Growing Use of Tasers

*by Anne Marie Cusac*

High-powered tasers are the new fad in law enforcement. They are becoming ever more prevalent even as their safety is increasingly in question. The proliferation of tasers in police departments across the country has led to unconventional uses. Among those hit by tasers are elderly people, children as young as one year old, people apparently suffering diabetic shock and epileptic seizures, people already bound in restraints, prisoners and hospital mental patients. Police used tasers against protesters at the 2003 Miami Free Trade Area of the Americas demonstration and against rowdy fans at the 2005 Fiesta Bowl. School systems are employing the weapons, with some officers carrying tasers even in elementary schools.

But doctors, reporters, and human rights groups have raised questions about the safety of the devices, which shoot two barbs designed to pierce the skin. The barbs are at the end of electrical wires carrying 50,000 volts. Last summer, *The New York Times* reported that at least fifty people had died within a short time after being hit with a taser. By April 1, 2005, when Amnesty International released its own report, that number had risen to more than 101. An earlier Amnesty report released in November, 2004, listed 70 taser related deaths. *[Editor's Note: The Amnesty International reports on tasers have been controversial among experts in police misconduct litigation because the vast majority of the deaths that AI claims are taser related are in fact caused by positional asphyxia, a common means by which police and jail employees have been killing citizens for decades. However, many victims of positional asphyxia are now being tasered prior to their deaths.]*

In February, 2005, Chicago police used the device against a fourteen-year-old boy, who went into cardiac arrest but survived, and a fifty-four-year-old man, who died. The Chicago Police Department, which had recently purchased 100 of the devices, decided not to distribute them until it had investigated the incidents.

The Department of Justice is conducting its own investigation into the safety of the devices. It has selected researchers at Wake Forest University and the University of Wisconsin to run independent taser studies.

Taser International, the biggest manufacturer of the weapon, denies that its product caused any deaths. The company insists that its products are safe. "The ADVANCED TASER has a lower injury rate than other non-lethal weapons and has had

no reported long-term, adverse after-effects," says the company website.

Early tasers, those used from the 1970s until the early 1990s, were lower wattage devices. "The original taser operated on only five watts and was followed by Air Taser on seven watts," says the November Amnesty International report.

William Bozeman, a medical doctor at the Wake Forest University department of emergency medicine, is investigating the safety of tasers for the Justice Department. "They've increased the amount of wattage that's delivered," he says. Above fourteen watts, he says, you get "electro-muscular disruption."

According to Taser International, that's the point. The "uncontrollable contraction of the muscle tissue" allows the taser "to physically debilitate a target regardless of pain tolerance or mental focus," says the company website. The tasers "directly tell the muscles what to do: contract until the target is in the fetal position on the ground."

Taser International introduced its "Air Taser" in 1994. Then, in 1998, "the company began Project Stealth: the development of the higher-power weapons to stop extremely combative, violent individuals who were impervious to non-lethal weapons." Project Stealth led to the M26, a taser with twenty-six watts of power.

In 2003, Taser International started selling an additional version of the twenty-six-watt taser, called the X26, which is light enough for police officers to carry at all times.

Police like tasers, sometimes for good reason. Greg Pashley, officer and spokesperson for the Portland Police Department, says the taser "is a tool that is effective in ending what could otherwise be a violent conflict without injuries. We're finding that time and again."

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PUBLISHER  
**Rollin Wright**

EDITOR  
**Paul Wright**

EXECUTIVE DIRECTOR  
**Donald W. Miniken Jr.**  
CIRCULATION MANAGER

COLUMNISTS  
**Mumia Abu Jamal, Denise Johnston, Daniel E. Manville & Kent Russell**

CONTRIBUTING WRITERS  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams, Mark Wilson & Robert Woodman**

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## **Shocked and Stunned (Cont)**

Many other officers add praise of their own. "It's increasingly a less lethal weapon of choice," says Scott Folsom, police chief at the University of Utah. "It doesn't have residual effects. It's proven to be a relatively safe and effective tool."

The Department of Justice is not the only governmental authority inquiring into tasers. On January 7, 2005, Taser International issued a press release that said the U.S. Securities and Exchange Commission was investigating what Taser International described as "company statements regarding the safety" of the company's products. Arizona's Attorney General Terry Goddard is also investigating their safety.

Taser International did not respond to repeated requests for an interview. It eventually allowed me to submit a list of questions, but it never answered them. The company did, however, send several press releases by e-mail. One of those press releases concerned stories by *Associated Press* and CBS about a study they said linked the taser to heart damage in pigs. The company disputed the news reports, saying, "TASER International is deeply concerned that *CBS News* and the *Associated Press* would publicize erroneous links between the TASER and heart damage conflicting with the study author's own assertions and relying solely on statistically insignificant readings."

In Portland, Oregon, police used a taser to shock a seventy-one-year-old blind woman four times on her back and once on the right breast. They also pepper-sprayed her and beat her.

On June 9, 2003, Eunice Crowder was home when a city official came to clean up her messy yard. When Crowder objected, he called the police. The *Portland Oregonian* reported that Crowder, who claimed to be hard of hearing, ignored police commands and tried to climb into a city truck to retrieve her possessions. The police claimed that when they tried to stop Crowder, she kicked at them. That's when they pepper-sprayed her and used the taser. Then they handcuffed Crowder's arms and yelled at her to stand up. "And she says, 'I bet you wouldn't yell at your mom like that,'" her lawyer, Ernest Warren Jr., told a radio station. One of the officers responded, "My mom is seventy-four." She said, "Well, I'm seventy-one."

In 2004, Crowder agreed to the \$145,000 settlement from the city of Portland. The police department admitted no wrongdoing.

"We don't have age restrictions" for

use of tasers, says Pashley of the Portland Police Department. But he says that policy is currently "under review."

Crowder wasn't the oldest person hit by a taser. The oldest one on record was seventy-five-year-old Margaret Kimbrell of Rock Hill, South Carolina, who describes the electricity from the taser as traveling "all over your chest like a big snake or something worming to try to get out." Kimbrell says, "I prayed, 'Lord, Jesus, make it quicker.' I was waiting to die so the pain would go away." Police used the taser on Kimbrell when she refused to leave a nursing home and, the police claimed, tried to hit an officer.

Some of Taser International's own materials suggest that shocking senior citizens may pose a danger. In its November report, Amnesty International cites a "certified lesson plan" from the company that warns it is "not advisable" to use its high-power devices on someone who is pregnant or elderly.

A study of available medical literature commissioned by Taser International and available on the company's website says that older people may have particular vulnerabilities. "Elderly subjects and those with preexisting heart disease are perhaps at an increased risk of cardiac complications and death following exposure to large quantities of electrical energy," wrote Anthony Bleetman of the University of Birmingham. "Since the elderly and heart patients don't often require to be subdued or controlled with a high level of force, then this is unlikely to pose a common problem."

Scientists and medical doctors have several theories, some of them conflicting, about how tasers affect bodies. Electricity near the heart can be dangerous, explains John Webster, professor emeritus in biomedical engineering at the University of Wisconsin, "because it might cause ventricular fibrillation." Webster and a team of University of Wisconsin researchers are investigating the taser's effect on the heart for the U.S. Department of Justice. While suggesting that the taser may be relatively safe for the heart, they speculate that an excess of potassium, produced when muscles contract violently but also produced by cocaine use, may be a key ingredient in the deaths associated with the device.

The Department of Justice study appears to have serious conflicts of interest. It turns out that Webster had hired four paid advisers for the DOJ sponsored taser study. One of those persons was Robert Stratbucker, a Nebraska physician who is also Taser International's medical consultant.

Within days of Stratbucker's participation being made public in *USA Today* in May, 2005, Webster removed him from the study. Webster lied to this reporter as when questioned he claimed he was picked by the DOJ to conduct the study because he was "independent." He said nothing of Stratbucker.

Others suggest that some deaths may be attributable to a combination of restricted breathing—due to being extremely excited, held forcibly on the ground, or strapped down—possibly in combination with the stress of enduring a taser shock. A 2001 article in the medical journal *The Lancet* notes that, in one study, cardiac arrests following incidents of taser use "occurred 5-25 min after the tasers were fired." This long after the shock, wrote the *Lancet* authors, "taser-induced muscle contractions would no longer be present, and one would expect the individuals to be relaxing and able to breathe in a way that would compensate" for the rise of acid levels in the blood. "Such may not be the case if the individuals remained agitated or were prevented from breathing freely."

Werner Spitz, a consultant forensic pathologist and the former Medical Examiner for Wayne and Macomb Counties in Michigan, says some deaths that occurred after suspects suffered both physical restraint and shocks with the taser may be due to the restricted breathing, also called positional asphyxia, rather than to the electrical shock. "Positional asphyxia is certainly much more common than many people want you to believe," says Spitz. However, he also believes that tasers can be dangerous and notes that there are "documented taser cases," in which coroners said the weapon contributed to the deaths. "The taser is not as innocuous as the taser company" suggests, says Spitz.

Many police departments say that use of tasers has reduced injuries and fatalities. The city of Phoenix saw a 54 percent drop in police shootings the year it began to use tasers. In 2003, Seattle, which also uses tasers, for the first time in fifteen years had no shootings that involved officers. That correlation has made tasers popular.

"As of October 2004, over 6,000 police departments in the United States and abroad had purchased TASER products," says the company website. "Over 200 police departments—including Phoenix, San Diego, Sacramento, Albuquerque, and Reno—have purchased TASER products for every patrol officer."

But Amnesty International says the tasers are making it too easy for the police to use excessive force. "Claims that tasers have led to a fall in police shootings need to be put

into perspective, given that shootings constitute only a small percentage of all police use of force," says the November report. "In contrast, taser usage has increased dramatically, becoming the most prevalent force option in some departments. While police shootings in Phoenix fell from twenty-eight to thirteen in 2003, tasers were used that year in 354 use-of-force incidents, far more than would be needed to avoid a resort to lethal force."

A number of the stories in the Amnesty report involve police use of tasers on people who were already restrained, including two who were strapped to gurneys and on their way to, or already inside, hospitals. In one such case in Pueblo, Colorado, "a police officer applied a taser to the man while he was restrained on a hospital bed, screaming for his wife," said Amnesty. Which supports claims that Tasers are being used primarily for torture and abuse rather than as a substitute for lethal force.

"That was a case where a rookie officer did not understand appropriate use of a taser," says Pueblo Police Chief Jim Billings. Although the incident involved a misunderstanding of policy, rather than maliciousness, he says, the officer received "a pretty heavy suspension."

Amnesty International wants the devices temporarily banned "pending a rigorous, independent, and impartial inquiry into their use and effects." The investigation should "be carried out by acknowledged medical, scientific, legal, and law enforcement experts who are independent of commercial and political interests in promoting such equipment," says the human rights organization.

In response to the Amnesty report, Taser International issued a press release accusing the human rights organization of being "out of step with law enforcement worldwide."

### **Tasers in Prisons and Jails**

Tasers started as a police tools, and police are still the chief users of the electroshock weapons. But, in addition to their spread into schools and hospitals, tasers are emerging in jails and prisons. In its November report, Amnesty cites information from Taser International indicating that "at least 1,000 U.S. jails and prisons have adopted the new generation M26 or X26 Tasers."

Prisons and jails lag behind police departments in taser purchases. Taser International says that won't be the situation for long. "Give us enough time, you'll have that attitude changed 180 degrees," Taser

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## Shocked and Stunned (Cont)

International spokesman Steve Tuttle told the *Associated Press*.

But some prisons aren't buying, in part because they feel the confrontational relationship that comes with a taser is more useful for police than for prison guards, who must build communication and relationships over time with the prisoners. Sam Sublett, security operations administrator for the Arizona Department of Corrections, in Taser International's home state, told the *Associated Press* that he was concerned tasers could pose a danger in a prison, saying, "We have a big concern about a Taser being taken away from someone and then used against them."

But because they can be shot from a distance, tasers may be useful in prison and jail situations, particularly dangerous ones like riots. In Monterey County, California, where prisoners took over their housing units in March of 2004, SWAT teams carrying tasers helped guards reclaim the jail.

Amnesty International has expressed concern about "reports that tasers have been used to gain compliance in the case of emotionally disturbed, intoxicated or uncooperative individuals in the booking section of jails." In one case, noted Amnesty, a prisoner who refused to open his hand for fingerprinting received a shock, as did another who would not "provide a blood sample." Deputies allegedly shocked a woman who "failed to remove an eyebrow ring."

The shockings don't stop after booking. In Clear Creek County, Colorado, says Amnesty, citing an incident report, a prisoner got a jolt when he threw a food tray to the floor of his cell and would not pick it up. At the jail in Greene County, Missouri, a group of prisoners filed a lawsuit in 2004 alleging numerous uses of, or threats to use, the taser "for failing to comply with orders." Both counties say that, because of the pending lawsuits, they cannot comment on the allegations.

In December, 2004, the *Los Angeles Times* reported that deputies shocked a man awaiting trial at the Orange County jail when he "draped a bed sheet around his neck," in what his lawyer told reporters was a bid for the guards' attention. Jon Fleischman, spokesman for the Orange County Jail, confirms that deputies did use a taser on the prisoner and that the action was "within proper regulations in the department." The Orange County jail, says Fleischman, is

mostly concrete. "In general, if you've got a choice between taking an inmate" to the cell floor and using a taser that, Fleischman says, "has a zero chance of causing permanent damage," a taser is preferable to "the laying on of hands." Tasers, he says, "apply a very minimal charge for a short time. My question is, what's the alternative?"

But the easy availability of the devices may lead to misuse. In March, 2005, a police officer resigned after he used a taser on an Escambia County, Florida, jail prisoner. "He pulled the taser out when the individual wouldn't get out of the chair," says Escambia County assistant Chief Chip Simmons. The officer moved out of range of the video cameras during the shock, but the sound of the taser firing was noticeable on an audiotape. Simmons says that the county conducted an internal affairs investigation on the incident and determined that the officer tased the prisoner unnecessarily. Pensacola police chief John Mathis "was going to recommend that he be terminated," says Simmons. "He resigned prior to that."

In response to the incident, Simmons conducted a review of taser use in the police force and made recommendations, which have since been incorporated into department policy. Among other stipulations, the changes would prohibit use of tasers in corrections facilities, require that the weapons be used only for active (rather than passive) resistance, and limit use of the devices on children, elderly people, and people with serious medical conditions.

In February, 2005, James Telb, Sheriff of Lucas, County, Ohio, announced that his department would no longer use tasers. The department was responding to the death of Jeffrey Turner, who was shocked nine times, four of those from guards at the county jail. An early autopsy on Turner's death was inconclusive. Telb did not respond to requests for comment.

But autopsies of some deaths following taser shocks delivered at jails did conclude that the taser was partly at fault. Local news reports on one such incident say that, in mid-August, 2004, William Malcolm Teasley, a prisoner at the detention center in Anderson County, South Carolina, rushed up to guards and attempted to use a pen as a weapon. "The subject, who was acting violently, began to assault the officers and was restrained with a Taser," says Robert Daly, Director of the Anderson County Detention Center. Teasley collapsed during the shock and died at a hospital. "The cause of death was cardiac arrhythmia,"

says Daly. The subject had serious cardiac and vascular disease that placed him at risk for arrhythmia." The county's Deputy Coroner told a reporter from the *Greenville News* that the shock, together with Teasley's heart disease, helped cause his death.

And at the Monroe County, Indiana jail, in November 2003, a guard shocked a handcuffed prisoner named James Borden. Borden died while still in the jail's booking room. "A pathologist determined Borden's death resulted from an enlarged heart, pharmacological intoxication and electric shock," reported the *Associated Press*. "An autopsy indicated that he had received six electric shocks." Monroe County Sheriff Stephen E. Sharp declined to comment, saying, "We've got pending litigation on this case."

Amnesty International has also noted numerous reports of people receiving shocks while restrained or during transport to and from prisons and jails. In some cases, notes the human rights organization in its November report, "individuals have been shot with taser darts, then threatened or stunned with repeated jolts of electricity while the darts remain in place during transportation or custody."

Tasers have made an appearance not only in our domestic prisons and jails but at military detention facilities in Iraq. In December, 2004, the Pentagon announced that the U.S. military was disciplining four Special Operations personnel because they had physically mistreated detainees at an interrogation camp in Baghdad. "Based on the results of this specific investigation, four individuals received administration punishments for excessive use of force," said Pentagon spokesman Lawrence Di Rita, according to a *New York Times* report. "In particular, I'm advised that it was the unauthorized use of Taser."

The abuse became public after the release of a letter by Vice Admiral Lowell J. Jacoby of the Defense Intelligence Agency. In that letter, Jacoby wrote, among other allegations of abuse, that officials with his agency had seen prisoners who had burn marks along their backs.

### Tasering Children

On December 10, 2004, police in Pembroke Pines, Florida, used a taser on a twelve-year-old boy who tried to stab another child with a pencil and then became combative with police. Commander Ken Hall, public information officer for the Pembroke Pines police, says the case "was looked at very closely, obviously because of the controversial nature" and found to be "within the parameters of our policy."

In November, 2004, a Miami-Dade officer shocked a twelve-year-old Florida girl who was playing hooky. At the moment he shocked her, she was running from him. Although Miami-Dade police did at the time consider tasers to be an appropriate weapon for use on children, the director of the Miami-Dade Police Department has raised questions about the event. "It was his opinion that that incident may not have been within our guidelines" because the girl was not posing a threat to herself or others, says Detective Juan DelCastillo, who handles media relations for the Miami-Dade police. The director is reviewing the incident.

Back in May, 2004, a nine-year-old runaway girl in Tucson, who was already handcuffed by police and sitting in a police vehicle, was shocked with a taser when she began to kick at the car and bang her head. The Pima County attorney general's office conducted an investigation of the incident and decided not to bring criminal charges against the officer who used the taser. "In all likelihood, the use of the taser prevented" the girl "from injuring herself any further," wrote David L. Berkman, the chief criminal deputy, in explaining his decision.

Even one-year-olds have been shocked, according to records Taser International supplied to the *Associated Press*. The company also told the *San Jose Mercury News* that its taser can be used safely on toddlers.

In October, 2004, in a widely reported incident, police in Miami shocked a six-year-old. The officers were dispatched to an elementary school where they encountered "a mentally disturbed student bleeding and holding a piece of glass," says the police report. "Upon their arrival, the officers were confronted by a highly agitated and disturbed male bleeding and smearing blood on his face while clutching a piece of glass in his left hand." The officers tried to talk the boy into giving up the glass and tossing it into a wastebasket. The boy refused and "attempted to cut his leg with the shard of glass." The report says that officers then shocked the boy to keep him from hurting himself more extensively. The boy "dropped the glass and was subdued without further incident."

The officers shot the boy with the taser "for his own safety and to stop him from hurting himself," says DelCastillo of the Miami-Dade police. As for the appropriate-

ness of shocking a six-year-old, DelCastillo says, "Our understanding is that there has been research" and that the taser causes "no after-effects." He says there is "no reason that would cause harm to someone younger than an adult."

But the research is not nearly so clear-cut.

A scientist who tested some of the early tasers for the Canadian government recommended that the government ban the devices. Andrew Podgorski says his tests showed the devices could cause death. He says that children could be especially vulnerable.

The use of a taser on the six-year-old disturbed Rudolph Crew, superintendent of Miami-Dade schools. In a November 16, 2004, letter to the police department, Crew wrote, "While I acknowledge the need of law enforcement officers on occasion to subdue and to restrain members of the public, I believe that certain tactics should never be used in dealing with young children—particularly within a school." Crew recognized that the student "was agitated and injured." But, he said, "Police officers have dealt with other children in this condition without resorting to a taser." Crew requested that the police

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## Shocked and Stunned (Cont)

department “refrain from deploying or discharging tasers against elementary school students in Miami-Dade County public schools” and that officers use the taser only as a “last resort” on older students.

Tony Hill, the Democratic whip in the Florida State Senate, was so concerned that he sponsored a bill that would prohibit schools from using tasers on schoolchildren. “Every day here in Florida,” says Hill, there are reports of “use of a taser on someone.” But, he says, it was a group of tasings at schools near Palatka, Florida, that first made him wonder about the appropriateness of the weapon. “They all were African American kids,” he says. “That raised a red flag.”

In early January, 2004, the Miami-Dade

police revised their guidelines. The new policy “requires officers to consider factors such as age, size, and weight,” in addition to other considerations, reported the *Associated Press*.

Crew and Hill are bucking a trend: the increasingly common use of tasers against students. Taser International says that 32 percent of the police departments it interviewed include tasers in local school systems, reported *The Birmingham News*.

In Birmingham, Alabama, officers armed with tasers will soon patrol the hallways of many schools. Superintendent Wayman Shiver says he’s OK with that. “You have got to have something that the children fear,” says Shiver, who has heard about people who were injured or who died after being hit with a taser. “We have to be in a position to control these schools by

whatever means possible.”

For Virginia Volker, a Birmingham School Board member, “whatever means possible,” is too much. “It’s easier for systems to say, ‘Zap them, throw them out,’ something technical, when there’s not a technical fix,” she says. “It’s a human problem.”

Like Shiver, Volker also talks about problems with fighting in the schools, but she opposes the taser. “It’s treating the children as criminals,” she says. “It doesn’t address why the children are acting out.”

In the South, electronic shocking devices have a disturbing precedent, says Volker. Back in the time of the civil rights marches, sometimes the police department would use cattle prods on protesters. “When I think of the taser,” she says, “I think of that.”

Dexter Massey is president of the PTA at Parker High School in Birmingham. He says he took a taser instruction course from the police academy, but he still has doubts about the device when it comes to kids. The trainers, he said, told him that the average shock from the taser is three seconds. “Who’s to say how many seconds it takes to die?” he asks. “Got my drift?”

### Mass Market for Tasers

Taser International, which features the slogan “Saving Lives Every Day” on its website, is also hawking tasers directly to consumers.

“Choose your citizen taser device,” says the company. Calling them “home self-defense systems,” the company says tasers are a “safe and effective defense” that is “easy to use” and has “no aftereffects or contamination.” The company offers three different consumer models, including one with a fifteen-foot range. The police version, the M-26, has up to a twenty-one-foot range. So, presumably, in a taser duel between a police officer and a consumer, the officer would win.

On January 26, 2005, Jim Weiers, House Speaker in the Arizona legislature, announced that he would propose a bill that would give police officers—and citizens—the upper hand against consumers who buy the tasers. It would allow the state’s “police officers and ordinary citizens the use of lethal force in confronting people who threaten them with remote stun guns such as tasers,” reported the *Associated Press*.

The consumer models sell for \$399.95, \$599.95, or \$999.00. ■

*[A shorter version of this article originally appeared in The Progressive. Used here with permission.]*

## \$150,000 for Inadequate Oregon Sex Offender Supervision Resulting in Death of Child

On July 15, 2004, the Multnomah County, Oregon, Board of Commissioners voted unanimously to pay \$150,000 to settle a wrongful death action filed by the family of a teenage girl who was raped and murdered by a parolee.

On December 13, 2001, 14-year-old Melissa Bittler was found raped and strangled in a neighbor’s backyard. Her death was later tied, through DNA evidence, to an unsolved 1997 sexual assault.

In May, 2002, Ladon Stephens was arrested for sexually assaulting his girlfriend’s cousin. He was subsequently linked, via DNA evidence, to the Bittler murder and the rapes of three teenage girls in 1997. At the time of each of those crimes, Stephens was on parole and was receiving sex offender treatment for the 1989 attempted kidnappings of two Portland girls.

Stephens was ultimately convicted of 30 offenses related to the Bittler murder and four other rapes. He was sentenced to life imprisonment without the possibility of parole and an additional 360 years, as a dangerous offender.

On December 12, 2003, Melissa’s family filed a wrongful death action in state court, seeking general damages of \$8,000 for funeral and burial expenses, and \$500,000 for pain and suffering. The suit alleged that parole officers were inadequately trained to supervise Stephens, failed to adequately supervise him, and failed to act when Stephens

did not keep scheduled appointments.

Some of the claims were based upon the County’s internal review of its supervision of Stephens. “The number of mistakes the county made is just staggering,” said Brian Williams, a Portland attorney representing one of Stephen’s other victims. “They’re glaring.” Joanne Fuller, director of the county’s Department of Community Justice allegedly admitted to the Bittlers that her agency “blew it.”

Bittler attorney Steven Scharfstein said the Bittlers were not motivated by money. “They just want to get the attention of the department that they must make same changes and punish people who screwed up,” he said.

Before approving the \$150,000 settlement, Commissioners heard testimony from Fuller about changes the county had made in response to the Stephens case. “We’re extremely committed to taking the appropriate steps to have the best system in place to monitor sex offenders,” Fuller said. “We don’t want this to happen again.”

In addition to the Bittler settlement, the Commissioners approved paying \$150,000 to settle a suit brought by a woman who was raped and left for dead by Stephens. A suit by a third victim, seeking \$520,000 was still pending. ■

Source: *The Oregonian*.



# Audit Finds Colorado DOC Loses Large Quantities of Drugs

by Matthew T. Clarke

A \$436,484 shortage in the Colorado Department of Corrections's pharmacy budget in 2003 prompted an internal audit. The audit found that close to a half-million dollars worth of drugs have been lost by the prison system.

The DOC Pharmacy dispenses \$8 million in drugs to nearly 20,000 prisoners annually. The audit found large errors in inventory records for many drugs, including expensive anti-psychotic medications. 20 of 22 drugs audited showed inventory discrepancies with some showing amounts above stock levels while others showed amounts below stock levels. The shortfalls for Zyprexa and Risperdal, two anti-psychotic drugs, totaled 35,000 doses valued at \$195,419.

Prison officials believe that sloppy bookkeeping and an outdated inventory system are at fault.

"We have no allegations of Schedule I or Schedule II narcotics, psychotropics, things like that are being diverted. There's no evidence of that," according to Mike Rulo, DOC Inspector General. But with no adequate means of record keeping, who knows.

Barry Pardus, DOC Director of Clinical Services, also ruled out fraud or theft stating that: the problem was "nothing that sensational."

To the contrary, inappropriate blister packaging, combined with arcane regulations may be partially to blame for the problem. The DOC central pharmacy in Denver and satellite facility in Pueblo often send prescription medications in 30-dose or 60-dose blister packs, even if fewer doses were prescribed. Prison medical staff punch out and dispose of the extra doses or return them to the pharmacy. Either way results in the loss of the extra doses without any record having been made of their disposal.

The audit reported that drug returns to the Pueblo pharmacy in 2003 "filled a large Dell computer box." However, drug returns from Sterling Correctional Facility alone in the four months following the audit filled 17 boxes. Most of the returned drugs may not be reissued due to state and federal regulations.

Outdated inventory methods also cause errors. Pharmacists inventory shelves manually, even though computer automated equipment has been available, according to the audit. The audit blamed a reluctance on the part of DOC Chief Pharmacist Doug

Massingill to use the latest technology for the failure to adopt available automated inventory systems. Pueblo District Attorney Gus Sandstorm is investigating Massingill for failing to disclose a conflict of interest when he purchased \$60,000 in ribovirus, a drug used to treat hepatitis C, from a pharmacy in Colorado Springs that employed him. However, Rulo says that the failure was probably merely an oversight as Massingill apparently did not intend to make any money on the deal. Whether he actually did or not was not disclosed.

To sum it up, prison officials think they simply lost the drugs. Alas, they don't have good enough records to prove it.

"There's very little if any inventory control. There's no clear process in place that tracks a drug through our system, from the time we receive it in our front door to the time it gets dispensed in the prison," said Pardus.

Interestingly, this is not the first time the DOC asked for extra funds to supplement its pharmacy budget.

"We've gone in and asked for supplemental appropriations for pharmacy for a number of years," admitted Pardus.

One has to wonder how long the missing drugs have been being not stolen. ■

Source: *Rocky Mountain News*.

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# \$1.45 Million To Be Paid In Death Of Florida Juvenile Prisoner

by Michael Rigby

The Florida Department of Juvenile Justice (DJJ) will pay \$1.45 million to settle a federal lawsuit arising from the 2003 death of Omar Paisley at the Miami-Dade Regional Juvenile Detention Center, the *Miami Herald* reported on November 2, 2004. A separate settlement was reached with Miami Children's Hospital, the prison's medical provider, but the amount of that settlement was not disclosed. Lorenzo Williams, the family's attorney, said only that it is "substantially" more than what the state is paying.

Paisley's story is one of unbelievable neglect and indifference. For three days Paisley, 17, begged his captors at Miami-Dade for help. His pleas fell on deaf ears, however, as guards and medical personnel callously watched his health fade. Uncared for and untreated, Paisley suffered an agonizing death from a ruptured appendix—a death the lawsuit called "entirely preventable."

Paisley awoke on the morning of June 7, 2003, seriously ill and in pain. According to the lawsuit, Paisley informed guard Johnny Byrd of his illness and submitted a sick call request stating, "my stomach hurts really bad. I don't know what to do. I cand (sic) sleep."

At 12:10 p.m., prison Nurse Gaile Loperfido was notified that Paisley was seriously ill and unable to eat, yet she waited roughly two hours before responding. Even then Loperfido failed to refer Paisley to a physician or fill out the necessary paperwork. That afternoon Dr. Lloyd Miller also paid a routine visit to Paisley. Miller, who was conducting a psychiatric check up,

noted that Paisley was sick and in bed, but he too failed to take action.

Paisley's condition continued to deteriorate over the next two days. On June 8, Byrd saw Paisley "rolled up into a ball, sweating profusely and walking painfully to the shower," the lawsuit contended. Moreover, other juveniles told Byrd, as they had the day before, that Paisley was vomiting and that his sheets were stained with diarrhea. Unmoved, Byrd decided against informing medical and instead told Paisley to "sweat it out."

By June 9, Paisley was so ill he could barely move. Helpless, Paisley languished in bed amid his own urine and feces. As was the case the previous two days, a number of guards and medical personnel were aware of Paisley's condition but did little or nothing to help him. A case in point is guard supervisor Jack Harrington who addressed Paisley's need for emergency medical care by telling the youth to "suck it up."

Early that afternoon prison Nurse Dianne Demeritte was informed that Paisley urgently needed medical attention. But like her coworker. Loperfido, nurse Demeritte did not respond until hours later. When she did check on Paisley at 8:15 p.m., she noticed that he could barely move and was delusional. All Demeritte did, however, was authorize Paisley's transfer to the hospital while derisively stating that he did not want to go near him because she might contaminate her children at home. After commenting that "there's nothing wrong with his ass," Demeritte then immediately left her shift at around 8:30 p.m. (which was over an hour early), making no attempt to supervising Paisley's transfer.

Just before 9:00 p.m., guard supervisor Lawrence Corbett noticed that Paisley was slumped over in his chair and losing consciousness. Lawrence checked Paisley and found that his pulse was extremely weak and that he was not breathing. Unconscionably, though Lawrence and at least four other guards present were fully trained in first aid and CPR, they made no attempt to provide emergency medical care to Paisley, the lawsuit contended.

What's more, guards were not permitted to call 911 pursuant to Miami-Dade policy and were subject to disciplinary action if they did. In fact, several years earlier, Miami-Dade had arranged for 911 calls from Paisley's housing area to be blocked.

Without a nurse on the unit and the guards standing idly by, Paisley slid into unconsciousness and lost his pulse. Only then was he transported to Jackson Memorial Hospital. But it was too late. Paisley was pronounced dead on arrival at 9:58 p.m. from a ruptured appendix.

According to the resulting 42 U.S.C. § 1983 lawsuit, which was filed in the U.S. District Court for the Southern District of Florida, Miami-Dade "had been warned for years about the lack of proper health care at it's detention center." One DJJ health care expert, Jane B. McNeele, confirmed this when she testified before a state legislative panel investigating Paisley's death.

McNeele called medical care at Miami-Dade "a train wreck" and said she had been cautioning her superiors about problems at the prison for nine years.

In the wake of Paisley's death, roughly 25 Miami-Dade personnel were fired or resigned. The fired included Secretary W.G. Bankhead and top prison administrators George LaFlam and Victor Davidson. (Davidson, it was later revealed, had been arrested four times and received 11 reprimands since he was hired in 1978).

Loperfido and Demeritte, both of whom falsified Paisley's medical records following his death, were each criminally charged with aggravated manslaughter and third degree murder. Their cases are pending.

Attorney Lorenzo Williams said he hopes the settlement will foster changes in the way medical care is handled at the prison. "Hopefully, this lawsuit will cause the Miami Juvenile Detention Center to clean up its act, and it will cause Miami Children's Hospital to recognize that, if you accept the responsibility of providing services to detainees, you have to give that facility first-class, competent medical service at all times."

The family was represented by attorneys Lorenzo Williams and Paul McMahon of the Fort Pierce, Florida, law firm Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando. See: *Williams v. Variety Children's Hospital*, USDC SD FL, Case No. 04-22079-CIV-UNGARO-BENAGES. ■

Additional source: *The Miami Herald*

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## New York Prisoner Awarded \$160,000 for Lost Testicle

A New York Court of Claims has awarded a former Collins Correctional Facility prisoner \$160,000 in a medical malpractice suit.

On November 22, 1998, Robert Hicks experienced pain in the area of his left waist. He said he laid on his bed, went to the restroom, and then returned to his dormitory, where he laid down and was unable to move. After Hicks noticed his left testicle was swollen, guards called the infirmary three times that afternoon, reporting Hicks was in pain, had blood in his urine, experienced pain when he urinated, and was constipated.

After he was finally assisted to the infirmary, Hicks told a nurse his left testicle was the size of a softball. She gave Hicks the prison cure all: Tylenol with codeine, which he vomited. Hicks was kept for overnight observation. A state doctor diagnosed Hicks with a gastrointestinal condition, which seemed to resolve itself after he had a bowel movement. Hicks was released from the infirmary the morning of November 23.

On November 24, Hicks returned to the infirmary with similar complaints as before. Between then and November 27, Hicks saw the doctor three times. His treatment for his enlarged left testicle was a scrotal support, stool softener, and instructions to soak in warm water. After the doctor noted Hicks' testicle was the size of a softball on November 27, he was sent to a local hospital.

Upon arrival at the hospital, it was determined Hicks had suffered a left testicular torsion and infarction, which is a twisting of the testicle. Hicks underwent an orchiectomy – surgical removal of the left testicle. A right orchiopexy, or tying of the right testicle to the scrotum to prevent torsion, was also performed.

Hicks testified at trial that upon return to prison from the hospital, he was unable to walk for some time. After release from prison, he has been only able to perform limited activities with his daughter, he cannot physically lift her, he cannot stand or walk for extended periods of time, his sex drive has decreased, and he feels a "pulling" where his right testicle was attached to the scrotum.

Hicks' expert witness testified Hicks suffered a visibly deformed scrotal sac;

feels tenderness in the left groin, and has some swelling in the right testicle. Hicks also appears to be depressed and complains of sexual dysfunction, the expert testified. The court of claims held the state doctors departed from reasonable care in failing to seek immediate evaluation on November 22. Moreover, had the condition been treated in the first six to eight hours after Hicks began

experiencing symptoms, the testicle might have been saved. The court awarded Hicks \$100,000 for pre-operation pain and suffering; \$50,000 for the loss of his left testicle; and \$10,000 for psychological damages. Hicks was represented by Edwin T. Mulhern of Franklin Square, New York. See: *Hicks v. New York*, New York Court of Claims, Case No. 99554. ■

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## From the Editor

by Paul Wright

I would like to thank everyone who has written, called or e mailed us with favorable comments about last month's 15<sup>th</sup> anniversary issue of *PLN*. It was quite the milestone and one which we are very proud of. We hope the next decade of publishing allows us to both expand the size and further improve the quality of *PLN*. This issue of *PLN* also includes comments from supporters about *PLN* that should have been in the anniversary issue but which were inadvertently excluded. But, better late than never.

Many readers have commented that they liked the 56 pages of the anniversary issue. We were able to run 56 pages thanks to the additional ads in the issue. We remain committed to maintaining a ratio of 25% ads to 75% editorial content. As our advertising content increases, so too will our overall size so we can bring readers more news and information.

Advocacy and outreach on prisoner rights issues remain another important part of the work we do at *PLN*. At least once a month I give presentations on prisoner rights issues and abuse within American prisons and jails around the country. In March I spoke at the University of Ottawa in Canada conference on Prison and Penal Transformation. Primarily criminologists from Canada, Europe and Australia, my presentation was on "Writing as Resistance," the role of prisoner publications as sources of news and organizing. Most exciting is being able to address students, in this case some 125 students enrolled in a penal abolition class taught by Robert Gaucher, a long time friend and supporter of *PLN* and the prison press.

At the conclusion of my presentation to the students about the state of human rights in American prisons and jails one student

asked me what they, as Canadians, could do to help improve the situation. My response was that as foreign citizens one thing they could do was to deny the United States government any legitimacy on the issue of human rights in any international forum where the United States dares to show its face. As long as the US maintains its concentration camps in Guantanamo, Abu Ghraib, Bagram Air Force base and the countless unknown CIA torture centers, as long as the US imprisons over 2 million people in overcrowded, violent and subhuman conditions, and as long as the US does not comply with international treaties to which it is a signatory on the matter of human rights for American prisoners, the world community should deny the US any international forum to criticize any other government or regime until it gets its own house in order.

This was well received. It also goes to the concept that people imprisoned in American detention facilities, whether here in the US or in military prisons in occupied countries elsewhere, have fundamental human rights which must be respected. Alas, for many people, especially those in government, this is a pretty revolutionary concept.


During the symposium in Ottawa I chatted with an official from the Correctional Services of Canada, the Canadian federal prison system which houses all prisoners sentenced to more than 2 years imprisonment. We were discussing disease prevention strategies and he was very enthusiastic about the Canadian prison system's needle exchange program and condom distribution policy and mentioned they had just opened one or two tattoo parlors in maximum security prisons on a trial basis to determine their efficacy in preventing the spread of blood borne diseases. Since I have at least four friends that I know of who have contracted Hepatitis C through jailhouse tattoos, this seems very reasonable. Canadian prisoners also have family visiting programs with spouses and family members. I asked if there was any political opposition to these programs and he said there was some, mostly from English speaking politicians from Western Canada who liked to emulate US politicians but that for the most part these were seen as realistic, successful and pragmatic ways to deal with important public safety issues.

Hearing a number of criminologists speak about their research I had to ask, at the conclusion, if anyone in the field internationally took US practices on prisons and crime

seriously. A professor from Australia said professionals did not and generally viewed American prison and crime policies as exactly what no one should do if they wish to control crime, but he said the problem was also political and to the extent the US dominates so much of the world politically and militarily, so too in the way of criminal justice policy. He used as an example the case of a governor from an Australian state who came to the US, visiting New York City and the Texas prison system and returned to Australia as a big advocate of "zero tolerance" policing and draconian prisons. The public loved it even when the local police chiefs, prison wardens and others in the criminal justice industry in Australia voiced their opposition and pointed out the failure of these policies in the US in terms of controlling crime and rehabilitating prisoners. Significantly though, the measures were not adopted.

What struck me about this is how little most Americans know about how out of synch the US is with the rest of the world on criminal justice policies. Many people know the US and Japan are the only two industrialized capitalist countries that have and use the death penalty. Very few, however, know that the US is one of the very few countries in the world which sentences people to life in prison without parole. US sentencing practices are far harsher than those of every other industrialized country in the world and much of the developing world as well. With 5% of the world's population, the US imprisons 25% of the world's prisoners. In conditions that are not only harsher, but deliberately designed to make people worse when they emerge from prison than when they go in. While other countries may have worse prisons, they do so not out of policy but because they are poor and lack the resources to do better. I was also the sole American attending this conference.

I would like to thank our readers who send us news clippings and information about the cases they win. Please don't send us copies of pleadings for cases when they are filed. If and when you win a settlement or a verdict on the merits please send us the details so we can report them in *PLN*.

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# Private Youth Prison Gouging Michigan Taxpayers

Five years after beginning its first flirtation with for-profit prisons, Michigan is learning an invaluable lesson: Despite the hype, private prisons are not cost-effective.

In the months following its 1999 opening, the Michigan Youth Correctional Facility (MYCF) was criticized over assaults, staff turnover, and suicide attempts. Now critics contend that MYCF, coarsely referred to as the "punk prison," is gouging taxpayers for high security costs when the majority of its young prisoners could be housed more cheaply in lower security prisons. MYCF is operated by the Geo Group Inc., formerly known as Wackenhut Corrections Corporation [see *PLN*, June 2004, pg. 16].

Approved in 1996 during the height of the "get tough on crime" craze, MYCF was part of a juvenile justice reform package that promised "adult time for adult crime." The prison comes complete with two adult-sized gun towers and an armed perimeter patrol.

But when the hordes of young "superpredators" propagandized in the 1990s never materialized, says Elizabeth Arnovits, executive director of the Michigan Council on Crime and Delinquency, the state simply decided to fill the prison with other kids. The numbers bear this out. In late March 2004, two-thirds of the prisoners were low security (levels 1 and 2) while only a third were high security (levels 4 and 5). MYCF warden Frank Elo confirmed this was the case. "The operation here security wise, is maximum security. Operationally, we probably operate more in line as a Level 2," Elo said.

Arnovits decried the practice of using a maximum security prison to house low level prisoners. "Why are we paying this private provider for a Level 5 facility, when in fact they are having predominantly minor offenders who don't need that kind of security?" she said. "The few that are [Level 5] that have committed terrible crimes need to be in a special place, but it doesn't have to be this hugely expensive prison." To operate the 480-bed prison in 2005, Michigan will spend \$19.27 million.

Part of the rationale of the juvenile justice reform package was to remove so-called hard-core juveniles from expensive state-run treatment facilities to a more retributive environment. But the wrong kids are going to the high security MYCF, said Jon Cisky, a former state senator who worked on the legislation. "A kid in on a [breaking and entering] doesn't belong in a maximum security prison," said Cisky, who is now a criminal justice professor at Saginaw Valley State University. Cisky went on to say that counties have an incentive to remove under age prisoners from juvenile prisons, where local jurisdictions bear part of the cost, and place them in the adult system, where the state foots the bill entirely.


When MYCF opened, the Michigan Department of Corrections (DOC) committed to a 20 year lease. In 2003, the DOC extended the contract an additional four years, estimating savings of \$3.4 million a year to the Michigan Civil Service Commission. However, the projected savings are based on what it costs the state to operate a maximum security prison. When classifications levels are considered, the savings dwindle to \$420,000 a year. Barry Wickman, the MDOC's chief financial officer, says the daily rate of \$75.81 paid to the Geo Group is still cheaper than the \$78.21 it costs the state to run a multi-level prison.

But other comparisons show no savings at lower security levels. For instance, the daily cost of housing level 2 prisoners under age 25 at the Handlon Correctional Facility is only

\$43.69. Even after adding \$21.20 per day, the extra cost Wickman says the Geo Group bears for workers comp, health care, and education, the daily rate is still just \$64.89 per prisoner—far less than the \$75.81 per day it costs to house prisoners at MYCF. And that's without taking into account the \$5.6 million a year the state shells out to lease the prison.

To justify MYCF's enormous cost, warden Elo points to programming. Unlike state maximum security prisons where prisoners remain in their cells for most of the day, says Elo, youths at MYCF are active in therapeutic and educational programs all day long. But critics disagree. Deborah LaBelle, an Ann Arbor human rights attorney, said the programming at MYCF appears skimpier than in state-run prisons. LaBelle has interviewed prisoners who spend only 90 minutes a day in school. "I think that the programming here is ... thinner than at many other adult facilities," she said.

State-run prisons are undoubtedly costly and problematic. But privatization is no panacea. Those who stand to profit have a strong incentive to skew the numbers and hide expenses—something Michigan legislators should remember the next time they consider the issue of privatization.

Despite numerous attempts in the 2005 legislative session to close the youth prison, or return it to state control, Geo Corp. has managed to retain control of the prison and keep its profits coming. 

Source: *mlive.com*

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# Habeas Hints

by Kent A. Russell

This column is intended to provide “habeas hints” to prisoners who are handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is post-conviction practice under the AEDPA, the 1996 law which now governs habeas corpus practice throughout the U.S.

## EXHAUSTION UPDATE

### “Stay and Abeyance”

“Stay and abeyance” is the legal name for what happens when the federal court holds onto (stays and abets) a federal habeas petition while the petitioner goes back to state court to exhaust one or more unexhausted claims that were included in the petition. In this column we will look at this important means for timely exhausting habeas corpus claims, and I’ll give you some “Habeas Hints” for how to most effectively employ stay and abeyance in the wake of the U.S. Supreme Court’s recent decision in *Rhines v. Weber*, 124 S.Ct. 1528 (2005).

A “mixed” habeas petition is one which contains at least one exhausted claim and one or more unexhausted claims. A federal court has no power to hear a mixed petition, and must either (1) dismiss the entire petition without prejudice (meaning you can file again in federal court without running into the successive petition bar); or (2) allow the petitioner to dismiss the unexhausted claims and go forward in federal court with an amended petition containing only the exhausted claims. Making either one of these choices creates a dilemma for the federal petitioner: The problem with alternative (2) is that it requires the permanent dismissal of unexhausted claims (or unexhausted facts within otherwise exhausted claims) which might, upon exhaustion, have a better chance of success than the already exhausted claims. The problem with (1) is that, although the dismissal is without prejudice, the time spent in federal court prior to the dismissal is not tolled against the AEDPA statute of limitations. Usually, by the time a federal court gets around to issuing a ruling forcing the petitioner deal with a mixed petition, whatever time remained on the statute of limitations will have been used up, so that it will be impossible to go back to state court, exhaust, and come back to federal court without the new federal petition being barred by the statute of limitations.

In an effort to deal with the dilemma

posed above, lower federal courts began offering the petitioner “stay and abeyance” as a third alternative: allowing the petitioner to dismiss the unexhausted claims but *staying* the federal petition instead of dismissing it while the petitioner returned to state court to exhaust his un-exhausted claims. See, e.g., *Kelly v. Small*, 315 F.3d 1063 (9<sup>th</sup> Cir. 2003). Stay and abeyance allows the petitioner to have his cake and eat it, too: The petitioner gets to return to state court to exhaust the un-exhausted claims, but as long as s/he files the state exhaustion petition promptly after dismissing his un-exhausted claims and promptly returns to federal court after exhaustion is completed, the original federal petition, which has been stayed, will be there waiting, and the petitioner can simply move to amend the stayed petition to add the newly exhausted claims.

Given the obvious benefits of the stay and abeyance alternative, most petitioners who were given the option of stay and abeyance elected to use it. Meanwhile, several circuit courts began holding that it was error for a district court *not* to offer stay and abeyance as an alternative to dismissal. As a result, some petitioners began to abuse stay and abeyance by dragging their feet on exhausting claims in state court until just before the AEDPA statute of limitations was about to run, and then falling back on stay and abeyance as a means of taking several more months or even years to exhaust habeas claims that, with due diligence, could have been exhausted *before* the federal petition was filed in the first place. This potential for abuse caused the U.S. Supreme Court to grant review.

In *Rhines*, a federal petitioner had filed his petition several months ahead of the statute of limitations, but by the time the district court got around to finding that it was a mixed petition, all of the remaining time on the AEDPA statute of limitations had been used up. Hence, and because the petitioner did not want to dismiss his un-exhausted claims, the district court granted stay and abeyance of the federal petition while the petitioner returned to state court to complete exhaustion, allowing him to return to federal court after state exhaustion was completed and staying the federal petition in the meantime. Nevertheless, the Eighth Circuit, which had previously held that stay and abeyance was only authorized in “truly exceptional circum-

stances”, wiped out the stay and ordered the petitioner to return to district court to pursue his only remaining option – to dismiss his un-exhausted claims and proceed without them. The petitioner sought review in the Supreme Court, and the Court took the case.

On the one hand, certain members of the Court were concerned that abuse of the stay and abeyance procedure was encouraging the same kinds of delays and lack of diligence that the AEDPA statute of limitations was designed to do away with. Other justices, however, felt that there was a continued need for stay and abeyance as a safety valve for federal habeas corpus petitioners, most of whom file their petitions without the assistance of lawyers, to timely exhaust claims that, for some good reason, had not been exhausted before it came time to file the federal habeas petition. These competing considerations produced an opinion in *Rhines* that is a mixed bag for petitioners. The good news is that the Supreme Court upheld the discretion of a district court judge to order stay and abeyance as an alternative to a dismissal. The bad news is that the Court, in an effort to curb abuses, held that stay and abeyance is only to be used henceforth in “limited circumstances”, namely where the petitioner can show: (a) good cause for the failure to exhaust the un-exhausted claims before filing in federal court; and (b) that the un-exhausted claims are “potentially meritorious”. Furthermore, the Court held that, where a stay was allowed, it had to be conditional upon a strict time limit (30 days was suggested) within which the petitioner would have go back to state court to exhaust and, after exhaustion is completed, return to federal court.

The *Rhines* decision should serve as a warning to petitioners that the availability of the stay and abeyance procedure will be more limited than it has been in the past. On the other hand, because stay and abeyance is still a viable option, a petitioner whose AEDPA statute of limitations is about to run should always file a federal habeas corpus petition before the AEDPA time runs out, and then should consider the following suggestions in attempting to obtain stay and abeyance in the wake of the *Rhines* decision:

## Habeas Hints

1. There’s no need to address the stay and abeyance issue in the petition. Instead, wait until the Respondent raises the issue in a Motion to Dismiss on the basis that the



4. Document #2 is your Motion for Stay and Abeyance, and is the most important one. It should start out with a Notice of Motion, in which you formally notify Respondent and the court that you are moving for a stay pending exhaustion. Next, you must provide a Declaration in Support of Motion for Stay and Abeyance, which will contain the facts you are alleging in support of the stay. Although the facts contained in the declaration will, of course, vary from case to case, it will always be necessary to state facts which provide good reasons why you did not exhaust the un-exhausted claims before filing in federal court. In providing your reasons, you should mention in a first paragraph that you have been incarcerated since your conviction, that you are indigent,

8. If the court refuses you a stay, and if you have to dismiss your unexhausted claims to avoid a statute of limitations bar, then be prepared to do so. However, you might want to first consider asking the district court for permission to appeal and for a stay while you are appealing the court's denial of your motion for stay and abeyance. ☐☐☐

*Kent A. Russell specializes in habeas corpus and post-conviction cases. He is the author of the California Habeas Handbook, which explains habeas corpus and the AEDPA. The latest edition (Ed. 4.04, revised Dec. 2004) is now shipping and can be purchased with a check or money order for \$29.99 (cost is all-inclusive for prisoners, others pay \$5 extra for postage and handling; no order form necessary), directly from the Law Offices of Russell and Russell, 2299 Sutter Street, San Francisco, CA 94115.*

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# What Some People Have to Say About PLN's 15<sup>th</sup> Anniversary

"As a civil rights litigator specializing in prison cases, I have read virtually every issue of *PLN* since its first newsletter was published 15 years ago. This publication is an essential resource for everyone concerned about human rights. Congratulations to *PLN* for reaching this great milestone. We all look forward to your next 180 issues."

Patricia Arthur,  
Director, Institutions Project  
Columbia Legal Services  
Seattle, WA

"*Prison Legal News* is the one publication that I read cover-to-cover every issue. In these days of struggle, when prisoners have so few resources to support and sustain their legal work, *Prison Legal News* remains a beacon of hope in a dark and forbidding judicial landscape.

Elizabeth Alexander  
Director, ACLU  
National Prison Project  
Washington D.C.

"The celebration of *PLN*'s 15th Anniversary is a truly momentous occasion. Not only does this birthday remind us of the bold passion, the unsparing dedication, and the certain perseverance of *PLN*'s staff, it is a tribute to the presence that *PLN* has carved into the lexicon of freedom and justice in America. "Prisons are better places today because of the tireless work of *PLN*. Prison guards and administrators are beginning to understand that there is a voice that will shout to the world about the crass brutality and senseless vacuity that is so common to prison life. The American public is better aware of the real costs and the enormous wastefulness of prisons because of the spotlight that *PLN* has lit. Seeing that spotlight, prisoners have begun to shed the aura of hopelessness and mind-control that prisons work so hard to instill

in their massive and growing populations of sheeple. The fight to protect human rights has benefited from the constant exposure that *PLN* provides; and, while that fight still has a long way to go, *PLN* has become the lightning rod of inspiration for the downtrodden.

"The Editors and Publishers of *Punch and Jurists* salute *PLN* and its staff, and we thank them for always being there. They give us confidence that, with the right leadership, we can and we will overcome."

Peter Schmidt  
Editor, *Punch and Jurists*  
New York, NY

"Because *PLN* is written mostly by prisoners or former prisoners, *PLN* is a vital source of information on how legal developments impact the real lives of prisoners. *PLN* also provides information about legal developments I wouldn't know about without extensive research. And, because I was privileged to write the *Pro Se Tips and Tactics* column for several years, *PLN* gave me the opportunity to share some of my legal knowledge. Lawyers should "de-mystify" the law, and writing the column allowed me to try to do just that. Thanks for a great run, with more to come, for a unique publication.

John Midgley  
Director, Columbia Legal Services  
Seattle, WA (Former *PLN* Columnist)

"Back in 1996, when I had been working at *The Progressive* for only few months, my editor handed me a clipping from *Prison Legal News* noting that the Federal Bureau of Prisons had introduced a little-known restraint weapon called the stun belt. That three-inch clipping led to my first investigative article for *The Progressive*, and to a long-term interest in human-rights reporting on American prisons. *Prison Legal News* is an invaluable publication. Please accept my hearty congratulations on fifteen important years. I wish you many, many more.

Anne-Marie Cusac  
Investigative Reporter  
*The Progressive*  
Madison, WI

"I recently faced the problem: How to make known to prisoners all over the country that for two years my book *Lucasville: The*

*Untold Story Of A Prison Uprising* (Temple University Press) would be available to prisoners free, instead of my taking royalties? The answer was *PLN*! This is a small example in my personal experience of the way in which *Prison Legal News* knits together prisoners and advocates outside the bars. If we are to make real the idea of creating history from below, compelling our leaders to "lead by obeying" (as the Zapatistas say), then newsletters that offer meeting places and an opportunity to exchange ideas are indispensable."

Staughton Lynd  
Attorney, Historian, Labor  
Organizer, Writer  
Niles, OH

"Ever since Human Rights Watch began regular work on U.S. prison conditions, *PLN* has been an important source of news for us. Our research projects have also benefited greatly from the being able to reach a wide number of prisoners through notices placed in it. We wish it many more anniversaries!!"

Jamie Fellner  
Director, Human Rights Watch  
New York, NY

"Over the years that I was working on *American Gulag: Inside US Immigration Prisons*, it was important for me to have a sense of prison conditions and prison-related litigation around the country. *PLN* was extremely valuable in helping me to do that."

Mark Dow  
Journalist, Author  
New York, NY

"*PLN* has been a great source of information to all of us at Western Prison Project. The hard-hitting investigative articles, the information on legal cases, have all been "news we can use" and is of great value to our members. But more than that, *PLN* has been a great ally in the work for criminal justice reform. When we were just getting off the ground, *PLN* was there to provide advice and share resources. Later, *PLN* was there to help us with legal strategies on censorship and other issues. And through it all, *PLN* has been a strong voice on behalf of prisoners' rights. Thank you, *Prison Legal News*!"

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Brigette Sarabi  
Executive Director  
Western Prison Project  
Portland, OR

"I only subscribe to two publications anymore, and *PLN* is one of them. *PLN* has helped me win cases, and keeps me informed on developments around the country. I applaud your efforts!"

Stephen Pevar  
Senior Staff Counsel, ACLU  
Hartford, CT

"Congratulations to *PLN*! Getting established was a great feat, which you have continually matched and exceeded. It's not surprising to me that the best source about US prison legal news is produced by prisoners, ex-prisoners and their supporters – but it's amazing what you've accomplished over the years, despite all the obstacles and challenges. Knowledge is power and sunlight is the best disinfectant. Best wishes for many more years!"


Scott Christianson (author)  
Sands Lake, NY

## \$1,000 Awarded After Surgeon Loses Broken Instrument in NY Prisoner's Mouth

On February 5, 2004, a New York Court of claims awarded a prisoner \$1,000 for the negligence of an oral surgeon under contract with the New York Department of Correction (NYDOC).

Sean Tapp was a prisoner at Attica Correctional Facility on January 28, 2000, when he was seen by an oral surgeon, who was an independent contractor to have a wisdom tooth removed. The surgeon broke the blade of the surgical instrument during his attempt to cut around the tooth. The piece of blade, which was approximately 5 millimeters long, 2 millimeters wide, and 1 millimeter thick, became lost by the surgeon and lodged in Tapp's left maxillary sinus.

Tapp, who represented himself pro se, did not present expert medical testimony about his tooth extraction. That, however, did not prevent the court from concluding that the surgeon's application of force sufficient to break a surgical instrument that became lost could be inferred to be negligence, just from the occurrence of the event itself.

The court also held the NYDOC was not relieved of vicarious liability for the oral surgeon's negligence by virtue of his contract status. Tapp testified his teeth have become extremely sensitive to temperatures and he experiences respiratory problems and pain. The court of claims awarded Tapp \$1,000. See: *Tapp v. New York*, New York Court of Claims, Case No: 105509. 

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**\*not admitted to practice; James' application for admission in Arizona currently pending. Donna is a retired non-lawyer justice court judge.**



# California's Parole-Violator Cell-Study Education Program Portends Increase In "Recidivism"

by Marvin Mentor

A well-intentioned but struggling new rehabilitative in-cell, tutored, self study program for California parole violators ("Bridging Program"), participation in which cuts five days per month off eligible violators' return-to-custody time, is having the anomalous effect of increasing the state's "recidivism" statistics. The paradox is that as fast as the California Department of Corrections (CDC) empties parole violators' prison beds with the benefit of their new life-skills schooling, poised prison-guards-union parole agents sweep the streets to refill those beds with technical parole violation "recidivists."

As a result, rather than saving \$51.5 million in the first year and \$71 million in the second, the Bridging Program is costing \$14.5 million more so far. If "recidivism" in CDC were instead restricted to only new offenses, thereby eliminating the practice of bed-vacancy driven "parole violations," California would not suffer its stigmatic 40% "recidivist" violator population that exceeds that of 39 other states combined. The deception goes deeper than just a gloss on the term "recidivism."

"The [Bridging Program] is a front, a fake, a way CDC can say, We are offering education," declared State Senator Gloria Romero, who intends to hold hearings on prison education soon. "Something

is probably better than nothing. But is this the kind we should offer? No." Even prison teachers' union spokesman Andy Hsia-Coron was dubious. "You know how Jesus turned water into wine? Well, we're turning wine into water."

Presently, nearly 20,000 prisoners are enrolled in the Bridging Program, following its launch in November, 2003. Teachers consist mostly of the 300 "laid off" vocational instructors "cut" to trim \$35 million from the 2003 budget, who were in reality simply redeployed to deliver lessons to cells and dormitories. Resembling correspondence courses, the material covers self-study topics such as anger management, violence control, HIV/AIDS, parenting, and substance abuse. A smattering of reading, writing and mathematics is added.

Some exercises ask prisoners to inventory their day, keep a journal, write an autobiography or work on their vocabulary. Another exercise asks them to list "101 Little Important Reasons Not to Come Back to Prison." Yet other exercises inspire self-reflection on how others would remember a prisoner after they die, or what their favorite memories are. Whatever the prisoners think of the Program, to which they are expected to devote 6 1/2 hours per day, most are co-operative, said Deuel Vocational Institution Bridging Instructor Jeff Ringelski.

CDC Director Jeanne Woodford called the Program "a beginning. Ideally, we would like to have a TV in every cell ... to provide education. But we don't have those dollars now." Notwithstanding budget concerns, 35% of the teaching positions remain unfilled due to recruiting problems. This saddles existing instructors with over 100 students, limiting them to no more than 1/2 hour per week on the volatile cell blocks with each enrolled prisoner. That is not enough instruction, opined Steve Steurer, executive director of the non-profit Correctional Education Association. John Berecochea, CDC's past research chief, said the Bridging Education model "does sound ludicrous, a half-hour a week." His predecessor, Robert Dickover, felt the program "does not sound promising." Using former vocational instructors "does not make a lot of sense," Steurer added, because prisoners often need specialized help to overcome literacy limitations and learning disabilities. And since instructional materials are in English, California's many foreign-

speaking prisoners are effectively shut out from meaningful participation.

Teachers provide feedback, but there are no grades or diploma credits. The immediate incentive to participating prisoners is that they earn 1/2 time credits (if their sentence permits), the same as if they worked in a prison job. But since there are no jobs for many prisoners especially the tens of thousands of parole violators who spend their entire return-to-custody time in work-ineligible Reception Centers the net result is that an estimated 45,000 qualifying prisoners each year will gain the benefit of 1/2 time over the otherwise automatic 1/3 time good behavior credits. Amounting to a net gain of 5 days per month, this adds up to 2 months reduction in incarceration per year. Put another way, the visible drop in the prison population should be  $45,000 \times 2 = 90,000$  prisoner-months, or 7,500 prisoners (saving over \$230 million) per year. When added to the 36,000 prisoners allegedly diverted to drug treatment programs under California's Proposition 36, there should be a manifest reduction of over 40,000 prisoners in CDC's population.

But CDC's population has instead swelled by 3,000 to 165,000, with parole violators packed into double bunks, 12-18" apart on cell block floors often for months while awaiting overdue *Morrissey* hearings. Guard overtime pay runs up to \$1 million per month at each Reception Center prison. In budget negotiations in 2004, Governor Schwarzenegger got the guards to agree to delay 5% of their scheduled July 1, 2004 11% raise until January, 2005, publicly advertised to save a projected \$108 million. But recent estimates from CDC are that they now project overrunning their \$6.2 billion budget by \$109 million. It would appear numerically that "recidivist"-driven overtime has repaid the delayed raise.

There can be no doubt that programs designed to increase self-esteem of prisoners can only aid their motivation to turn their lives around. But so long as CDC's automaton parole branch has the unchecked power to "flip" the parolees back as fast as the Bridging Program can recycle them, the chronic hopelessness that infects these pawns of prison job-protectionism whom CDC euphemistically labels "recidivists" will, like the prison population, only continue to grow. ■

Source: *Sacramento Bee*.

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## U.S. Supreme Court Holds § 1983 Proper to Challenge Execution Procedure

In an “extremely limited,” unanimous decision, the United States Supreme Court held that an Alabama death row prisoner properly utilized 42 U.S.C. § 1983 to challenge a procedure to be utilized during his execution.

In 1979, David Nelson was convicted of capital murder and sentenced to death. His appeals were finally exhausted in 2003 and the Alabama Supreme Court set Nelson’s execution by lethal injection for October 9, 2003.

Due to years of drug abuse, Nelson’s veins are severely compromised, making them inaccessible by standard intravenous access techniques. Therefore, prison officials planned to utilize a “cut-down” procedure to access Nelson’s veins before and during his execution.

Prison officials refused to provide Nelson’s attorney with a copy of the State’s written protocol for gaining venous access prior to execution. However, they assured her “that ‘medical personnel’ will be present during execution and the prison physician would evaluate and speak with” Nelson before the execution.

On September 10, 2003, Nelson was told “prison personnel would cut a 0.5 - inch incision in [his] arm and catheterize a vein 24 hours before the scheduled execution.” However, on October 3, 2003, this prognosis was “dramatically altered.” Nelson was told “prison personnel would now make a 2-inch incision in [Nelson’s] arm or leg; the procedure would take place one hour before the scheduled execution; and only local anesthesia would be used... There was no assurance that a physician would perform or even be present for the procedure.”

Counsel again requested a copy of the State’s execution protocol. Three days before Nelson scheduled execution, he filed a “§ 1983 action alleging that the so-called ‘cut-down’ procedure constituted cruel and unusual punishment and deliberate indifference to his serious medical needs in violation of the Eight Amendment.”

Nelson “sought: a permanent injunction against use of the cut-down; a temporary stay of execution to allow the District Court to consider the merits of his claim; an order requiring respondents to furnish a copy of the protocol setting forth the medical procedures to be used venous access; and an order directing respondents, in consultation with medical experts, to promulgate a venous access protocol that comports with

contemporary standards of medical care.”

The district court characterized the action as a second or successive habeas corpus action and dismissed for want of jurisdiction. Relying on *Fugate v. Department of Corrections*, 301 F.3d 1287 (11<sup>th</sup> Cir. 2002), a divided panel of the Eleventh Circuit affirmed, holding that Nelson “was without recourse to challenge the constitutionality of the cut-down procedure in Federal District Court.” See: *Nelson v. Campbell*, 347 F.3d 910 (11<sup>th</sup> Cir. 2003). The Supreme Court granted certiorari, stayed Nelson’s scheduled execution, and reversed.

The Court found that it “need not reach... the difficult question of how to characterize method-of-execution claims a generally.” Rather, noting that Respondents “conceded that § 1983 would be an appropriate vehicle for an inmate who is not facing execution to... challenge... the constitutionality of the cut-down procedure if used again at venous access for purposes of providing medical treatment[,]” the Court

saw “no reason... to treat [Nelson’s] claim differently solely because he had been condemned to die.” It explained that “[m]erely labeling something as part of an execution procedure is insufficient to insulate it from a § 1983 attack.”

The Court noted that on remand, the district court may “need to address the broader question... of how to treat method-of-execution claims generally.” Additionally, expressing concern about the breath of Nelson’s requested injunctive relief, the Court suggested this issue may need to be addressed on remand as well. However, “[a]n evidentiary hearing will in all likelihood be unnecessary,” concludes the Court “as the State now seems willing to implement [Nelson’s] proposed alternatives.” See: *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117 (2004).

As far as we know, as of June 15, 2005, remand proceedings were underway in the district court and Nelson had not yet been executed. 📞



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# ACLU-WA Challenges Washington Ex-Felon Disenfranchisement Law

On October 21, 2004, the American Civil Liberties Union (ACLU) of Washington brought suit in state court, challenging a law which prohibits Washington ex-felons from voting solely because they owe "legal financial obligations" (LFOs) such as court filing fees and costs, restitution and incarceration costs.

"Article VI, § three of the Washington Constitution prohibits all persons convicted of 'infamous crimes' from voting until they have their civil rights restored." Under R.C.W. 29A.04.079 "all felonies are considered 'infamous crimes.'"

"A person convicted of a felony under the Washington Sentencing Reform Act of 1981 may restore their civil rights, including the right to vote, only after completing 'all the requirements of the sentence, including any and all legal financial obligations.' RCW 9.94A.637."

Washington has a long and ever-growing list of LFO's, including but not limited to: \$500 victim penalty assessment fee; domestic violence penalties; restitution orders (which cannot be reduced or waived due to indigency); County and interlocal drug fund penalties; trial costs, including fees for court-appointed counsel, defense costs and jury fees; incarceration costs; community supervision costs; and costs of adding defendants' DNA to a law enforcement database.

One or more of these and many other, LFO's are levied against every Washington felony offender without consideration of the offender's ability to pay. Additionally, interest accrues on all unpaid LFO's at 12 percent per year, beginning upon entry of judgment. Sentencing courts are restricted in their ability

to waive interest, in addition, many counties charge late fees of up to \$100 per year on unpaid LFO's.

According to ACLU attorney Nancy Talner, for the majority of Washington felons, LFO's are an insurmountable barrier to having their civil rights restored, creating a modern form of the "poll tax" for a large percentage of Washington voters. Washington's own statistics establish that more than 90 percent of its felony offenders are indigent.

"The state should not hold hostage the right to vote in order to collect legal system debts," says ACLU-WA Executive Director Kathleen Taylor. Yet, that is exactly what it does. According to estimates of the Washington Department of Corrections, (DOC), "as of December, 2001, 46,500 convicted felons remained a disenfranchised solely because of pending legal financial obligations. Many of these are permanently disenfranchised due to their inability to pay." The Sentencing Project, a national criminal justice research group based in Washington, D.C., places the number at approximately 159,000 disenfranchised Washington state ex-felons. This translates into approximately 3.5 percent of the state's voting population - almost double the national average - who are disenfranchised.

Minorities are hit especially hard. Due to "racial disparity in Washington's incarceration rate, the State disenfranchised is almost 25% of all adult African-American males." Representative Eric Pettigrew, D- Seattle, whose district includes traditionally black neighborhoods agrees that "[t]he impact is huge. It means that the voice of the poorest, most struggling part of the black community is not heard."


According to Washington DOC data, between 1988 and 2004, 70,000 ex-felons had their civil rights restored while 200,000 did not, because of outstanding LFO's and other reasons. D'Adre Cunningham, a staff attorney with the Racial Disparity Project of the Defender Association in Seattle, believes an ex-felon's ability to have voting rights restored is based solely upon financial means. "A wealthy sex offender or rapist can get their rights back, but a poor drug offender can't," she noted.

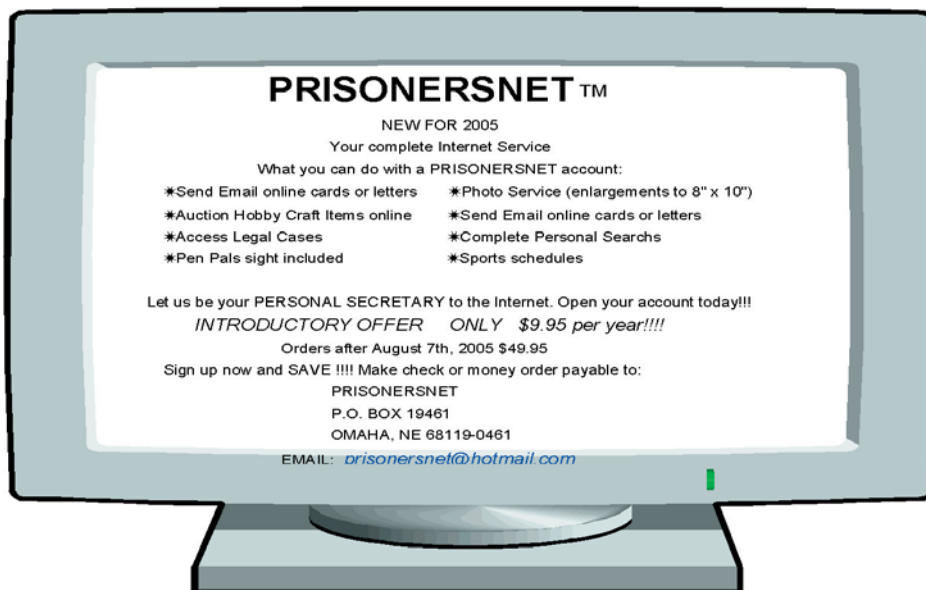
The ACLU of Washington and others hope to bring this inequity to an end. Representative Pettigrew has co-sponsored legislation supported by the ACLU, which would eliminate the requirement that outstanding LFO's paid in full before civil rights may be restored. Unfortunately, however, many lawmakers see the proposal as soft-on-crime, and it has died in committee during the past two legislative sessions.

This spurred the ACLU-WA to file its action, seeking to invalidate the law. The plaintiffs to the ACLU action are Lawrence Bolden, Beverly DuBois, Danielle Garner, Daniel Madison, and Sebrina Moore, who are Washington ex-felons who are disenfranchised from voting solely because they owe outstanding LFO's ranging from slightly more than \$300 to more than \$6 million.

The suit names the State, Governor and Secretary of State as defendants and alleges violations of the Equal Protection Clauses of the United States in Washington Constitution's and Article I, § 19 of the Washington Constitution which mandates that "[a]ll elections shall be free and equal[.]"

The suit does not seek to eliminate outstanding LFOs or change criminal sentences in any way. Rather, it asks only that the right to vote now contingent upon one's financial ability be changed. "Having the rights and responsibilities of citizenship as an important part of successfully re-entering society," said Taylor. "Yet our current laws keep former felons from exercising the most basic right of citizenship." Cunningham agrees, noting that it "is yet another door that is not open to them."

Hopefully that will change soon. Plaintiffs are represented by Peter Danelo, Molly Terwilliger, Darwin Roberts and Darin Sands of the firm Heller Ehrman White and McAuliffe, ACLU-Wa staff attorney Aaron Caplan and Neil Bradley of the ACLU Voting Rights Project. *PLN* will report on any significant developments in the case. See: *Madison v. State of Washington*, King County Superior Court, Case No. 04-2-33414-4SeA (Oct. 21, 2004). 





# Mystified Felons Blamed In Washington Election Challenge

by Michael Rigby

A byzantine disenfranchisement scheme has cast a pall over the electoral process in Washington.

On November 2, 2004, Democrat Christine Gregoire won the state's gubernatorial race by the narrowest margin in state history--129 votes. Republican challenger Dino Rossi's camp quickly cried foul and sued to have the election results nullified. Their claim: voter fraud.

At the center of controversy is a list produced by Rossi containing the names of 1,135 alleged felons who supposedly voted. The list was hotly contested in Chelan County Superior Court. Rossi's lawsuit was later dismissed. But it has already caused an uproar.

Democrats claim the list is riddled with errors and "smears the names of innocent people." Investigations launched by a number of counties after the list was released seem to confirm that assertion. In court documents filed in March 2005, Democrats reported a "75 percent error rate" in the Whatcom County list. Of the 13 people on the list, Whatcom County investigators found that 2 had never been convicted of a felony, 4 had been convicted but had their voting rights restored, and 3 hadn't even voted in the November elections.

Other inaccuracies have also surfaced. For instance, Democratic lawyers contend that hundreds of people on the list had juvenile convictions, which under state law do not result in the loss of voting rights.

Earlier in the year Rossi staffers submitted a list of 15 people to Yakima County officials who they said voted illegally. Investigators found that only 4 had voted improperly, said County Auditor Corky Mattingly. "It's really inconsistent information," said Mattingly. "But 1,100 felons voting makes a great headline."

In other developments, an attorney for Governor Gregoire said his team had discovered that the conservative Building Industry Association of Washington had been working for Rossi's campaign since the election. For months the group has been amassing information about felon voters to bolster Rossi's lawsuit.

In January and February the Association sent out false homeowner surveys to 400 King County residents--where 912 of the list's alleged felons reportedly voted--in order to gain their signatures to compare with absentee ballots.

Erin Shannon, a spokeswoman for the

Association, said they were right to deceive people. "We wanted to get folks' signatures, and this was the best means by which we could get it," she said. "It's quick, it's efficient and it's legal. We're not apologetic about that."

Some felons did vote illegally. However, most of those interviewed thought their voting rights had been restored--a testament to Washington's convoluted reinstatement process. Under state law, felons are banned from voting unless their civil rights are restored. To regain voting rights, those convicted of a felony must first complete all community service, pay any court-ordered fines, and obtain a certificate restoring voting rights.

In a March 17 hearing, most of the 10 felons who testified, and the 7 others who filed affidavits, said they thought they were eligible to vote. Kenneth Mason, 48, a Seattle resident who has completed his sentence noted that his voting rights were automatically stripped when he was convicted of second-degree theft in 2001. "So shouldn't it be automatic that you give it back?" he questioned. Mason added that if he had known his voting rights hadn't been restored, "I wouldn't have voted at all." Voting illegally is a class C felony, but it's unlikely anyone will be charged. To win a conviction, prosecutors must establish that a person knew they voted illegally. "I didn't hear anything today that anyone knowingly or intentionally violated the law," said King County Elections Director Dean Logan, who attended the hearing.


"What I heard was surprise about what it takes for people to get their voting rights restored."

Some Washington residents may never be able to vote again because they can't pay debts imposed by the court. An example is Rosemary Heinen, who was convicted of embezzling \$3.7 million from her former employer. Released from prison in 2004 after completing her sentence, Heinen is ineligible to have her voting rights restored because she still owes \$2 million in restitution.

Secretary of State Sam Reed said the easiest way to solve Washington's voting problems would be to automatically restore voting rights immediately upon release from prison, regardless of unpaid debts. His suggestion appears to have gone unheeded. See accompanying story on a lawsuit challenging that issue.

For now, state officials are relying on a new database--which federal laws require to be operational by January 1, 2006--to prevent many of the improper votes. The database will list all state voters on a single roster accessible to state and county officials via computer. The roster will also be linked to Washington Department of Corrections and Washington State Patrol databases. The State Patrol database will list in-state felonies dating back to at least the mid-1970s.

It's uncertain how any disputed votes will ultimately be apportioned since felons could have voted for either candidate. Chelan County Superior Court Judge John Bridges on June 6, 2005, declared Gregoire the winner of the election and Rossi conceded the election.

Though Democrats have vehemently contested the list's reliability, it should be noted that as state attorney general, Governor Gregoire vigorously defended the ban on felon voting. It's probable that if Gregoire had lost by 129 votes, the same scenario would be playing out. 

Sources: *Seattle-Post Intelligencer*, *Seattle Times*, *Tacoma News Tribune*

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## Starved for Attention

### How do you break a high-security hunger strike? Put a lid on it.

by Alan Prendergast

Prisoners who joined in a hunger strike at the Colorado State Penitentiary from January 15-26, 2005, were hoping their protest would attract a media feeding frenzy -- and put pressure on officials to modify harsh conditions at the state's supermax prison.

Instead, they just got hungry.

The official story of the strike is that it was a complete dud. Participation dropped off quickly, Colorado Department of Corrections officials say, and the protest accomplished nothing, since prison administrators weren't about to negotiate policy matters with a bunch of disgruntled prisoners.

But the protesters say that isn't how it went down. DOC administrators misled the public about the number of prisoners involved, they claim, and went to great lengths to muzzle the effort -- including intercepting prisoner mail, denying medical attention and threatening disciplinary action in an effort to break the strike. And since DOC policy bans media interviews with high-security prisoners, the prisoners had little chance to tell their side of the story.

"They lied so blatantly about what was really going on," wrote Troy Anderson, one of the organizers of the strike, in a letter to *Westword*. "They think they are immune to any accountability. If through this action we can expose any part of their deceit, it'll be worth it."

The strike began on January 15, 2005, when dozens of prisoners at CSP -- some estimates put the number as high as 140, or close to 20 percent of the facility's prisoners -- refused meals. It ended eleven days later, when Anderson, the last man fasting, decided to have a bite of breakfast.

"They said that as soon as I passed out, they'd call an ambulance, do the hospital thing and charge me," says Anderson, who lost eighteen pounds and is now down to 117. "I figured since I wasn't leaving anyone hanging, I might as well hang it up."

Opened in 1993, CSP was designed to house the state's most combative, escape-prone or just plain dangerous prisoners in total isolation. Prisoners spend 23 hours a

day in their cells and are shackled when escorted to showers, phone calls or family visits. They're supposed to earn their way to greater privileges through cognitive-skills classes and avoiding conflicts with staff. DOC spokeswoman Alison Morgan says the behavior-modification program has been a deterrent to violence across the system. "We've had 3,700 inmates go through this program, and only 10 percent have come back to CSP," she says.

But over the years, the amount of time prisoners are locked down in CSP has nearly doubled: The average length of stay is now 31 months. Critics of the supermax approach say it often intensifies existing behavior problems -- at least 12 percent of CSP residents have been diagnosed as mentally ill -- and leads to more violence when long-term solitary prisoners are released. Morgan was unable to provide figures on how many CSP graduates return to other prisons.

Anderson describes himself as "the poster child for why prisons like CSP don't work." He spent six years in administrative segregation -- four of them at CSP -- during a prior prison stint in the 1990s, then was paroled right to the street. He soon got into two shootouts with police in Adams County. He's been in CSP for nearly five years this time around, with numerous write-ups for assaults on staff and an extensive mental-health history. Yet he's also been incident-free for years at a time and says he's been unable to progress out of the supermax because of conflicts with medical staff over his medication.

"I believe this facility played a huge part in me committing all the violence I did," Anderson says. "I'm not saying I don't belong in prison. I do. But this place breeds hate. It's a trip. We sit in these cells and fantasize about killing cops, rats and child molesters."

The hunger strike was supposed to highlight a long list of grievances prisoners have with conditions inside CSP. Some of the complaints, such as the excessive markups on TV sets sold to prisoners or the ban on sexually explicit magazines, weren't the kind of thing that would generate an outpouring of sympathy from the public. But other items addressed more serious allegations, such as inadequate ventilation and little access to books. And at the core of the protest was what prisoners consider the greatest injustice of the place: the lack of a coherent process for getting out of CSP.

In theory, prisoners who complete programs and don't commit more disciplinary infractions are eligible for transfer to less austere prisons; in reality, they are often denied transfer because of suspected gang ties or reasons officials decline to explain.

"To date I've been ad-segged [in solitary] for four years, four months," reports prisoner Shawn Shields. "I've completed every class foisted upon me. I've been write-up-free for one year, seven months, 23 days. I held a porter job for a full year. And I've been denied [transfer] five times now. No reason given, other than 'continue behavioral review.'"

Tim Tinsley, a CSP resident who's done more than nine years in administrative segregation, adds that prisoners are often held back because of "negative chrons" -- unflattering written observations by staff of prisoner behavior that the prisoner has no opportunity to dispute or correct. "Their policies make it difficult to progress," he says. "I stay slammed down here because there is no due process."

Officials may have underestimated how quickly word of the strike spread through lockdown, but they moved swiftly to squelch the protest. One internal memo obtained by *Westword* indicates that prisoner mail to reporters was intercepted by prison staff, on the grounds that "such correspondence may present a threat to the safety and security of the public, staff, offenders and agency/facility." Yet one justification for the DOC's ban on media interviews with high-security prisoners is that the prisoners are free to write letters to communicate their views.

Prisoners were also told that their refusal to eat could result in charges of "supporting and inciting a facility disturbance" -- and that their punishment would probably include even more time spent in CSP. Under DOC rules, Morgan says, any "organization of a combined effort" by prisoners, even a non-violent hunger strike, is prohibited.

Four days after the strike began, the *Pueblo Chieftain* quoted Morgan as saying that only eight prisoners were still fasting. That figure is disputed by strike leaders and food-service workers, who claim that at least forty prisoners were still participating. Morgan acknowledges that dozens of other prisoners were still refusing "some" meals at that point, but she also suggests that an unknown number were squirreling away

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canteen items and sneaking meals. "They were still eating their snacks," she says.

But cell shakedowns failed to produce a hoard of chips and candy bars. Anderson, who claims to have survived on water and vitamins, has a receipt for one shakedown four days into the strike that shows no snacks were found in his cell. "They lied to the newspapers," he insists. "They videotaped all meal refusals, so it's all documented."

Anderson also challenges officials' assertions that the strikers, with the exception of those who declined treatment, were seen daily by medical staff. He was visited regularly only toward the end of the strike, he says; one nurse told him that "there were just too many people to see. That's a hell of a reason to refuse treatment."

As the strike entered its second week, the number of protesters dropped sharply. One prisoner became dizzy and collapsed in his cell, suffering a head injury. Feeling shaky and light-headed himself, vomiting water and suffering nosebleeds, Anderson finally decided to pack it in.

To date, no prisoner has been charged with a disciplinary infraction for the strike, but it produced no changes in policy, either.

"Real change has to come from out there," Anderson says. "There are thirty to forty of us in here who will never be allowed to leave. They give us no hope. It gets harder and harder to find excuses not to act up. What's worse are all the people who will parole from here. They have a huge backlog of people who should have left years ago -- or shouldn't be here at all." ■

*This article appeared originally in Westword. Reprinted with permission.*

## Florida Prison Uprising

A riot at Florida's Apalachee Correctional Institution (ACI) resulted in one guard being stabbed and eleven others beaten. As a result, over 100 prisoners were transferred to other prisons.

The incidents started shortly after prisoner Nakia Huggins was questioned by guards concerning a knife that another prisoner told guards Huggins was intending to use to stab him with.

Huggins, who is serving two life sentences for murder, was sentenced to another 30 years, four years ago, for setting his mattress on fire while incarcerated at Everglades Correctional Institution.

Upon being confronted, Huggins assaulted one guard and began running when four guards isolated him between two fences. Seeing that running further was no longer an option, Huggins turned his aggression on the guards. Taking the knife in hand, he began frantically waving it at the guards. Close proximity, isolation, plus four on one, equaled little success for Huggins.

Huggins was then rushed from behind with one of the guards grabbing him. Huggins, attempting to wrestle loose, consequently stabbed the guard.

Meanwhile, additional guards were called to the recreation yard to quell the uprising by other prisoners. Once the guards reached the recreation field, some 200 prisoners begun attacking the guards, while still others begun shouting encouragement.

In all, it took over an hour to restore order.

After the incident, 52 prisoners were charged with offenses ranging from battery

on a law enforcement officer to inciting a riot. Along with the prisoners being charged, a total of 102 prisoners were transferred to other prisons.

Immediately following the melee, which transpired on Monday, January 31, 2005, the prison was placed on lockdown, which was lifted two days later.

"On the positive side, the situation was contained and didn't have the opportunity to spread to any other portions of the facility," Department of Corrections spokesman Sterling Ivey said.

Considering ACI holds approximately 1,300 prisoners, the containment was significant. For those involved, they have had a drastic change occur in their lifestyle, as most were sent to Florida's most egregious prison: Florida State Prison. ■

Sources: *The New York Times, the Miami Herald, the Tallahassee Democrat.*

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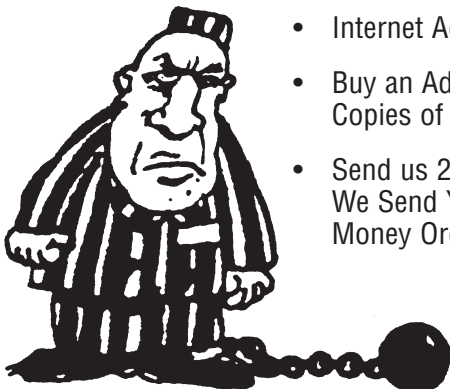
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# **\$95,000 Settlement For Imprisonment Based On Falsified Police Report In Los Angeles**

*by John E. Dannenberg*

The Los Angeles, California County Sheriff's Department sought \$95,000 authority from the L.A. County Claims Board (Board) to settle a wrongful incarceration federal civil rights lawsuit brought by a plaintiff whose conviction had been predicated upon an admittedly false detective report, even though the detective was subsequently acquitted of criminal proceedings brought against him for that falsification of records, perjury and false imprisonment.

On June 26, 2001, Sheriff's deputies executed two narcotics search warrants in the city of Compton. Reyes Cardenas was at one location. One deputy ("Detective") reported seeing Cardenas throw a bag of narcotics onto the neighboring roof. Notebooks recovered at both locations revealed apparent drug courier lists, including Cardenas' name. The Detective arrested Cardenas for possession and sale

of cocaine, to which he pled no contest and was sentenced to four years. However, Cardenas always denied that it was he who threw the bag of drugs.

When an investigation ensued into allegations that an unknown suspect had stolen money during service of the warrants, it turned up that a Sheriff's Deputy at the scene stated she saw the Detective's informant, not Cardenas, throw the drugs; information not available at trial. Based upon this, the District Attorney filed a petition for writ of habeas corpus on behalf of Cardenas, resulting in the conviction being set aside. Cardenas was released from prison on May 8, 2002 after serving over ten months.

On May 31, 2002, a grand jury indicted the Detective on seven counts, including accessory after the fact of possession of a controlled substance, filing a false report, falsification of records, perjury under oath, and false imprisonment. However, on January 28,

2003, a jury acquitted him of all charges.

The Board reviewed the damages exposure presented by County Counsel regarding Cardenas' subsequent civil rights suit for false arrest and imprisonment. Counsel estimated emotional distress liability of \$500,000 plus attorney fees of \$250,000, while reporting the county had already expended \$72,184 in attorney fees and \$4,044 in costs. Noting that the case was one of contested liability, County Counsel nonetheless conceded that a jury might believe the other Sheriff's Deputy, and conclude that the Detective was protecting his informant at the expense of Cardenas.

Accordingly, counsel recommended the Board's approval of \$95,000 authority to settle all claims for damages, costs and attorney fees. On September 27, 2004, the board approved payment to Cardenas. See: *Cardenas v. County of Los Angeles*, U.S.D.C. CD CA, Case No. CV 03-5182 DT. ■

## **Fifth Circuit Holds Sleep Deprivation From Constant Illumination Constitutional**

The Fifth Circuit court of appeals, in an unpublished opinion, held that alleging sleep deprivation caused by constant illumination was not a claim with an arguable basis in law for which a prisoner may be granted relief.

Juan Chavarria, a Texas state prisoner at the Eastham Unit, filed suit under 42 U.S.C. § 1983, alleging constant illumination in his segregation cell for sixteen months had caused chronic sleep deprivation in violation of the Eighth Amendment prohibition against cruel and unusual punishment. Chavarria alleged that, in response to a hunger strike protest against the lighting, Major Richard Alford claimed constant illumination was necessary for security reasons. Alford also denied a request to dim the lighting except when a guard was actually looking into a cell, stating that such a practice would be even more disruptive of sleep. Without serving defendants, the magistrate judge held a *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1999) hearing. Therein Michael Unit Warden Jason Heaton testified that the lights were dimmed except when presently used by a guard at his unit, the exact practice Chavarria sought to have implemented at the Eastham Unit. None of the defendants

testified at the hearing. The magistrate judge then dismissed the suit as lacking an arguable basis in law and failing to state a claim upon which relief may be granted because Chavarria had not complained to medical personnel about lack of sleep and the policy was a reasonable security measure. Chavarria appealed.

In a divided panel opinion, the Fifth Circuit affirmed. The panel held that, whereas sleep constitutes a basic human need, Chavarria could not show that the sleep deprivation was unnecessary and wanton and the alternative suggested by him of dimming the lights except when actually being used would be more disruptive of sleep. Judge Beavley concurred, stating without any support in the record that "a little cloth over his eyes would solve the problem, negate deprivation, and escape this exercise in frivolity." Judge Beavley did not state whether prison rules allow sleeping prisoners to cover their faces nor did he objectively determine whether "a little cloth" would in fact block the alleged harsh illumination of six different lights.

In a dissenting opinion, Chief Judge King noted that, because the Fifth Circuit had already recognized that "sleep undoubtedly counts as one of life's basic needs" in *Harper v. Showers*, 174 F.3d 716 (5th Cir.

1999), it was improper to dismiss the suit as legally frivolous for failure to state a claim. Chavarria's complaint appeared to allege that he could only get sleep every 30 to 35 hours when fatigue overcame illumination, causing adverse physical effects of sleep deprivation such as "seeing spots and shadows that are not really there," "headaches," and a feeling of "bugs jumping and clawing all over his body." Chavarria also testified at the hearing that the lights were "'very strong' and that they hurt him and caused him to see 'lights, and shadows, and spots.'" This alleged deprivation of the basic need of sleep.

Judge King also noted that defendants had direct knowledge of the complaints but were deliberately indifferent to them. Also, the claim that dimming the lights would be more disruptive to sleep had not come from the defendants--they had not yet been served. Rather, the panel, and the magistrate before it, had engaged in making fact findings improperly. This denied Chavarria due process.

Will the Fifth Circuit now require a segregation prisoner being starved by the guards to complain to the medical department to have an actionable claim? The ruling is unpublished. See: *Chavarria v. Stacks*, 102 Fed. Appx. 433 (5th Cir. 2004). ■

# Texas Now Requires D.A.'s Approval For Wrongful Conviction Compensation

by Matthew T. Clarke

An amendment to the 2001 Texas law allowing compensation of the wrongly convicted requires that people applying for compensation present a letter from the district attorney who convicted them certifying the person's innocence.

In 2001, State Senator Rodney Ellis, D-Houston, introduced a bill to allow people who were wrongfully convicted in Texas to receive \$25,000 per year of incarceration up to \$500,000. The compensation was conditioned on the person being able to document having served all or part of a sentence and having received a pardon based on innocence or relief from a court based on innocence. The new provision was added without Ellis's knowledge or approval.

"Someone has slipped into state law in the dark of night a provision that says—even if you have a pardon—you have to have a letter from the district attorney saying you are actually innocent," said Ellis. "It's ridiculous."

The "ridiculous" amendment was included in the voluminous fiscal matters bill, a routine bill passed every legislative session.

Jesse Ancrica, Associate Deputy Comptroller, said the amendment resulted from a discussion about moving the responsibility for determining who should receive compensation from the Comptroller to a more

suitable agency. "We talked about using the attorney general or Texas Department of Criminal Justice--anywhere but here," said Ancrica.

The problem with this solution is that Texas district attorneys rarely admit having made a mistake, even when overwhelming scientific evidence proves the innocence of the wrongly convicted person. Consider the case of Josiah Sutton, a Houston man wrongly convicted of a 1998 rape for which he spent more than 4 years in prison. Sentenced to 25 years in prison, Sutton's innocence was proven after the Houston Police Department's crime lab came under scrutiny following a number of high-profile blunders and an inability of crime lab personnel to pass proficiency tests. New DNA tests performed in March 2003 exonerated Sutton. However, it took another 11 months for his pardon to go through, and now Harris County District Attorney Chuck Rosenthal refuses to issue the letter needed for compensation.

"If I knew he was innocent, I would. But I don't know that now," said Rosenthal, ignoring the DNA test that excluded Sutton and the pardon based on innocence. "If you give me some good reason to believe the victim was mistaken, I will probably send the letter."

That day will likely never come. Even

in high-profile cases, such as that of Randall Dale Adams, falsely convicted of killing a police officer in Dallas; Clarence Brandley, falsely convicted of a rape-murder in Conroe; or Lionel Getter, falsely convicted of robbery in Dallas, the district attorneys still maintain the guilt of the wrongfully convicted, even in the face of confessions by the actual perpetrators. Why? District attorneys are elected to obtain convictions. To admit having made a mistake is tantamount to loading your political opponent's guns. If you are a D.A. it is politically-expedient to never admit an error--especially in writing.

Ironically, the failure to compensate the wrongly convicted may cost the State. Compensated people must give up their right to sue to receive compensation. Uncompensated persons have no choice but to sue and, unlike compensation awards, the awards in lawsuits are not capped. However, as past articles in *PLN* have noted, frequently there is often no one to sue which leaves the wrongly convicted with no recourse for having spent years or decades in prison for crimes they did not commit.

Ellis intends to introduce legislation to remove the new requirement and raise the compensation limits to \$40,000 per year in the 2005 legislative session. ■

Source: *Houston Chronicle*.

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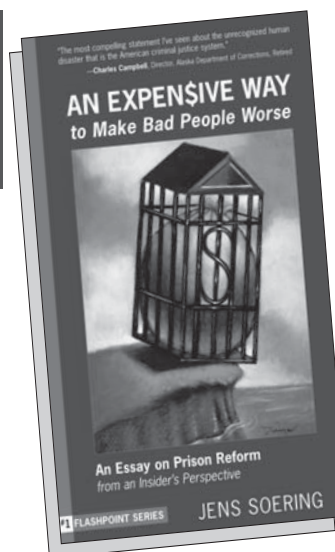
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# CSC May Be Liable For Retention of Sexually Abusive Employee

by Matthew T. Clarke

A federal district court in New York has held that Correctional Services Corporation (CSC) may be liable for retaining an employee at a CSC-run halfway house after his sexual abuse of female prisoners was reported to another CSC employee.

Yvette Adorno and Stephanie Womble, federal prisoners formerly confined at Le Marquis Community Correctional Center, a New York city halfway house for state and federal prisoners, filed suit against CSC in New York federal court, alleging CSC employee Miguel Correa sexually abused them at Le Marquis. Correa's job was Resident Advocate. He was responsible for protecting prisoners' rights in disciplinary actions.

On the evening of November 13, 1998, Correa allegedly picked up Adorno's shirt, "touched her breasts, made various inappropriate sexual comments ..., kissed her and pushed his body up against her," only allowing her to leave his second-floor private office "after she threatened to scream and promised not to report the incident." Adorno did not report the incident to any federal Bureau of Prisons (BOP) or CSC official because of threats by Facility Administrator Josette Nelson-Dabo to send prisoners who complained about conditions at Le Marquis back to prison. Adorno told another prisoner

about the abuse the day after it happened.

Adorno alleged the sexual abuse "caused her to experience anger, mood swings, feelings of distrustfulness toward men and problems with being intimate with men." She has been treated by a psychiatrist and diagnosed with post-traumatic stress disorder (PTSD) due to the abuse.

Correa allegedly sexually abused Womble in September 1998 by hugging her, fondling her breasts through her clothes, touching her buttocks, and making sexually inappropriate remarks to her. After several such episodes, she reported the abuse to CSC Case Manager Ms. Arias. Arias quit her job before Thanksgiving Day without passing on the charges of sexual abuse. A day or two after Thanksgiving Day, Correa allegedly sexually abused and raped Womble. Infected with chlamydia during the rape, she has received psychiatric treatment for PTSD, and endured rape-related physical pain and emotional suffering.

Other prisoners reported the sexual abuse of plaintiffs to a BOP official in December 1998. Following a BOP investigation, CSC fired Correa.

The suit proceeded in federal court under New York law with diversity jurisdiction. CSC moved for summary judgment. The court

held that CSC was not vicariously liable for Correa's actions because they were outside his scope of employment. CSC could also not be held directly liable for negligent hiring, even though Correa did not have the experience required by CSC for the position of Resident Advocate, because there was no causal connection between his lack of experience and the sexual abuse. However, CSC was not entitled to summary judgment on the issue of direct liability for negligent retention because there was evidence that Correa was retained after Womble reported sexual abuse to Arias and before the sexual abuse of Adorno and rape of Womble. Even though the only evidence was of this report was Womble's testimony it was sufficient to create a material issue of fact and defeat summary judgment on that claim. CSC was not entitled to government contractor immunity and the plaintiffs were not required to produce expert testimony on the issues in this suit. CSC's claim that plaintiffs' history of mental and physical abuse rendered the sexual abuse by Correa harmless was distasteful and unsupported. Therefore, summary judgment was granted with regard to the negligent hiring and vicarious liability claims and denied in all other respects. See: *Adorno v. Correctional Services Corp.*, 312 F.Supp.2d 505 (S.D.N.Y. 2004). ■

## Restitution Payments By Federal Defendant Whose Direct Appeal Was Final Held Not Reimbursable Upon Later Collateral Relief

by John E. Dannenberg

A convicted swindler whose direct appeal of his federal conviction was denied, but whose subsequent habeas corpus petition was granted, was not entitled to reimbursement of \$77,507 in court-ordered victim restitution payments made after his direct appeals became final. The court ruled that he was only entitled to the return of \$850 in court costs paid to the U.S. Government.

H. Wayne Hayes ran a Ponzi [pyramid] scheme between 1984 and 1986 wherein he collected \$1,187,800 that he supposedly invested in oil exploration and development. In a 1993 jury trial for fraud, it came out that he put \$981,000 of the funds instead into his personal account, of which \$644,000 was traced to his purchases of a home in Florida, a Rolls-Royce and expensive jewelry. His "oil exploration" venture produced only \$10,554 in "revenue."

Hayes, who represented himself at trial, was sentenced to 20 years in the Bureau of Prisons (BOP) and ordered to pay \$424,705 in restitution plus \$850 in court costs. Thereafter, he unsuccessfully appealed his conviction through the U.S. Supreme Court in 1997. At this point, he began making restitution payments, totaling \$77,507.

But in 2000, Hayes won a 28 U.S.C. § 2255 habeas corpus reversal of his conviction on grounds that he was never warned by the trial court of the pitfalls of self-representation. See: *U.S. v. Hayes*, 231 F.3d 1132 (9th Cir. 2000) However, when the prosecution was unable to reproduce the evidence for a new trial, his case was dismissed.

Hayes then moved for reimbursement of his restitution payments and court fees, arguing that they were assessed upon a wrongful conviction. The district court agreed that

the government must return its court fees of \$850, but declined to order the victims to return their restitution payments.

The Ninth Circuit U.S. Court of Appeals upheld the district court. It held that after Hayes' direct appeal became final, the restitution collected in good faith by the government became the property of the victims and indeed, was properly disbursed to them. Since the government no longer had control of those funds, it could not be ordered to return them. The court costs of \$850 were refundable, however, since the government still possessed those funds.

In hindsight, it appears that the pitfalls of self-representation weren't so deep, after all Hayes netted over \$1.1 million plus seven years room and board from the BOP. See: *United States v. Hayes*, 385 F.3d 1226 (9th Cir. 2004). ■



# Ohio Awards \$1,402.92 For 11 Days False Imprisonment

by Michael Rigby

An Ohio prisoner should be awarded \$1,402.92 for 11 days of false imprisonment, a magistrate recommended to the Ohio Court of Claims on October 21, 2004.

On September 14, 1999, plaintiff Glen Wilson was sentenced to two years in prison and up to 3 years of post-release control. Wilson appealed his sentence, and on January 11, 2000, he was released on an appeal bond. On January 9, 2001, the Eighth District Court of Appeals affirmed Wilson's conviction and he was reimprisoned.

After a number of adjustments regarding credits for jail time and transportation time, prison officials calculated a release date of September 2, 2002. In April 2002, Wilson was transferred to the Harbor Light halfway house in Cleveland to complete his sentence. However, due to miscommunication between the Ohio Department of Rehabilitation and Correction (DORC) and the state Adult Parole Authority (APA), Wilson was not released until September 5, 2002.

Wilson sued the DRC and APA, pro se, claiming they were "liable for false imprisonment because DRC improperly calculated his release date and APA held him in custody

beyond that date." Under Ohio law, "False imprisonment occurs when a person confines another intentionally 'without lawful privilege and against his consent within a limited area for any appreciable time, however short.'"

At trial, the magistrate concluded that DRC failed to include 8 days of credit for transportation time--pursuant to a June 28, 2002, entry by the court of common pleas--when calculating Wilson's September 2, 2002 release date. The magistrate further acknowledged that although Wilson's calculated release date was September 2, 2002, he was held at the halfway house until September 5, 2003. Thus, the magistrate concluded that Wilson was imprisoned "a total of 11 days beyond his lawful term."

The magistrate next noted that Wilson did not qualify for damages under R.C. 2743.48 because he was not a "wrongfully imprisoned individual within the meaning of the statute" However, because Wilson had been falsely imprisoned, the court used this statute as a guideline. After reducing the amount of compensation authorized under R.C. 2743.48 by 50%, the magistrate determined Wilson was entitled to compensation

in the amount of \$1,214.52 for the 11 days he was falsely imprisoned.

Wilson also contended that he had been employed making \$6.50 an hour while at the halfway house, but that he had not been permitted to work during his last three days there. Wilson testified that he could have worked 25 hours in that time. Based on this, the magistrate further found that Wilson was entitled to \$162.50 for lost wages.

Accordingly, the magistrate recommended that Wilson be awarded a total of \$1,402.92, which includes the \$25 filing fee. (The 90 cent discrepancy was unexplained.) See: *Wilson v. Ohio*, 2004 Ohio 5922 (OH 2004). The recommendation was later adopted in full by the court of claims. See: *Wilson v. Ohio Dept. of Rehabilitation*, 2004 Ohio 7297, 2004 Ohio Misc. LEXIS 695. ■

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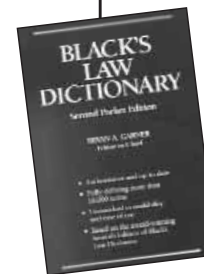
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# Dental Treatment Denial Claim Cannot Be Subdivided By Court

The court of appeals for the Eighth Circuit held that a prisoner's allegation of denial of dental treatment cannot be split into three separate sub-claims then dismissed for failure to exhaust state remedies on the sub-claims.

James McAlphin, an Arkansas state prisoner, filed suit against prison officials under 42 U.S.C. § 1983, alleging defendants' refusal to provide dental treatment caused him to lose five teeth, two more than would have been extracted had he received prompt treatment, and that two more teeth still needed to be extracted due to the lack of treatment. McAlphin is incarcerated at the Varner SuperMax which is attached to the Varner Unit. His complaint alleges that Warden Rick Toney and Dr. Stanley Ware "ignored his requests and had not allowed him to be escorted down the hall to receive treatment at the Varner Unit Infirmary." He also alleged that Toney and Grievance Officer Terri Brown "refused to treat his situation as an emergency and had shown deliberate indifference" to his dental treatment needs when McAlphin's gums became infected.

The district court dismissed the suit

without serving the defendants because McAlphin was subject to the three-strikes provision of 28 U.S.C. § 1915(g) for having filed three previous frivolous lawsuits. McAlphin appealed.

The Eighth Circuit held that the allegation that McAlphin still needs two additional tooth extractions because of a spreading gum infection fell within the "imminent danger of serious physical injury" exception to § 1915(g). *McAlphin v. Toney*, 281 F.3d 709 (8th Cir. 2002).

On remand the defendants moved to dismiss the suit for failure to exhaust state remedies. McAlphin opposed the motion and sought leave to amend the complaint with additional claims and defendants. The district court granted the motion to dismiss and denied McAlphin's motion for leave to amend the complaint. The district court reasoned that McAlphin had raised three claims: (1) denial of dental treatment; (2) failure to treat the grievances as an emergency; and, (3) refusal to escort him to the Varner Unit infirmary for treatment. Because McAlphin had not exhausted all three claims, dismissal was in order. McAlphin appealed.

The Eighth Circuit disagreed with the district court's reasoning. It held that McAlphin had raised a single claim of denial of emergency dental treatment and the failure to treat it as an emergency and failure to escort him to Varner Unit's infirmary were a part of that single claim which had been fully exhausted. Therefore, the dismissal of McAlphin's suit was in error.

The Eighth Circuit also noted that the district court was correct in denying McAlphin leave to amend the complaint because some of the claims he sought to add fell outside the "imminent danger" exception to § 1915(g). In dicta, the Eighth Circuit stated that, should a prisoner who is subject to the three-strikes rule initially join "an exhausted imminent danger claim with other unexhausted claims, it may be both necessary and appropriate to sever the unexhausted claims so that the imminent danger may proceed" as a pauper to a prompt separate disposition.

The denial of leave to file an amended complaint was affirmed. The dismissal was reversed and the suit returned to the district court for further proceedings. See: *McAlphin v. Toney*, 375 F.3d 753(8th Cir. 2004). ■

## Flight From California Parole Agents' Attempted Arrest Constitutes Felony Escape

The California Court of Appeal held that a parolee who fled an attempted arrest by his parole agent was a "prisoner" nonetheless and that his actions supported his later conviction of felony escape.

Parolee Aaron Nicholson unknowingly had a Board of Prison Terms warrant issued for his arrest six days before he routinely appeared at the Redwood City, California parole office. When he showed up, several parole agents escorted him to give a urine

sample, a ruse for their intent to arrest him. As he went down the hall to comply, the agents told him to get on the wall and that he was under arrest. But when they tried to cuff him, he literally slipped loose due to a Vaseline-like substance on his arms. Less than an hour later, he phoned the parole office threatening to "shoot up the agents" and "blow up the parole office." "Watch your back. It's on..." he warned. The next night, acting on a tip, Highway Patrol

officers spotted him at a nearby Palo Alto mall. Nicholson sped off in his car, which he abandoned after a high-speed chase, and fled. Police found a loaded .32 caliber gun and 43 cartridges in the car. Three months later, he was caught and thereafter convicted of felony escape (Penal Code § 4532(b)(1)) as well as misdemeanor criminal threats.

His appeal focused on whether he could be found guilty of escape from custody, when he was not yet a prisoner having evaded the attempted arrest. The court held that a parolee is always a "prisoner" in California just one serving his time outside the walls of prison. Stated another way, he was in "constructive custody."

Nicholson also challenged the standard jury instructions as inadequate to properly define lawful custody and escape. While the court agreed, and criticized the instructions, it found any error harmless beyond a reasonable doubt. The felony escape conviction's impact on Nicholson was enormous. Because the jury found true that he had seven "strike" priors and three prior prison terms, this newest "any felony" conviction cost him 28 years-life as a "third striker." See: *People v. Nicholson*, 123 Cal. App. 4th 823 (2004). ■



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## Los Angeles County Pays \$32,500 To Settle Public Defender's Legal Malpractice

On November 8, 2004, the Los Angeles County, California Claims Board granted authority of \$32,500 to settle a claim by a prisoner for legal malpractice on the part of the Public Defender, wherein the prisoner had been incompetently advised to accept a felony plea-bargain for what amounted only to a misdemeanor offense.

Benjamin Jaramillo was arrested in possession of marijuana on October 15, 2001, for which a felony drug charge was filed against him. Upon advice from his appointed deputy public defender, Jaramillo pled guilty to the felony. His four year state prison sentence was suspended in exchange for five years probation plus one year county jail. After release from his jail term in July, 2002, he violated his probation terms and was sent to state prison for four years.

On direct appeal of that sentence, the California Court of Appeals ruled that based upon the facts of his case, the original charge should have only been a misdemeanor punishable by a \$100 fine. Jaramillo was released from prison on August 23, 2003; he had been incarcerated a total of 440 days.

In evaluating the County's exposure on Jaramillo's subsequent claim, county counsel advised the Claims Board of potential damages at trial of \$175,000, consisting of \$150,000 pain and suffering plus \$25,000 loss of earnings. Against this exposure, counsel asked the Board of Supervisors for settlement authority of \$32,500, inclusive of Jaramillo's damages, costs and attorney fees. County counsel noted that its own costs of defense of the pending trial were \$7,320 in attorney fees plus \$1,452 in costs, so far.

County counsel summarized the liability to the Board: "Benjamin Jaramillo depended on the legal counsel of the Public Defender's Office before he entered his plea to the felony. A jury could conclude that the Deputy Public Defender should have known that the crime was a misdemeanor and brought that to the Court's attention." *PLN* readers experiencing "dump-truck" legal representation from a public defender should learn from this report that as an attorney, the public defender is held to the same standards of professional responsibility as a private attorney. See: *Jaramillo v. County of Los Angeles*, Los Angeles County Superior Court Case No. BC 307738. ■

## Ohio Prisoner Awarded \$500 For Lost Property

The Ohio Court of Claims awarded \$500 to a prisoner who claimed prison personnel lost various items of property when he was transferred.

Thomas Pasco, an Ohio state prisoner, was transferred from the Ohio State Penitentiary (OSP) to the Belmont Correctional Institution on October 29, 2003. However, Pasco claimed that various items of property were not transferred with him. These items included a radio/cassette player, a pair of headphones, a television, a fan, two cassette tapes, games and game pieces, various articles of clothing, and assorted photographs from two albums.

Pasco sued in the Court of Claims seeking to recover damages in the amount of \$1,203.49: \$500 for the photographs, \$428.49 for his remaining property, \$250 for assistance in preparing his claim, and \$25.00 for reimbursement of the filing fee. Defendant OSP admitted liability but disputed Pasco's damages request stating that it "has no objection to an award of damages in this case in an amount reflective, of the loss sustained."

Without elaborating, the court awarded Pasco a total of \$500: \$475 for the lost property and \$25.00 for the filing fee. The court denied Pasco's claim for assistance in preparing the claim holding that it was not a recognizable element of damages. Court costs were assessed against the OSP. See: *Pasco v. Ohio State Penitentiary*, 2004 Ohio 4821; 2004 Ohio Misc. LEXIS 505 (Oh. Ct. clms.). ■

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# \$195,900 in Damages, Fees/Costs Awarded in Prison Sexual Abuse Case; PLRA Fee Caps Inapplicable to Former Prisoners

A federal court in New York awarded a former prisoner \$179,900 in attorney's fees and costs, against the prison guard who sexually assaulted her. The court concluded that the fee cap provisions of the Prison Litigation Reform Act (PLRA) did not apply, but reduced the requested fee by approximately 48 percent.

While confined in the Bayview Correction Facility in New York, Beatrice Morris was sexually assaulted by Bayview guard, Gilbert Eversley. He entered Morris' cell while she slept and she awoke when Eversley touched her. She demanded that he leave, but he refused and attempted to rape her.

"Eversley was unable to penetrate Morris and instead ejaculated on her leg and bed. ...The next morning, using a pair of nail clippers, Morris cut out a piece of her sheet that had been stained by Eversley's semen...She eventually reported the assault to prison officials and handed over the piece of stained sheet...DNA testing later confirmed that the semen on the sheet was, to a virtual certainty, Eversley's."

Approximately two-and-one half weeks before her release from prison, Morris filed a pro se action in federal court against Eversley, the New York Department of Correctional Services and various supervisory prison officials. Sometime later, counsel was retained to represent her on a pro bono basis.

The court denied defendant's motion to dismiss for failure to exhaust available administrative remedies, finding that no remedies were available because Morris had been released. See: *Morris v. Eversley*, 205 F.Supp.2d 234 (SDNY 2002). Following discovery, defendants moved for summary judgment and the court granted the motion as to the supervisory defendants only. See:

*Morris v. Eversley*, 282 F.Supp.2d 196 (SDNY 2003). The parties then stipulated to the dismissal of all but the § 1983 claim against Eversley.

After a three-day trial, "a jury found that Eversley acted intentionally and maliciously and violated Morris' Eighth Amendment right to be free from cruel and unusual punishment...The jury, however, awarded Morris only \$500 in compensatory and \$7,500 in punitive damages."

The court "was baffled that the first jury awarded such low amounts," and issued an order holding "that the jury's damages were so grossly inadequate as to shock the conscience, vacat[ing] the jury's verdict in part, and order[ing] a new trial on the issues of punitive and compensatory damages only."

During the second trial, "Kenneth Werbach, the former deputy superintendent for security at Bayview...testified that sexual abuse of [prisoners] was an ongoing problem at Bayview during his tenure." He indicated "that the problem of sexual abuse of female prisoners by guards at Bayview was so serious that it compelled him to resign from his position." The court observed that "[s]exual abuse of female prisoners by male [guards] is a pervasive, well-documented, national problem. See: Amy Laderberg, *The 'Dirty Little Secret': Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 Wm. & Mary L. Rev. 323 (1998)[.]"

Yet the second jury awarded Morris just \$1,000 in compensatory and \$15,000 in punitive damages. The court found it "hard to imagine that Morris could be made whole for the damages she suffered, including the loss of her dignity, by a mere...\$1,000...in compensatory damages."

"[N]otwithstanding the amounts of the damages awarded, 'however, the court found that 'Morris still obtained a significant victory, one that undoubtedly will help to protect the civil rights of others. The non-monetary value of her victory...should not be underestimated.'"

Following the second trial, Morris filed a motion seeking \$295,818 in attorney's fees and \$58,228.23 in costs for a total award of \$354,046.23. Eversley objected to the requested award in several respects.

The court began with the threshold issue of whether the PLRA's restrictions on attorney's fees, of 42 U.S.C. § 1997e(d), applies to cases where the plaintiff was a prisoner when the action was filed but was released shortly thereafter. The court recognized that the Second Circuit has applied the fee cap to prisoner cases, *Torres v. Walker*, 356 F.3d 238 (2d Cir. 2004). However, it does *not* apply to a plaintiff who is no longer a prisoner when the action is filed. See: *Kerr v. Puckett*, 138 F.3d 321 (7th Cir. 1998); and *Greig v. Goord*, 169 F.3d 165 (2d Cir. 1999).

Interpreting the language of the statute, the court held "that the words of § 1997e(d) do not plainly require that the statutes applications to a prisoner-plaintiff who is no longer 'confined' when fees are incurred and awarded." Turning next to legislative intent, the court concluded "that the words of the statute must be interpreted so that § 1997e(d) is inapplicable to a case...where the prisoner-plaintiff was released shortly after filing suit and did not engage lawyers until she was no longer confined in prison." Finally, relying upon "the instructive reasoning." Of *Robbins v. Chronister*, 2002 U.S. Dist. LEXIS 3835, No. 97-3489-DJW. 2002 WL 356331 (D. Kan. March 1, 2002), the court found that "[i]t would be absurd to interpret § 1997e(d) to impose attorneys' fees limits on a plaintiff who files a successful, non-frivolous civil rights action while a prisoner, but is released from prison less than three weeks later and retains lawyers when she is no longer a prisoner."

Applying the "traditional lodestar analysis [to] Morris's application for fees and costs[ ]" the court found that the hourly rates of \$315-395/hour charged for the lawyer time on the case were "excessive in light of the type of litigation involved and the experience level of the associates who worked on the case." The court noted that "these amounts exceed the rates usually charged by experienced civil rights attorneys[ ]" and concluded "that the appropriate rate is \$200/hour[.]" for a total of \$152,400. It then concluded that paralegal time of "97.5 hours of \$155/hours[ ]" was high, and allowed "100 hours of paralegal time at \$125/hour[.]" [\$12,500] for a total fee award of \$154,900. Finally, the court reduced plaintiff's requested costs from \$58,228.23 to \$25,000, finding that the costs, "particularly office expenses and electronic legal research costs, [were] excessive." Thus, the total fee and cost award of \$179,900. See: *Morris v. Eversley*, 343 F.Supp.2d 234 (SDNY 2004). ■

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## Failure to Protect from HIV-Positive Prisoner Negates Qualified Immunity Defense

The Eighth Circuit Court of Appeals has held that prison officials are not entitled to qualified immunity in a civil rights action filed by three prisoners at South Dakota's Mike Dufree State Prison. The prisoners alleged that prison officials failed to protect them from Paul Soyars, an HIV-positive prisoner. Plaintiffs Richard Nei and Alvin King also alleged they were retaliated against for filing the suit and denied access to the prison law library. After the district court denied prison officials motion for summary judgment based upon a qualified immunity defense, prison officials filed an interlocutory appeal.

The facts of the complaint show that Soyars admitted to prisoners and prison staff that he was infected with AIDS. He often threatened to infect other prisoners with the virus. While cleaning the prison restrooms, Soyars urinated on the floor, spit in the sinks and water fountains, and smeared fecal matter on the floor. After King reported to Unit Manager Lisa McFletcher that he disapproved of the way Soyars "cleaned" the bathroom, Soyars and King got into a fight. Soyars spit in King's face. Soyars cut his lip, and his blood came into contact with an open wound on King's hand.

A few days later, Soyars got into a fight with another prisoner and threatened to infect him with AIDS. King and Nei told McFletcher and Special Security Head Sally Boyd about Soyars fights, threats, and manner of how he would "clean" the restrooms. After they took no action, King filed a grievance and began obtaining signatures from several prisoners to initiate a class action lawsuit. Four days later, King's grievance was denied because prison policy prohibits segregating infected prisoners outside the general population. [Editor's Note: The prison appears unusual though

in that it does not segregate prisoners who routinely fight with other prisoners, damage state property and, if the complaint is accurate, constitute a walking health hazard.]

On May 1, 2000, McFletcher received an anonymous note stating Soyars was improperly cleaning the toilets, Soyars admitted he was HIV positive, and threatened the note's author. McFletcher reported to Boyd, who was told by Soyars he was HIV positive. The next day, Soyars pushed Nei and threatened to infect him with AIDS. Some of Soyars blood went into Nei's mouth, on his body, and on his clothing.

Two days later, after prison officials received a copy of the complaint in this action, King and Nei were placed in segregation. Their grievances were responded to as being under investigation. Once released from segregation, King, Nei and plaintiff Paul Amundson were denied access to the law library to draft documents for this case.

The Eighth Circuit held the district court correctly denied prison officials qualified immunity because of evidence that Soyars fought with King, Nei, and Amundson, which involved fluid exchange, threats of infection, or both. Viewing the facts in a light most favorable to the prisoners, the officials did not respond in an objectively reasonable way. Indeed, they did little to address the situation for months after being made aware of the circumstances.

The court found there was a genuine issue of material fact about whether prison officials retaliated against the prisoners or placed them in segregation to investigate whether they were soliciting signatures in violation of prison rules. The district court's denial of summary judgment to prison officials was affirmed in all respects. See: *Nei v. Dooley*, 372 F.3d 1003 (8<sup>th</sup> Cir. 2004).

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# California Muslims' Prayer Attendance And Religious Beard Injunction Made Permanent; \$289,011 Awarded in Fees

by John E. Dannenberg

The U.S. District Court (E.D. Cal.) granted summary judgment and entered a permanent injunction (PI) against the California Department of Corrections (CDC), authorizing Muslim prisoners to leave their job assignments (without punishment) to attend one hour Friday Jumu'ah prayer services, as well as to maintain beards up to 1/2 inch long. The ruling was based upon the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, et seq.

Karluk Mayweathers and five other prisoners sued prison officials at California State Prison (Solano) in 1996 on First Amendment grounds, seeking permission to attend weekly Jumu'ah prayer services during their job assignments without being penalized. They also challenged CDC's grooming policy denying them religious beards. In 2000 they amended their claim to include the then new RLUIPA. The district court granted preliminary injunctive relief (*Mayweathers v. Terhune*, 136 F.Supp.2d 1152 (E.D. Cal. 2001)), which was upheld on appeal. (*Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001); *PLN*, Sept. 2002, p.18.)

CDC next challenged the constitutionality of the new RLUIPA, but was denied in both district and appellate courts. See: *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), cert. den., *Alameida v. Mayweathers* (2003) 157 L.Ed.2d 30; *PLN*, Sept. 2003, p.6).

Since 1996, the court issued fifteen preliminary injunctions granting such relief - each automatically expiring after 90 days. Unsuccessful in appealing these injunctions, CDC nonetheless stipulated to them pending appeal. In this final litigation, the preliminary relief was made permanent in a

novel ruling distinguishing habeas corpus, § 1983 and § 2000 claims. The court ruled that not only were the prisoners entitled to such beards and to attend prayer services without punishment, they were entitled to retrospective disciplinary credit-loss recovery as well as to have all corresponding paperwork expunged from their prison files.

The court first reviewed the rules for summary judgment "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Upon examining the extensive record, the court concluded that there were no factual disputes and that appeals regarding previous questions of law had been exhausted - thus ripening the case for rulings on the prisoners' motions for summary judgment and permanent injunction.

Next, the court validated standing of the current class members. "The prisoners have standing to seek injunctive relief, and a holding to the contrary would allow prison officials to defeat prisoners' claims simply by changing individual plaintiffs' work schedules as soon as they file suit." (Citing *Mayweathers*, 258 F.3d 930, 934-35.) ... "The mere fact that the substituted class representatives, who were added as representatives after the preliminary injunctive relief had been granted, have not been disciplined, does not suggest that they are inadequate as representatives."

As to grooming standards, the court had earlier denied relief based upon the pre-RLUIPA standard of *Turner v. Safley*, 482 U.S. 78 (1987). But post-RLUIPA, it ruled that there existed ready alternatives to the beard restriction, and that CDC had not used the least restrictive means of accomplishing its goals of prison security and easy identification of prisoners. Therefore, the grooming standards, as applied, violated the RLUIPA.

Separately, as to Jumu'ah service attendance, the court found that "[t]he absence of Muslim inmates for about one hour on Fridays only will not disrupt the operation of the work incentive program."

Next, the court examined the question of retrospective application of any relief. Regarding beards, the court found that since no injunction was available prior to the RLUIPA, the question was moot. But for the prayer restriction, the court had granted preliminary injunctions both before and after the RLUIPA, and concluded now that under

the Prison Litigation Reform Act's limit to relief extending no further than necessary to correct the threat to plaintiffs' rights under RLUIPA, the relief drawn was appropriately narrow and minimally intrusive to correct the harm. Yet, RLUIPA is "silent" as to retroactivity, and retroactivity absent express statutory authority is disfavored. However, since the court ruled that pre-RLUIPA, the restriction on Jumu'ah attendance was unconstitutional under *Turner v. Safley*, corrective relief for past violations was appropriate.

Nonetheless, the decision as to retrospective liberty interest relief for past disciplinary actions - e.g., restoring lost conduct credits, expunging besmirched prison records - required new thinking here because CDC lately raised a concern that under *Heck v. Humphrey*, 512 U.S. 477 (1994), any relief as to loss of conduct credits implicated habeas corpus and that like in 42 U.S.C. § 1983 actions, the exhaustion requirements of habeas corpus could not be circumvented by simply re-labeling a credit-loss claim a "civil rights complaint."

In its analysis, the court first compared habeas and § 1983 as held in *Preiser v. Rodriguez*, 411 U.S. 476 (1973) and *Heck*. The court noted that *Heck* ruled that because the exhaustion requirement of habeas corpus was a more specific statutory enactment than the broad reach of the civil rights act of § 1983, its more narrowly drawn requirements would necessarily control: "The [*Preiser*] Court's reasoning hinged on the distinction between the generality of section 1983 and the specificity of the federal habeas statutes in addressing a means for attacking the validity of confinement."

Extending this logic to the present tension between § 2000cc and habeas corpus, the court found that RLUIPA was expressly drafted narrower than habeas corpus, and that Congress's intent for RLUIPA necessarily trumped that of habeas corpus as to the question of the habeas exhaustion rule. Indeed, it found *Heck* "irrelevant" to the question of exhaustion under § 2000cc when retrospective restoration of lost conduct credits was implicated. The court left to the parties to devise a mechanism to identify those plaintiffs who were entitled to credit restoration/file-expungement and to report that to the court within thirty days.

Plaintiffs were represented by Susan Christian of the Prison Law Office, San Quentin, California, and numerous law stu-

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dents. See: *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. CA 2004).

In a separate, unpublished ruling, the court awarded attorney fees of \$289,011 on November 19, 2004 for the seven year effort of appointed counsel Susan Christian to win rights for Muslim California state prisoners to attend Jumu'ah prayer services and to wear beards without suffering disciplinary sanctions. The touchstone of the fee ruling (42 U.S.C. § 1988(b)) was the court's determination per 42 U.S.C. § 1997e(d)(1)(A) that plaintiffs had "indisputably proved actual violation of their rights protected by 42 U.S.C. § 1983 and RLUIPA."

As noted above, the prolonged litigation involved numerous phases and appeals, with 15 preliminary injunctions issued pending final disposition. Each injunction was appealed, adding to the costs. See: *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), cert. den., *Alameida v. Mayweathers*, 124 S.Ct. 66 (2003). Fees were also incurred in defending defendants' unsuccessful challenge to the constitutionality of the RLUIPA, as well as to gain an order governing a process for locating and expunging all related disciplinary documents from plaintiffs' files throughout the state.

Part of the fee award was made for the extensive use of 34 law students, under direction of attorney Christian, at the University of California at Davis' King Hall Civil Rights Clinic. The students were paid at the rate of \$60/hr. for 1,913 hours of billed time, amounting to \$114,780. Their tasks included conducting discovery, taking depositions, doing legal research and arguing motions in court. Carter White, supervising attorney of the King Hall Clinic, said, "We are especially proud of this ruling. This is the largest amount that's ever been awarded on one case for work done by our students."

Attorney Christian's fees were paid at the rate of \$112.50/hr. until 2/1/02, when the allowable rate became \$169.50 under the PLRA. Overall, attorney fees of \$174,231 were awarded for her 1,418 hours as "reasonable and necessary" to prove the actual civil rights violations. Christian is now associated with the non-profit Prison Law Office, San Rafael, California.

The court also acknowledged that further fees may accrue for successful efforts in defending defendants' appeal of the judgment, as well as for any enforcement of injunctive relief. See: *Mayweathers v. Terhune*, U.S.D.C. (E.D. Cal.), No. CIV. S-96-1582 LKK/GGHJP, Order, November 19, 2004 (unpublished). 



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# Immigration Detainee Wins Appointed Counsel And New Trial In Brutality Suit Against CCA

by John E Dannenberg

An immigration detainee of seven years, who had unsuccessfully sued his jailer, Corrections Corporation of America (CCA) and its employees for severely beating him during a medical emergency transport, was granted a new trial with appointed counsel. The Ninth Circuit U.S. Court of Appeals held that the complexity of the case should have alerted the district

court to grant the detainee's original motion for appointment of counsel, the lack of which reduced his chances of prevailing to virtually nil.

Emmanuel Agyeman, a native of Ghana deemed an illegal alien by the Immigration and Naturalization Service (INS), had been "detained" since February 4, 1997. He was found deportable on July 28, 1997, but the ruling was overturned on July 23, 2002, (*Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002)) and remanded for a full and fair hearing. Meanwhile, part of his unending federal detention was spent in facilities operated by private contractor CCA, where he claimed he was mistreated.

Agyeman complained that on October 11, 1998, while he was a pre-trial detainee at CCA's Central Arizona Detention Center, he was beaten by shift supervisor Captain Lopez, by Lt. Egber and by a Sgt. "John Doe." Agyeman had been in full mechanical restraints preparatory for his emergency medical transport to Casa Grande Medical Center for treatment of what the Prison Medical Unit had diagnosed as "cardiac arrest." Agyeman, barely conscious, apparently didn't move fast enough to satisfy his CCA jailers, who then proceeded to beat him severely. Agyeman suffered three broken teeth, loss of blood and numerous bruises - in addition to obvious pain and suffering from being locked in a cell thereafter for twelve hours, fastened to a bed in an unnatural position calculated to inflict torture.

He filed a lawsuit against CCA and its employees in June 1999. On October 5, 1999 the U.S. District Court granted him in forma pauperis status (IFP) but declared his complaint deficient in a screening order. Agyeman responded on November 5, 1999 with his first amended complaint. The case bounced back and forth, continually being trimmed back by a magistrate judge. Significant for the present case, the magistrate denied Agyeman's motion to appoint counsel because he was not "experiencing difficulty... [traceable to] the complexity of the issues involved." Moreover, because "the case was beyond the pleading stage, no constitutional right to counsel was at stake."

On May 3, 2003, after a 3 ½ day jury trial, Agyeman lost, and his motions for a new trial, relief under F.R.Civ.P. § 60(b)(3) and judgment notwithstanding the verdict were denied. He appealed, but the district court

certified that the appeal was not taken in good faith and revoked Agyeman's IFP status.

The Ninth Circuit, however, ruled contrary and also appointed pro bono counsel for him. The question before the Ninth Circuit was, "When does appointment of counsel become necessary due to the complexity of the case." (28 U.S.C. § 1915(e)(1).) Precedent held that such appointment is reserved for "exceptional circumstances."

Analyzing Agyeman's case, the Ninth Circuit found a "triple complexity." First, to the extent he sued the corporation CCA, the case could not be brought as a *Bivens* (403 U.S. 388) action because *Bivens* does not lie for private corporate defendants (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2000)). Rather, Agyeman should have sued CCA under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-2680. Alternatively, per *Malesko*, he could have sued in tort seeking injunctive relief.

Second, as to suing CCA employees, Agyeman was required to bring a *Bivens* action. And third, Agyeman's status as a detainee (non-criminal charges) gave him an enhanced status, bringing into question whether BOP rules governing transport of prisoners were even applicable to him.

Agyeman did the best he could, but inappropriately used 42 U.S.C. § 1983 for his action - a statute reserved for suing state employees. The Ninth Circuit reviewed all the places where an alert attorney would have properly steered the progressing actions, and concluded that Agyeman failed not for a bad try, but because the complexities of the case were so overwhelming as to be predictably fatal to its outcome, absent professional help. In short, they were "exceptional."

The Ninth Circuit also expressed its disdain for a legal system that "detained" a person on non-criminal charges for seven years, and subjected him to treatment like a dangerous criminal. "Is there any warrant for shackling the feet and binding the chest of innocent detainee," the court asked? To which this writer adds, "Is there any warrant to pummel a shackled prisoner suffering cardiac arrest and torture him for twelve hours," regardless of his incarceration status?

The Ninth Circuit accordingly vacated the judgment below and remanded for relitigation by appointed counsel. See: *Agyeman v. Corrections Corporation of America*, 390 F.3d 1101 (9th Cir. 2004). ■

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# Overdue California Lifer Entitled To Immediate Parole Release After Prevailing At Rescission Hearing

by John E. Dannenberg

The Marin County, California Superior Court ruled that a lifer who was twelve years overdue for release when he was finally granted parole, but who was then referred back to the Board of Prison Terms (BPT) by the Governor to have a pre-release rescission hearing, was entitled to immediate release upon having prevailed at the rescission hearing. The court further ordered credit against his parole term retroactive to the date of the rescission hearing.

Edward Lee was convicted of kidnap-for-robbery with use of a gun and sentenced to seven years to life in 1982. On February 26, 2003, the BPT granted parole and fixed his term at 100 months, net of behavior credits. Five months later, then-Governor Davis recommended a rescission hearing. (California Penal Code § 3041.1.) On August 12, 2003, the en banc BPT ordered the hearing, citing seven "charges" as to why the grant of parole had been "improvident."

Defending himself at the December 17, 2003 rescission hearing, Lee prevailed against all seven "charges" and the BPT reaffirmed his parole grant. Per BPT regulation 15 CCR § 2468, he should have been released "immediately" but he was not. Then San Quentin State Prison Warden Jeanne Woodford told him that Penal Code § 3042(b) and 15 CCR § 2041(h) required him to stay another 60 — 120 days.

Lee filed a Form 602 administrative appeal to the warden demanding immediate release, which the warden refused to even

screen or process, saying Lee's remedies lay instead with the BPT. Lee disagreed, and having thus exhausted his prison administrative remedies to the extent he was able, filed a petition for writ of habeas corpus the same day seeking an order to the warden to immediately release him and to credit his excess incarceration against his parole term.

In answer to the court's Order to Show Cause, the BPT argued that § 2468 applied only to rescission hearings stemming from an in-prison disciplinary event, and would not apply to a rescission grounded in BPT error in the original grant. The BPT thus inferred that there were two types of rescission hearings. The flaw in this novel theory was that it was inconsistent with their own rules, which provide only for a unitary rescission procedure, i.e., regardless of cause.

In granting the writ, the court relied upon the plain language of § 2468 as "seemingly clear" requiring immediate release. Rejecting the BPT's argument, the court found that the pre-release legal review required in § 2041(h) had already been performed after the initial grant of parole, and therefore held "[r]espondents cannot now contend that a new legal review should commence in the face of the language mandating immediate release." Although Lee had been suddenly released on February 14, 2004 after 59 days of over incarceration thus mooting any custodial relief by the court the court ruled "however, the period of delay from December 17, 2003 until February 14, 2004 shall be deducted from his parole. See: *In re Ballard*, 115 Cal.App.3d 647, 650 (1981) and Penal Code section 2932(g)."

Lee appeared in pro per with the aid of a jailhouse lawyer. Counsel was not appointed; no evidentiary hearing was held; the BPT did not appeal. This appears to be a case of first impression regarding interpretation of § 2468 and, although unpublished, could be cited as "persuasive" in future similar litigation. See: *In re Edward Lee*, Marin Superior Court No. SC 133116A, Order Granting Petition For Writ of Habeas Corpus, April 5, 2004. ☐

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# California Jail Suicide Lawsuit Settled For \$840,000; Contract Health Care Inadequate

A three year old federal wrongful death lawsuit brought by the family of a Yolo County, California jail detainee who hanged himself was settled for \$840,000 on September 1, 2004. Contract health care provider California Forensic Medical Group, Inc. agreed to pay \$825,000 of the total, based upon a finding that its four hours per week of jail psychiatrist staffing was inadequate and contributory to the plaintiff's death.

Thirty-two year-old Morton Aachen had been in the Monroe Detention Facility in Woodland, California for ten days in connection with corporal injury to a girlfriend. Aachen was known to jail personnel, and

their contract psychiatrist Dr. Asa F. Hambly, because Aachen had been jailed by nearby Davis, California police two weeks earlier, where he had attempted suicide. Both in Davis and Woodland, Aachen was treated by California Forensic, who knew of Aachen's history of mental illness and drug and alcohol abuse of almost twenty years.

Although Aachen was initially placed on suicide watch in Woodland, it was only an "informal" watch. Court papers showed that during the ten days, he received intermittent varying levels of medical supervision. Importantly, they showed Aachen did not receive prescribed psychotropic medications for a "number of

days." After showing a "heightened level of anxiousness" on the last day, he was found hanged from a sheet tied to his bed in his cell on August 5, 2000.

California Forensic is paid \$1.75 million annually by Yolo County to cover two jail facilities, and has been under contract since 1990. It has contracts with 25 California counties, and has been troubled by short staffing before. It paid \$1.5 million to settle two wrongful death lawsuits in 1999 regarding prisoners who died when their minor infections worsened while they were in the Ventura County jail. ■

Source: *Sacramento Bee*.

## Recharacterization Requires Notice Or Opportunity To Withdraw

The U.S. Sixth Circuit Court of Appeals held that a Michigan prisoner's improperly filed medical claim should not have been recharacterized without his consent or an opportunity to withdraw, nor should it have been dismissed with prejudice.

Eric Martin, a Michigan state prisoner, underwent bladder surgery in April 2002 while imprisoned at the Michigan Correctional Facility (MCF). Martin's treating physician, Dr. Pinson, scheduled Martin for a follow-up visit around May 18, 2002.

However, Martin was transferred to the Baraga Maximum Correctional Facility before he could be reexamined.

In December 2002, Martin filed a pro se complaint in the U.S. District Court for the Western District of Michigan seeking his return to MCF for treatment by Dr. Pinson. Martin styled his complaint "Petition For Writ of Habeas Corpus" and improperly filed it pursuant to 28 U.S.C. § 2241.

On review, the district court interpreted Martin's petition as a 28 U.S.C. § 2254 habeas corpus action and recharacterized

it as such. The court then determined that Martin's claim was more properly addressed under 42 U.S.C. § 1983. After making these two determinations, the district court applied Rule 4 of the Rules Governing § 2254 Cases in the District Courts and dismissed Martin's petition with prejudice. Martin appealed.

The Sixth Circuit reversed and remanded for two reasons. First, the appeals court held that § 2254 and § 2255 are essentially equivalent--the former applying to state habeas petitions, the latter to federal petitions. The Court then applied the

rule governing 28 U.S.C. § 2255 motions arrived at in *In re Shelton*, 295 F.3d 620 (6th Cir. 2002). In *Shelton* the Court held that district courts should not recharacterize motions supposedly "made under some other rule as a motion made under § 2255 unless" (1) the movant is warned of the potential adverse consequences and agrees to the recharacterization, or (2) the movant is allowed to withdraw the petition before it is recharacterized. In Martin's case, the district court failed to provide him with notice or an opportunity to withdraw.

Second, the Sixth Circuit held that the district court should not have recharacterized Martin's motion from an apparent habeas petition to a § 1983 civil rights claim. Although prisoners are to be afforded leniency when filing pro se petitions--the "leniency standard" still requires basic pleading standards. "Arguably, hanging the legal hat on the correct peg is such a standard..." the Court opined. Thus, Martin's petition should have been dismissed without prejudice so that he could "raise his potential civil rights claims properly as a § 1983 action." See: *Martin v. Overton*, 391 F.3d 710 (6th Cir. 2004). ■

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# Noncompliance With South Carolina Prevailing Wage Statute Grievable

by Michael Rigby

The South Carolina Supreme Court upheld the decisions of two circuit courts regarding the application of South Carolina's Prevailing Wage statute to prisoners.

South Carolina's prevailing wage statute, S.C. Code Ann. 24-3-40, -410, -430 (Supp. 2002), requires the Department of Corrections (DOC) to pay prisoners in the Prison Industries Program (PIP) the prevailing wage for similar work performed in the private sector. In *Adkins v. South Carolina Department of Corrections*, 360 S.C. 413; 602 S.E.2d 51 (SC 2004), prisoners at the Tyger River Correctional Institute were employed making "Anderson Hardwood Floors." The prisoners began with a training wage of 25 cents to 75 cents per hour, which increased to the minimum wage of \$5.15 per hour after 320 hours. (The policy of paying a training wage ended June 1, 1999). The prisoners, represented by Harry Leslie Devoe, Jr., of New Zion, filed action pursuant to the South Carolina Tort Claims Act claiming that their training and hourly wage violated S.C. Code Ann. § 24-3-430(D) because the prevailing wage for similar work was \$9.00 to \$12.00 per hour.


The Richland County Circuit Court dismissed holding that prisoners have no private, civil cause of action under the statute, and even if they did, the prisoners "had not established DOC's method of payment was grossly negligent, as required to maintain a tort claims action."

The Supreme Court affirmed. The Court first briefly noted that "the DOC's failure to pay a certain wage simply does not constitute a tort so as to be cognizable under the Tort Claims Act." The Court went on to hold that "Where a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party." In this case, the Court concluded, the prevailing wage statute was apparently not enacted for the benefit of prisoners, but rather to "to prevent unfair competition, and to aid society and the public in general." Thus, the statute did not give rise to a private, civil cause of action. However, the Court did note that, as held in *Wicker* below, the prisoners could file a grievance to protest the DOC's failure to pay wages in accordance with the statute.

In *Wicker v. South Carolina Department of Corrections*, 360 S.C. 421; 602 S.E.2d 56 (SC 2004), Bennie Wicker also challenged,

pro se, the DOC's policy of paying a training wage. Wicker participated in the PIP while at the Evans Correctional Institute and was paid a training wage for his first 320 hours. Wicker protested the training wage through the prisoner grievance procedure. After his grievance was denied, Wicker appealed to an Administrative Law Judge (ALJ). The ALJ concluded that the DOC had no authority to deviate from the statute and ordered Wicker compensated at a rate of \$5.25 per hour for the first 320 hours. The Newberry County Circuit Court affirmed and the DOC appealed.

As in *Adkins*, the Supreme Court first held that the prevailing wage statute did not provide prisoners with a private right of action. However, the Court further ruled that, "particularly where there is a statute mandating payment of the prevailing wage," Wicker had properly filed a grievance. Moreover, the Court continued, since Wicker had a statutory right to payment of the prevailing wage, such payment could not be denied without due process of law. Therefore, "in this very limited circumstance, the DOC's failure to pay in accordance with the statutes," was reviewable by the ALJ. The Court ultimately concurred with the ALJ and the circuit court holding that "there is simply nothing in the statutory scheme authorizing the DOC to pay Wicker a training wage less than the prevailing wage."

Many states around the country have similar prison industry programs where prisoners are mandated to be paid a specific wage but in reality are not. Previous issues of *PLN* have reported on court decisions dealing with these wage issues as well as the problems of prison slave labor programs in South Carolina and elsewhere. See indexes for details. 

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# Eighth Circuit Reverses Summary Judgment Against Pretrial Detainee's Dental Claim

by Robert H. Woodman

The U.S. Eighth Circuit Court of Appeals reversed a grant of summary judgment by the U.S. District Court for the Southern District of Iowa in a complaint filed by a pretrial detainee alleging that jail personnel were deliberately indifferent to his serious dental needs.

Napoleon Hartsfield was a pretrial detainee in the Scott County Jail in Iowa in 2001. On October 20, 2001, he filed a written request asking to be examined by jail medical staff because of a severe toothache and three loose teeth. Nurse Janice Colburn and Dr. Ludwig examined him, the jail doctor. Hartsfield alleged nothing was done despite his continued complaints of pain. He filed a grievance on November 28, 2001, and was seen by a dentist on December 5, 2001.

The dentist pulled three teeth, prescribed antibiotics and ibuprofen, and told Hartsfield the treatment delay had caused a bad mouth infection.

Hartsfield sued Nurse Colburn, Dr. Ludwig, Captain McGregor, Sheriff Conord, and Lt. Brundies under 42 U.S. § 1983, claiming that jail personnel were deliberately indifferent to his serious medical needs and that the jail had "a custom or policy of not providing adequate treatment for pretrial detainees to save money."

The defendants moved for judgment as a matter of law claiming that they had no liability. Dr. Ludwig submitted an unnotarized statement in which he "attested to" the truth of his version of events regarding the October 20 medical request. Hartsfield

disputed Defendants' statement with a verified claim of his own. Without telling Hartsfield that it was doing so, the district court construed Defendants' motion as one for summary judgment, accepting Dr. Ludwig's unnotarized statement but rejecting Hartsfield's verified statement. The court analyzed Hartsfield's claim under the Eighth Amendment and ruled against him on grounds that he "failed to present verifying medical evidence that the delay in dental treatment adversely affected his condition." Hartsfield appealed, citing five errors.

Reviewing the case *de novo*, the Eighth Circuit held that the district court's failure to notify him that it was treating Defendants' motion for judgment as a matter of law as a motion for summary judgment did not prejudice Hartsfield, because the district court gave Hartsfield opportunity to respond to the motion. The appeals court also held that, although Dr. Ludwig's non notarized statement did not conform to the requirements of 28 U.S.C. § 1746, the district court's consideration of that statement was harmless, "because our review of the record convinces us that reversal is required with or without consideration of Dr. Ludwig's statement."

Citing several precedent cases, the appeals court held that summary judgment to Defendants was error. The claim should have been analyzed under the Fourteenth Amendment, not the Eighth, since Hartsfield was a pretrial detainee. Further, even under the Eighth Amendment, Hartsfield stated a claim because he showed "(1) he suffered from an objectively serious medical need, and (2) defendants knew of the need yet deliberately disregarded it." The court held that Hartsfield's claimed suffering — extreme pain, loose teeth, swollen mouth, bloody gums, and difficulty eating and sleeping — "would have been obvious to a layperson, making submission of verifying medical evidence unnecessary." Moreover, the jail medical staff failed to grant treatment to Hartsfield for non medical reasons, despite his obvious suffering. This raised a material fact whether the defendants were deliberately indifferent to his serious medical needs.

The district court of summary judgment was reversed as to all defendants except Lt. Brundies, against whom Hartsfield made no claims. See: *Hartsfield v. Colburn*, 371 F.3d 454 (8th Cir. 2004).

## Guard Sues Over Smoke Grenade Injury

The U.S. Court of Appeals for the 8th Circuit reversed a lower court's grant of summary judgment against a prison guard who was injured by a smoke grenade.

On June 2, 1998, Timothy Gamradt, a Bureau of Prisons (BOP) guard, was hurt during a training exercise at the Federal Prison Camp in Duluth, Minnesota. The injury was caused by a smoke grenade which was detonated near him in a stairwell. Gamradt was not issued a gas mask and inhaled the smoke from the grenade. As a result of chemicals in the smoke, Gamradt experienced ongoing coughing, shortness of breath, and a 60% loss in his aerobic capacity.

Defense Technology Corporation of America-Wyoming (DTCA Wyoming) manufactured the grenade and sold it to

the BOP without providing any warning about the danger of detonating the grenades indoors. Later, another branch of DTCA acquired DTCA-Wyoming.

Gamradt brought a product liability action against DTCA in the U.S. District Court for the District of Minnesota (district court). The district court found an issue of material fact as to whether DTCA's acquisition of DTCA-Wyoming amounted to a de facto merger between the two companies. If so, DTCA might be liable for DTCA-Wyoming's defective grenades. Even so, the district court dismissed the suit finding that the danger of detonating the grenade indoors was so obvious that no warning was necessary. Gamradt appealed.

The appeals court disagreed with the district court's reasoning that the danger of detonating the smoke grenade indoors was obvious; thus that DTCA was not obligated to warn BOP of that danger. The court found that the fact that the grenade would produce smoke when detonated did not make it obvious that the chemicals therein, if inhaled, could cause the injuries Gamradt sustained (the same reasoning would seem to apply to injuries caused by the un-announced dangers of pepper spray).

The appeals reversed and remanded the case to the district court for further proceedings, including the issue of corporate liability after the merger. See: *Gamradt v. Federal Laboratories Inc.* 380 F.3d 416 (8th Cir. 2004).

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## Court Discusses Deliberative Process Privilege

In two separate rulings, a southern District of New York federal district court has expounded upon the deliberative process privilege, which is a “sub-species” of the work product doctrine.

This action was filed by the Administration of the Estate of Ralph Joseph Tortorici, who committed suicide on August 10, 1999, while a prisoner at New York’s Sullivan Correctional Facility (SCF). Less than a month earlier, Tortorici had been discharged from the Central New York Psychiatric Center (CNYPC), a maximum security inpatient hospital operated by the New York State Office of Mental Health (“OMH”) for New York’s Department of Corrections (NY-DOC) prisoners in need of forensic mental health services.

The lawsuit’s main claim is that Tortorici’s suicide resulted from DOC’s and OMH’s failure to create discharge criteria that adequately addressed his need for inpatient psychiatric treatment. The complaint also alleges Tortorici was discharged not because it was medically appropriate to do so, but rather because CNYPC had limited inpatient capacity. It is alleged CNYPC’s discharge criteria “compelled the discharge of any prisoner who remained hospitalized for a period of one continuous year, despite the patient’s ongoing need for inpatient psychiatric treatment.” The defendants contend Tortorici was discharged because “in the judgment of the treatment team, he had been psychiatrically stabilized and did not require further acute inpatient treatment at that time.”

In the first order, the Court had before it a motion for protective order. Defendants had sent the court a letter seeking to preclude plaintiffs from taking depositions of NY-DOC’s Commissioner Glen S. Goord and OMH’s Commissioner James C. Stone. The plaintiff’s letter in response attached a two-page letter dated September 1, 1999, from Goord to Stone. Four hours after receiving the letter, defendant’s counsel requested by telephone that the letter be returned as a document protected by the deliberative process privilege. Opposing counsel refused to return the letter, but agreed to keep it confidential pending outcome of the Court’s ruling.

The deliberative process privilege has also been called the “official information” privilege, the “intragovernmental opinion” or “governmental opinion” privilege, and the “executive” privilege. The privilege protects “recommendations, draft documents, proposals, suggestions, and other subjec-

tive documents [that] reflect the personal opinions of the writer rather than the policy of the agency.”

The privilege applies to both inter-agency and intra-agency communications. The agency must show the document is both “predecisional” and “deliberative.” A document is “deliberative” if it is “actually...related to the process by which policies are formulated.” The court found the letter at issue was predecisional because the policy area at issue – the capacity to deliver services to mentally ill prisoners was obviously a fluid one.

The Goord letter was also “deliberative” because it was “actually...related to the process by which policies are formulated.” The agencies had a mutual understanding to meet yearly for “budget initiatives” and to meet before either made departmental or facility policy changes. The Court found the letter both “predecisional” and “deliberative,” and it granted the defendants a protective order. See: *Dipace vs. Goord*, 218 F.R.D. 399 (S.D.N.Y. 2003).

The second ruling presented the court with plaintiff’s motion to compel documents prepared in connection with a quality assurance review conducted by the Central New

York Psychiatric Center, which are listed on defendants’ privilege log. The defendants assert the documents are protected by the deliberative process privilege and the self-critical analysis privilege.

The Quality Assurance documents were produced pursuant to 14 N.Y.C.R.R. § 524 Et seq., which requires formal review in a number of circumstances, including a prisoner’s suicide. The court found “the documents were created in order to measure compliance with existing procedures in the specific instance of Tortorici’s suicide. As such, they are not “predecisional.”

The self-critical analysis privilege requires that the material sought must “result from a critical self-analysis undertaken by the party seeking protection, and be of the type whose flow would be curtailed if discovery would be allowed.” Since the Quality Assurance Documents were produced pursuant to a mandatory review and will continue to be produced absent amendment of the applicable regulations, the essential element of a chilling effect on future investigations is absent. The court ordered the defendants to produce the Quality Assurance Documents. See: *Dipace v. Goord*, 216 F.R.D. 256 (S.D.N.Y. 2003). ■

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# Fifth Circuit Reinstates Texas Prisoner's Property Confiscation/Retaliation Suit

by Matthew T. Clarke

The Fifth Circuit court of appeals issued an opinion vacating the district court's dismissal of a prisoner's suit alleging prison officials confiscated his property in retaliation for his criticism of the prison.

Billy Fredrick Allen, a Texas state prisoner, filed a civil rights suit under 42 U.S.C. § 1983, alleging major Johnny M. Thomas, and guards Ronnie Major and Robert Dickey confiscated his radio and word processor in retaliation for his having given to the prison's mail room for mailing typed letters to state newspaper editors critical of the prison for holding prisoners beyond their release dates. According to Allen, shortly after the letters were tendered to the mail room, Thomas ordered Major to confiscate his radio and word processor, using the false allegation that they were "altered" and therefore violated prison Administrative Directive 03.72. Allen claims they were not

altered and the confiscation was in retaliation for the letters.

The defendants filed a motion for summary judgment based upon qualified immunity which District Judge Nancy Atlas granted. Bizarrely, Atlas said Allen's free speech rights had not been violated because "only the method by which he may communicate his speech was affected." Allen appealed.

The Fifth Circuit noted several errors of reasoning and law in Atlas's dismissal order. First, Atlas stated that Allen did not have a due process claim under § 1983 because there were adequate state post-deprivation remedies, citing the U.S. Supreme Court's *Parratt/Hudson* doctrine. However, *Parratt/Hudson* only applies when the action complained of is random and unauthorized. In this case, the action was allegedly taken pursuant to an administrative directive, not in a random and unauthorized manner. Therefore, *Par-*

*ratt/Hudson* could not apply and dismissal of those grounds was vacated.

A second error was Atlas's contention that the only evidence that the property confiscation was retaliatory was Allen's unsupported allegations.

The Fifth Circuit noted that Allen did "allege a chronology of events from which retaliation may plausibly be inferred" as is required by *Woods v. Smith*, 60 F.3d 1161 (5th Cir. 1995) for retaliation cases. Furthermore, Atlas had refused to allow Allen to depose two mail room employees on the ground that their testimony could not raise an issue of material fact when Allen alleged they could help prove the retaliatory motive. This refusal to allow depositions was premature and was vacated as was the dismissal on the grounds of unproven retaliatory conduct.

The Fifth Circuit held that Atlas committed a third error when she denied Allen's motion for appointment of counsel without analysis on the grounds that the case had no exceptional circumstances requiring appointment of counsel. See: *Ulmer v. Chancellor*, 691 F.3d 209 (5th Cir. 1982) requires such an analysis and explains which factors must be considered. Because it was not clear from the record whether such exceptional circumstances did exist, this ruling was also vacated and the district court instructed to "present specific findings explaining why counsel was denied" should it deny the motion again.

The orders of the district court discussed above were vacated, the remainder of the district court's orders were affirmed and the case was returned to the district court for further proceedings. See: *Allen v. Thomas*, 388 F.3d 147 (5th Cir. 2004). ■■

Additional sources: *Houston Chronicle*, interview with Billy Fredrick Allen.

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# Sixth Circuit Clarifies “Verifying Medical Evidence” Requirement Of *Napier*

The U.S. Sixth Circuit Court of Appeals has held that when a prisoner’s medical malady is so obviously serious that even a layman would easily recognize the need for medical attention, “verifying medical evidence” is not required.

Thomas Blackmore was arrested for driving with a suspended license in the early morning hours of May 27, 2000, and placed in the Kalamazoo County, Michigan, Jail. Within an hour of his 5:25 a.m. arrival at the jail, Blackmore began experiencing severe abdominal pain and told a jailer that he needed medical attention. When none was forthcoming, Blackmore continued to complain. At around 5:00 p.m. the next day jailers gave Blackmore some antacids but took no other action. Sometime on May 29, 2000, Blackmore submitted a “Request for Medical Care” complaining of sharp, severe abdominal pain lasting 26 hours for which he needed medical attention “right away.” A jail nurse examined Blackmore at 6:30 a.m. that morning—48 hours after he began complaining—and diagnosed him as displaying “classic signs of appendicitis.” He was transported to the hospital a half-hour

later, where doctors performed a successful appendectomy.

On May 13, 2002, Blackmore sued the County and 20 jailers under 42 U.S.C. § 1983 claiming they violated his constitutional rights. Specifically, Blackmore claimed the jailers failed to provide him with prompt care for his serious medical needs and that the County failed “to implement policies and to train [jailers] adequately to respond to inmates’ serious medical needs.”

On cross motions for summary judgment, the U.S. District Court for the Western District of Michigan denied Blackmore’s motion but granted defendants’ motion. Relying on *Napier v. Madison County*, 238 F.3d 739 (6th Cir. 2001), the district court held that Blackmore had not established, through verifying medical evidence, that defendants’ delay in treating him was detrimental. Blackmore appealed.

The Sixth Circuit reversed and remanded. In instances where “a plaintiff’s claims arise from an injury or illness ‘so obvious that even a layperson would easily recognize the necessity for a doctor’s attention’” the Court held, the verifying medical evidence

requirement of *Napier* does not apply. Rather, “*Napier* applies where the plaintiff’s ‘deliberate indifference’ claim is based on the prison’s failure to treat a condition adequately, or where the prisoner’s affliction is seemingly minor or non-obvious. In such circumstances, medical proof is necessary to assess whether the delay caused a serious medical injury.”

In Blackmore’s case, he complained of “sharp” and “severe” abdominal pain for two days, he vomited—“a clear manifestation of internal physical disorder,” jailers deemed his condition serious enough to place him in an observation cell, and he complained both orally and in writing. Based on these facts, the Sixth Circuit held, a jury could reasonably conclude that Blackmore’s serious medical need was so obvious that a layman would have easily recognized his need for medical attention. Thus, the district court erred in granting summary judgment to defendants on this basis.

Blackmore was represented by Mark R. Bendure of the Detroit law firm Bendure & Thomas. See: *Blackmore v. Kalamazoo County*, 390 F.3d 890 (6th Cir. 2004). ■



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# Guantánamo: What the World Should Know

By Michael Ratner and Ellen Ray

Chelsea Green Publishing Company, 184 pages

Review by Jules Siegel

## The Inquisition Strikes Back

*“And therefore never send to know for whom the bell tolls; It tolls for thee.”*

*--John Donne, Devotions upon Emergent Occasions, “Meditation XVII,” 1623*

We have by now all seen much of this material before, but reading it all in one piece, told by human voices in this book-length interview, is not easy to take. *Guantánamo: What the World Should Know* becomes a heart-stopper once you cross the line and realize that you could be any of these victims.

Michael Ratner, President of the Center for Constitutional Rights, is co-counsel in *Rasul v. Bush*, the historic case of Guantánamo detainees in which the U.S. Supreme Court held prisoners on the island could access the U.S. courts. His interviewer, Ellen Ray, is President of the Institute for Media Analysis, and a widely published author and editor on U.S. intelligence and international politics.

It's hard to say which is more disgusting, the descriptions of the torture or the bone-chilling analyses of how the president of the United States gave himself the powers of an absolute military dictator. Under Military Order No. 1, which the president issued without congressional authority on November 13, 2001, George W. Bush has ordered people captured or detained from all over the world, flown to Guantánamo and tortured in a lawless zone where, the White House asserts, prisoners have no rights of any kind at all and can be kept forever at his pleasure. Despite the at-best marginal intervention of the American courts so far, there is no civilian judicial review, no due process of any kind.

While any military force will routinely violate the civil rights of anyone who gets in its way, Ratner's descriptions of how victims wound up in Guantánamo reveal wanton cruelty and callousness that will nauseate any sane human being.

Ratner writes:

“A lot of the people picked up by warlords of the Northern Alliance were kept in

metal shipping containers, so tightly packed that they had to ball themselves up, and the heat was unbearable. According to some detainees who were held in the containers and eventually released from Guantánamo, only a small number, thirty to fifty people in a container filled with three to four hundred people survived. And some of those released said that the Americans were in on this, that the Americans were shining lights on the containers. The people inside were suffocating, so the Northern Alliance soldiers shot holes into the containers, killing some of the prisoners inside.”

Some prisoners were captured in battle; many others were picked up in random sweeps for no reason at all except being in the wrong place at the wrong time. As usual in these kinds of operations, some were turned in as a result of petty revenge or as an excuse to steal their property. When asked in court to explain the criteria for detention, the government had no answer. There were no criteria, it appears. “The government even made the ridiculous argument before the Supreme Court that the prisoners get to tell their side of the story, by being interrogated,” Ratner reports.

Ratner notes that 134 of the 147 prisoners later released from Guantánamo were guilty of absolutely nothing. Only thirteen were sent on to jail. He believes it is possible that a substantial majority of the Guantánamo prisoners had nothing to do with any kind of terrorism. One prisoner released after a year claimed he was somewhere between ninety and one hundred years old, according to Ratner. Old, frail and incontinent, he wept constantly, shackled to a walker.

So what did the authorities get from those who survived? We will never know, but we can guess from at least one incident in this book. Ratner reports that the Guantánamo interrogators showed some of his clients videotapes supposedly depicting them with Osama bin Laden. At first they denied being in the videos, but they confessed after prolonged interrogation under harsh conditions. Yet British intelligence proved to the American government that the men were actually in the United Kingdom when the tapes were made.

If many of these people who died in custody or were tortured had committed

no crime, there is no doubt that they were all victims of crime, whether guilty or not. Despite White House arguments to the contrary, torture is a crime under international and United States law.

Under United Nations Convention Against Torture, an international treaty that almost every country in the world, including the United States, has ratified, torture is an international crime. The United States has made it a crime even if it occurs abroad.

“The Convention Against Torture also establishes what is called universal jurisdiction for cases of torture,” Ratner explains. “So, for example, if an American citizen engaged in torture anywhere in the world and was later found in France, let's say, that person could be arrested in France and either tried for torture there or extradited to the place of the torture for trial. To the extent U.S. officials were or are involved in torture in Guantánamo or elsewhere, they should be careful about the countries in which they travel.”

He continues, “In addition, torture committed by U.S. soldiers or private contractors acting under U.S. authority is a violation of federal law, punishable by the death penalty if the death of a prisoner results from the torture. Even if one argues that al Qaeda suspects are not governed by the Geneva Conventions, the Convention Against Torture and other human rights treaties ratified by the United States prohibit torture as well as other cruel, inhuman, and degrading treatment.


“The convention is crystal clear: under no circumstances can you torture people, whatever you call them, whether illegal combatants, enemy combatants, murderers, killers. You cannot torture anybody ever; it's an absolute prohibition.”

While many well-meaning people on both left and right profess to be shocked by the stories that continue to pour out of Guantánamo, Abu Ghraib and other detention centers, they usually fail to understand that these atrocities are well-rooted in American culture.

“None of what is known to have happened in Guantánamo is alien to American prisoners,” says Paul Wright, Editor, *Prison Legal News*. “Sexual assault, long term sensory deprivation, abuse, beatings, shootings, pepper spraying and the like are all too familiar to American prisoners. Coupled with

overcrowding, this is the daily reality of the American prison experience.”

Perhaps the only real difference is that the White House argues more forcefully than usual that no court can forbid it to arbitrarily detain and torture anyone it designates an unlawful enemy combatant, a definition that it has applied not only to foreigners but also to American citizens. We have seen how the drug exception to the Constitution has nullified basic American rights such as freedom from illegal search and seizure. But the war on drugs was merely a test run. Some rights remained intact. Now comes the permanent war against terrorism in which all human rights are annihilated.

*Rasul v. Bush* could be a legal turning point, but it remains to be seen whether or not the White House will respect the court's decision, no matter how high the bench. Michael Ratner and Ellen Ray could be merely eloquent early witnesses to the inevitable future. Thus ends democracy in the United States. The most hope that one can express is a question mark. Thus ends democracy in the United States? 

JULES SIEGEL's writings have been published in *Playboy*, *Best American Short Stories* and many other publications. He served with the 4th Military Intelligence Detachment, U. S. Army, Korea, 1955-56. Read more about him at <http://www.lulu.com/jules/>.

Originally published by The Narco News Bulletin <http://www.narconews.com/Issue35/article1157.html>

## Fifth Circuit Upholds \$5,000 Excessive Force Verdict Against Wackenhut Guard

In an unpublished opinion, the Fifth Circuit Court of Appeals upheld a jury verdict finding that a prison guard used excessive force against a prisoner and awarding \$5,000 in damages.


Mississippi prisoner Thomas Unger sued Wackenhut (now Geo Corporation), various supervisory officials and guard Reginald Blanchard, alleging that he was subjected to excessive force in violation of his constitutional rights.

Prior to the jury's verdict, the district court dismissed, as frivolous, the claims against all defendants but Blanchard. The jury then returned a verdict for Unger, "finding Blanchard had used excessive force against [him]...and "awarding \$5,000 in damages.

Blanchard filed several post-judgment motions seeking to reverse the verdict, but the district court denied them all.

The Fifth Circuit subsequently concluded "there was a legally sufficient evidentiary basis for a reasonable jury to find that unreasonable force was used, without provocation, by... Blanchard and that the use of such force resulted in an injury to Unger. Therefore, the district court did not err in denying his motion for a new trial." The court also found no error in the denial of "Blanchard's post judgment

motion to amend the judgment or" in the refusal to stay the judgment.

The court also rejected the prevailing defendant's claim that the district court erred in denying their motion for attorney's fees and costs. "Although the district court dismissed as frivolous, the claims against those defendants prior to the jury's verdict, its ruling...implied that it did not believe that the facts of the case warranted an award to the prevailing defendants. The record also indicated that the claims against those defendants were not totally vexatious and without any foundation." See: *Unger v. Wackenhut*, 85 Fed. Appx. 387 (5<sup>th</sup> Cir. 2004). 

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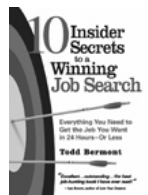
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## News in Brief:

**California:** In February, 2005, police arrested Glen Westberg, 35, in Redwood City, for violating his parole conditions for his child molestation conviction. Westberg used the state's internet registry of sex offenders to contact other child molesters he found attractive and solicit them for sex. Apparently one of the sex offenders reported the advances to police who set Westberg up for a sting. His parole conditions include a ban on contact with convicted felons. Some would say it is better for public safety for child molesters to have sex with each other than with children. Apparently that view is not shared by local police.

**California:** On February 5, 2005, Anthony Gibson, 34, and Jose Manuel Vera, 24, guards at the Yolo County Monroe Detention Center were arrested on kidnapping, rape of a drugged victim and sexual penetration with a foreign object charges. The men are accused with another person of kidnapping, drugging, and raping a 21 year old woman in Gibson's SUV.

**California:** On January 31, 2005, two prisoners were seriously stabbed and six others suffered minor injuries in a scuffle between some two dozen prisoners at the Salinas Valley State Prison in Soledad. The incident occurred in the recreation yard of facility D.

**California:** On March 7, 2005, Jose Mendoza, 24, drove his Ford Mustang into a wall of the Vista Detention Facility in San Diego, ran into the jail's lobby and ignored orders to halt from jail guards. Mendoza then attempted to seize a guard's pistol and was then shot and killed by several guards. No motive is known for the incident.

**Colorado:** On January 3, 2005, Douglas Wilson, 45, pleaded guilty in Colorado Springs to possession of contraband and was sentenced to three years in prison for passing out cheese sandwiches to other prisoners in the jail, in violation of jail rules. A jail guard testified he told Wilson not to pass the sandwiches to other prisoners and when Wilson ignored him, he shocked Wilson with a stun gun, tackled and handcuffed him.

**Congo:** According to the United Nations, at least 50 prisoners starved to death in the nation's prisons and a majority suffers from severe malnutrition. The government is too poor to feed its prisoners, who must rely on food from relatives to survive. Civil war has displaced many people which make such feeding programs difficult. The United Nations has suggested allowing the prisoners, the majority of whom have not been

formally charged with a crime, much less convicted of one, grow their own food rather than lie in the prisons and starve to death.

**Delaware:** On January 6, 2005, Wayne Lee, 40, a lieutenant at the Young Correctional Institution in Wilmington, was arrested and charged with assaulting prison guard Kristina Yeager, 21, on December 26, 2004, when she refused to work overtime. Yeager had finished working her 8 hour shift and Lee told her she had to work mandatory overtime, Yeager refused, saying she was sick when Lee confronted her and grabbed her arm, bruising her.

**England:** A report released in January, 2005, revealed that a 2002 uprising at the Lincoln Prison in October, 2002, that led to prisoners seizing control of the facility for 8 hours and causing about \$5 million in damages was in response to the prison eliminating hot meals from the lunch menu. This was considered the most destructive prisoner uprising since the Strangeways uprising in 1990.

**Florida:** In January, 2005, Florida supreme court justice, Raoul Cantero, denounced the quality of lawyers handling death row appeals before the court stating that some have botched cases, omitted key arguments and generally performed "the worst lawyering I've seen." Cantero, appointed to the court by Governor Jeb Bush, testified before the state legislature that Bush's efforts to close regional offices that represent condemned prisoners and replace them with poorly trained private lawyers would waste court resources as well as disserve the accused.

**Florida:** On December 31, 2004, Wilis Hiers, 47, was sentenced to 30 months in prison for violating probation by trying to smuggle cigarettes into the Indian River County jail after a jail sergeant saw Hiers throw a pack of cigarettes into the bushes near the jail where prisoners were working. At the time of his arrest Hiers was on probation for DUI, driving with a suspended license and criminal mischief. He was also assessed court costs and fines.

**Florida:** On February 16, 2005, Damen Cody, 23, a guard at the Montgomery Corrections Facility, was arrested and charged with battery and official misconduct for beating and choking Timothy Burroughs, 22, a prisoner at the facility. In January, 2005, Edward Mincey, 28, another guard at the prison, was charged with kicking and beating another prisoner at the same facility to the point that the prisoner required between

30 and 40 stitches.

**Florida:** On February 28, 2005, federal prosecutors in Jacksonville indicted and arrested Florida Department of Corrections employees Sgt. Oscar Shipley, 41, Clayton Manning, 33, and former DOC employees Michael Chambliss, 36, and Marcus Hodges, 32, for illegal distribution of steroids.

**Florida:** On January 11, 2005, Richard Hirshfield, 57, a prominent lawyer and financier, hanged himself in the laundry room of the Federal Detention Center in Miami with Saran Wrap while awaiting transfer to Virginia to be tried on conspiracy and obstruction of justice charges. Imprisoned for securities fraud in 1991, Hirshfield was a fugitive from the FBI for 8 years before being captured hiding in the closet of his \$4 million mansion in Ft. Lauderdale.

**Florida:** On January 27, 2005, Assistant Attorney General John Rimes, 54, was beaten and robbed in a Tampa motel room after he summoned two women from an escort service. He offered them \$200 for sexual services and was told he needed \$500. After retrieving the additional funds from an ATM a well dressed man knocked on Rimes' motel room door. Rimes opened it and was pepper sprayed, beaten and relieved of his money. The women left with the assailant.

**Florida:** On January 3, 2005, Victoria Lopo, 46, a food service contract employee at the Punta Gorda jail was arrested on charges she had sex with jail prisoner Sylvester Camon, 41. She admitted to having sex with Camon in a kitchen closet when questioned by police.

**Gaza:** On February 10, 2005, several dozen armed men burst into a jail run by the Palestinian Authority by blowing up a wall with rocket propelled grenades, entering a cellblock and shooting and killing two prisoners. A third prisoner was abducted, taken to a nearby refugee camp and killed. Several prisoners escaped in the commotion. Police claimed the incident was the result of score settling by feuding clans.

**Kentucky:** On October 15, 2004, Gregory Goins, 35, a guard at the federal Atwood Prison Camp, was convicted of 8 counts of raping two female prisoners at the facility.

**Louisiana:** In December, 2004, U.S. district court judge Jay Zainey sentenced former Orleans Parish public defender Glenda Spears, 35, and Angela Kirkland, who formerly ran the drug court program at the Orleans Parish Criminal District court, three years of probation, 200 hours of com-



munity service and six months of house arrest. The two women had pleaded guilty to charges of computer fraud for releasing probationers from court supervision programs in exchange for cash bribes ranging from \$500 to \$2,500. After being caught, Kirkland wore a wire for federal prosecutors to entrap Spears. Spears was also fined \$10,000 and was facing disbarment.

**New Jersey:** On January 6, 2005, employees of the Gateway Foundation, a company that provides drug treatment services to state prisoners for \$4.2 million a year, staged a skit that featured three prisoners dressed as members of the Ku Klux Klan being interviewed by another prisoner in a parody of the Jerry Springer Show. Five employees of the company were fired for the incident and remaining employees were required to undergo a new 40 hour training program.

**New Jersey:** On New Year's day, 2005, an incident between an unidentified number of prisoners (corrections commissioner Devon Brown claimed four, guard union spokesmen claimed dozens) and guards at the minimum security unit of the Bayside State Prison left 29 guards injured, including one lieutenant with a titanium plate inserted to repair a crushed cheekbone. Apparently the prisoners were members of the Bloods street gang. Six prisoners have been internally disciplined for assault and 20 for rioting which would belie Brown's claim that the incident was not a "riot" but instead a "skirmish."

**Ohio:** On January 31, 2005, Richard Keiser II, a former guard at the Belmont Correctional Institution, was sentenced to two years in state prison after being convicted of smuggling marijuana into the prison.

**Ohio:** On January 14, 2005, Warren county district judge Dallas Powers was indicted on 13 charges of sexual battery and retaliation stemming from his alleged sexual assault of two court employees. He was also charged with witness intimidation, theft in office and unauthorized use of government property. Prosecutors claim that Powers and court employee Libbie Gerondale had a sexual relationship in the courthouse during business hours and Powers allowed Gerondale to be paid for hours she did not work. Gerondale was also indicted on charges of public indecency, theft, perjury and unauthorized use of property.

**Oklahoma:** On January 29, 2005, prisoner Ronald Sites, 48, was strangled to death in his cell at the Lawton Correctional Facility, which is run by the for-profit Geo Group. Sites' cellmate, Robert Cooper, 32, is

the primary suspect in the case.

**Oregon:** On January 29, 2005, Aaron Munoz, 21, was found hanged in his cell in the Intensive Management Unit at the Oregon State Penitentiary in Salem. He was due to be released from prison six days later after serving a two year sentence for assault. Munoz had recently testified before grand jury that he had been raped by Michael Boyles, 49, a former Oregon Youth Authority probation officer charged with 101 counts of raping minors under his supervision, Munoz among them. Munoz told his aunt that he did not want to leave prison with a reputation as a homosexual and a snitch.

**Pennsylvania:** On February 10, 2005, prisoners at Federal Correctional Institution-McKean staged a strike to protest a smoking ban at the prison. Faced with the strike, prison officials locked the prison down for a week, lifted the lockdown and reimposed it a week later.

**Pennsylvania:** On February 8, 2005, 13 prisoners at the Snyder county jail in Selinsgrove refused to return to their cells in protest of food cutbacks caused after the jail contracted its food services out to Aramark, a for profit company. After four hours of being confronted by riot gear clad jail guards and police the prisoners returned to their cells when jail warden George Nye agreed to give the men sandwiches. The prisoners were transferred to other facilities the next day. Nye admitted that prisoners had been fed relatively well prior to the Aramark contract.

**Tennessee:** In January, 2005, United Way announced that its 2005 fundraising campaign in the Nashville area would be headed by John Ferguson, president and CEO of Corrections Corporation of America. CCA was also a big sponsor of President Bush's 2005 inaugural ball along with other

## U.S. Torture Information Needed

Because the United States has signed the United Nations Convention Against Torture, they are required to submit reports on the status of US compliance to the Treaty every five years. In May of this year, the US submitted their "Second Periodic Report of the United States of America to the Committee Against Torture". Several national prisoner advocacy groups are planning to issue what is called a "Shadow Report" to supply the Committee with credible evidence of US violations of the Convention which are ignored in the official report. The Convention not only prohibits torture but also "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" committed by a government official. We are seeking testimonies from prisoners on torture and abuse, including isolation and use of devices of torture (stun guns, stun belts, restraint beds, restraint chairs and other restraint devices, spit hoods, black boxes, etc.). Please send testimonies of your experiences and how the authorities dealt with any complaints you made to: Bonnie Kerness, AFSC Prison Watch Project, 89 Market Street, Newark, NJ 07102. We very much appreciate your help.

corporations dependent on public money for their existence.

**Texas:** On February 1, 2005, Manuel Castillo, 19, a guard at the Geo Central Texas Detention Facility in San Antonio was arrested while trying to bring a bottle of vodka, cocaine and tobacco into the federal facility. He is the fourth guard arrested for smuggling contraband into the privately run facility in the past 30 months.

**Texas:** On January 4, 2005, prisoner James Porter, 33, was executed in Huntsville after dismissing his appeals. Porter had been sentenced to death for killing Rudy Delgado, a child molester, in 2000 while both were imprisoned at a state prison in Texarkana. Porter claimed Delgado had made a sexual advance towards him which caused him to pummel him to death with a rock wrapped in a pillow case.

**Texas:** On January 11, 2005, D'Andrae Chatman, 20, and Norman Minor, 27, guards at the Grimes County jail in Anderson, were arrested and charged with improper sexual activity with a person in custody after the two men admitted to police that they had had sex with two female prisoners in the jail chapel and a filing room. One of the women said she had had a relationship with Minor before being imprisoned. ■■

## PLN Classifieds

**Resources for Prison Law Libraries**  
and Prison Activists 82pp. 2003  
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## Washington DOC Fined \$22,503 For Fuel Spill

The Washington Department of Corrections (WDOC) has been fined \$22,503 for polluting the environment with thousands of gallons of diesel fuel, the *Tacoma News Tribune* reported on September 3, 2004.

In October 2002, 6,100 gallons of diesel fuel were spilled at the McNeil Island Corrections Center. The Department of Ecology (DOE) levied the fine because prison officials failed to timely notify it of the accident

and because about 2,500 gallons of the diesel contaminated a nearby wetland.

Another 3,600 gallons leaked into a local wastewater treatment plant. DOE officials found trace amounts of fuel in the plant's discharge, which flows into Puget Sound.

According to the DOE, had the prison followed its own procedures the damage could have been minimized. "If the facility's spill contingency plan had been followed appropriately, the cleanup would have gone quicker and it's possible that less environmental damage would have occurred," said DOE spill response manager Dave Beyers.

The spill was caused by a faulty automatic shut-off switch on a fuel tank at the prison's emergency generator building, the DOE said. ■

Source: *The News Tribune (Tacoma)*

### Prisoners' Guerrilla Handbook to Correspondence Programs

High-school, vocational, paralegal and college courses available to prisoners.  
**\$24.95**

**Available From PLN's Book Store!**  
See Page 45 for more information.

## Other Resources

### ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

### Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

### CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

### FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

### Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rulings, administrative developments and news about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

### Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

### Hepatitis C Awareness News

Hepatitis C and HIV/HCV newsletter free on request. Write: National Hepatitis C Prison Coalition, PO Box 41803, Eugene, OR 97404.

### November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

### Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

### Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.



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**The Celling of America: An Inside Look at the U.S. Prison Industry**, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 Pages. \$19.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

**Everyday Letters For Busy People**, by Debra Hart May, 287 pages. \$15.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Lots of tips for writing effective letters 1048

**The Criminal Law Handbook: Know Your Rights, Survive the System**, Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$34.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

**Represent Yourself in Court: How to Prepare & Try a Winning Case**, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

**Law Dictionary**, Random House, 525 pages. \$17.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

**The Blue Book of Grammar and Punctuation**, Jane Straus, 68 pages, 8-1/2 x 11. \$11.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

**Legal Research: How to Find and Understand the Law**, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

**Spanish-English/English-Spanish Dictionary**, 60,000+ entries, Random House, \$5.99 Two sections, Spanish-English and English-Spanish. All entries listed from A to Z. Hundreds of new words. Includes Western Hemisphere usage. 1034

**Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. & Canada**, by Jon Marc Taylor, 341 pages. \$24.95. Includes contact info & outlines courses offered by over 250 education providers. Info on high school, vocational, paralegal, law, college and graduate courses. One of a kind prisoner resource. 1047

**The Citebook**, 21st ed., by Tony Darwin, Starlite, 306 pages, \$41.95. This plain language legal manual lists positive cases (cases that give you a right, not take one away) and gives a short synopsis detailing each. 1057

**Deposition Handbook**, by Paul Bergman and Albert Moore, 2nd Rev Ed., 352 pages, \$29.99. How-to handbook for anyone who will conduct a deposition or be deposed. Valuable info, tips & instructions. 1054

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**Actual Innocence: When Justice Goes Wrong and How To Make It Right, updated pb.**, by Barry Scheck, Peter Neufeld and Jim Dwyer, 432 pages. \$9.99. Two of O.J.'s attorney's explain how defendants are wrongly convicted on a regular basis. Detailed explanation of DNA testing and how it works to free the innocent. Devastating critique of police and prosecutorial misconduct and the system that ensures those abuses continue. 1030

**Roget's Thesaurus**, 717 pages. \$5.99. Over 11,000 words listed alphabetically linked to over 200,000 synonyms and antonyms. Sample sentences and parts of speech shown for every main word. Covers all levels of vocabulary and identifies informal and slang words. 1045

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**Capital Crimes**, by George Winslow, 360 pages. \$19.00. Explains how economic policies create and foster crime and how corporate and government crime is rarely pursued or punished. 1024

**Lockdown America: Police and Prisons in the Age of Crisis**, by Christian Parenti, Verso, 290 pages. \$17.00. Documented and has first hand reporting on law enforcement's war on the poor. Covers paramilitary policing and SWAT teams, the INS and prisons. 1002

**The Perpetual Prisoner Machine: How America Profits from Crime**, by Joel Dyer, 318 pages. \$19.00. Exposes how private prisons, banks, investors and small companies profit from the prison industrial complex, and prison growth adds to revenue & profits. 1025

**Crime and Punishment In America**, by Elliott Currie, 230 pages. \$12.95. Refutes arguments in favor of prison building as a crime solution. Demonstrates crime is driven by poverty and discusses proven, effective means of crime prevention. 1019

**Worse Than Slavery: Parchman Farm & the Ordeal of Jim Crow Justice**, by David Oshinsky, 306 pgs \$14.00. Analysis of prison labors roots in slavery. Focuses on prison plantations and self sustaining prisons. Must reading to understand prison slave labor today. 1007

**States of Confinement: Policing, Detention and Prison, revised and updated edition**, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

**Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World**, by Danny Cox & John Hoover, 256 pages, \$14.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

**BOP Occupational Training Programs Directory**, 124 pgs. \$10.00. Directory listing vocational and education programs available to prisoners in every federal prison. Includes contact info for BOP national, regional and CCM offices, and BOP facilities. Invaluable if considering a training or education transfer. 1053

**Criminal Injustice: Confronting the Prison Crisis**, by Elihu Rosenblatt; South End Press, 374 pages. \$18.00. A radical critique of the prison industrial complex. 1009

**Marijuana Law: A Comprehensive Legal Manual**, by Richard Boire, Ronin, 271 pages. \$17.95. Examines how to reduce the probability of arrest and successful prosecution for people accused of the use, sale or possession of marijuana. Invaluable information on legal defenses, search and seizures, surveillance, asset forfeiture and drug testing. 1008

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**Hepatitis and Liver Disease: What you Need to Know, 2004 Rev Ed**, by Melissa Palmer, MD, 470 pages. **\$16.95**. Describes symptoms & treatments of hepatitis B & C and other liver diseases. Includes medications to avoid, what diet to follow and exercises to perform. 1031 ☐

**All Things Censored: Mumia Abu-Jamal**, ed. by Noelle Hanrahan, 303 pgs. **\$14.95**. Includes 75 articles by Abu-Jamal. Attacks capital punishment & critiques the dehumanizing prison system. 1040 ☐

**Prison Writing in 20th Century America**, by H. Bruce Franklin, Penguin, 1998, 368 Pages. **\$13.95**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022 ☐

**Soledad Brother: The Prison Letters of George Jackson**, by George Jackson; Lawrence Hill Books, 368 pages. **\$16.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 30 years ago. 1016 ☐

**The Politics of Heroin: CIA Complicity in the Global Drug Trade**, April 2003 Rev Ed, by Alfred McCoy; Lawrence Hill Books, 734 pages. **\$32.95**. Latest Edition of the scholarly classic documenting U.S. government involvement in drug trafficking. 1014 ☐

**No Equal Justice: Race and Class in the American Criminal Justice System**, David Cole; The New Press, 218 pages. **\$15.95**. Shows how the criminal justice system perpetuates race and class inequality, creating a two tiered system of justice. 1028 ☐

**Ten Men Dead: the story of the 1981 Irish hunger strike**, by David Beresford, 334 pages. **\$13.50**. Relies on secret IRA documents and letters smuggled out from the IRA political prisoners during their 1981 hunger strike at Belfast's infamous Long Kesh prison. 1006 ☐

**Prison Nation: The Warehousing of America's Poor**, edited by Tara Herivel and Paul Wright, 332 pages. **\$21.95**. Exposes the dark side of America's 'lock-em-up' political and legal climate. 1041 ☐

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**10 Insider Secrets to a Winning Job Search**, by Todd Bermont, 216 pages. **\$14.99**. Roadmap on how to get a job even under adverse circumstances - like being an ex-con. Includes how to develop a winning attitude, write attention grabbing resumes, prepare for interviews and answering questions. 1056 ☐

**Prison Madness: The Mental Health Crisis Behind Bars**, by Terry Kupers, 245 pages. **HARDBACK ONLY. \$25.00**. Psychiatrist writes about the mental health crisis in American prisons and jails. Covers all aspects of mental illness, rape, racism, negative effects of long term isolation in control units and much more. 1003 ☐

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procedural aspect of litigating a disciplinary guilty finding in that particular state court. The DSHLM was recently denied a grant that would have provided free copies to prison law libraries because it **speaks the truth** of how the prison disciplinary process works.

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# PRISON

## Legal News

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*Dedicated to Protecting Human Rights*

July 2005

## Fatal Justice: The New Maryland

*by Michael Rigby*

It's a state already steeped in heritage—birthplace of The Star Spangled Banner, home to the U.S. Naval Academy in Annapolis, and site of the bloody Civil War battle at Antietam. But now Maryland is raising a new legacy: a system of dangerous and deadly prisons.

Much of the scrutiny directed at the Maryland Division of Correction (DOC) has stemmed from two recent high-profile homicides. In one, a prisoner was choked to death on a prison bus under the noses of five apparently torpid guards. His body was not discovered until the bus arrived at its destination. The death has resulted in the firing of three guards and a review of the DOC's transportation protocols.

In the other, a cabal of riot-clad guards killed a prisoner while performing a violent cell extraction. Numerous procedures and policies were violated, and signs of a cover-up abound. The prisoner's family has filed a lawsuit against the DOC. Both deaths have sparked calls for reform among lawmakers and prisoner advocates.

### Death On A Bus

It was pitch-black inside the prison bus as it rolled down Highway 70 in the pre-dawn hours of February 2, 2005. Onboard, the killer readied for the attack, sucking in his stomach to loosen the chain around his waist. The victim sat just in front, pinned to his seat by another prisoner. Slipping the loosened chain over the victim's head, "The killer sat down pulling the kid's head backwards over his seat, choking him," an unidentified prisoner witness wrote in a letter to his family. "I could hear the killer tell him, 'It's okay. Just go to sleep now.'"

The "kid" was Phillip E. Parker Jr., one of 35 prisoners returning from the courthouse in Hagerstown to the Maryland Correctional Adjustment Center (MCAC), a supermax prison in Baltimore. Parker, 20, had been sentenced to three years in prison for committing a robbery with a broken pellet gun. He had about a year to go when he was murdered.

Also on the bus was Kevin G. Johns Jr., 22, a twice-convicted killer who had pledged to kill again unless he received psychiatric help. Johns' propensity for violence was known. In February 2002 he was convicted of murdering a male relative and sentenced to 35 years. According to prosecutors, Johns strangled his uncle with a belt, and after finding him still alive, tried to cut off his head

with a rusty saw. Johns committed a second murder in January 2004 while serving out his sentence at the Maryland Correctional Training Center. This time he strangled his 16-year-old cellmate, Armad Cloude.

On February 1, 2005, Johns was sentenced to life without parole for murdering Cloude. At the hearing Johns requested assignment to the Patuxent Institution's program for mentally ill prisoners, telling the judge he would likely kill again without psychiatric care. Parker was one of four MCAC prisoners to testify at the hearing on Johns' behalf. "DOC can't give him the treatment he needs for all his mental problems," Parker told the court. "He gets really paranoid. He gets a really short temper, right." Still, Washington County Circuit Judge Frederick C. Wright III refused to assign Johns to Patuxent.

Parker was killed on the return trip to Baltimore early the next morning. Five guards rode on the bus, but none noticed the attack. Two of the guards were seated up front in a cage behind the driver. Two more sat in a cage at the rear—no more than 10 feet from where Parker was murdered. At one point, a guard in the back reportedly heard a commotion and switched on his flashlight. The guard noticed Johns standing in the aisle and saw blood on him, but couldn't tell if anything was wrong because the bus's interior light was broken. Rather than earn his pay, however, he did nothing. Parker's body was discovered only after the bus arrived at MCAC around 4 a.m.

Parker's father, Phillip E. Parker Sr., said he doesn't understand how the murder went undetected. "I'm sure he was kicking with everything he could when he was being choked to death," he said. One possibility is

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PUBLISHER  
**Rollin Wright**

EDITOR  
**Paul Wright**

EXECUTIVE DIRECTOR  
**Donald W. Miniken Jr.**

COLUMNISTS  
**Mumia Abu Jamal, Denise Johnston, Daniel E. Manville, Kent Russell**

CONTRIBUTING WRITERS  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Rabih Aboul Hosn, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams, Mark Wilson & Robert Woodman**

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## **Fatal Justice (cont.)**

that the guards were sleeping, according to some former Maryland prisoners. "That's what they do: They sleep on the way up and sleep on the way back," said Norman D. Chester Jr., 33, who served a six year sentence for robbery. Chester said he rode the bus to court in Baltimore dozens of times and often the only person awake was the driver. Craig Davidson, 40, who spent three years in Maryland prisons, said his experience on the buses was similar.

Parker's father also wondered how a properly shackled prisoner could have strangled someone; so did Chester and Davidson. "You have what's called a three-piece restraint. I don't see how it could be done," Chester said. This "three-piece restraint"--required for all prisoners during transport--includes "leg irons, handcuffs, waist chains, padlocks and handcuff covers," according to DOC policy.

Another reason the attack may have gone unnoticed, the former prisoners said, is that loud music regularly blasted from the radio during the trips.

But lazy guards, broken lights, and loud music aside, just seating Johns with other prisoners was a serious violation of DOC policy. "All inmates identified as security alerts or who require special handling" are to be placed in one of two "segregation cages" at the front of the bus, the policy states. Johns' statements in court should have "absolutely" triggered the provision, said Ed Rothstein, a board member of the Maryland Association of Correctional and Security Employees. But the transport guards were not apprised of Johns' threats, he said. "I don't know what supervision was thinking, but officers should have been notified of that fact."

In response to the killing, prison officials announced on February 23, 2005, that 3 of the 5 guards had been fired. Of the remaining 2, one was suspended for 5 days and the other was given a written reprimand. The guards' names were not released. Parker's mother, Melissa Rodriguez, said she thought the guards should face a criminal investigation. "I'm glad they're fired and they're not going to be responsible for anyone else's life," she said. "But that's not enough for me. I need to know why they didn't do enough to protect my child."

Michael A. Mastracci, the Parkers' attorney, said the family is also upset by the lack of information they've been provided about their son's death. "Whatever they can

be told, they want to know, Mastracci said "Clearly, something can be told rather than just saying it's under investigation."

Following a review of its transportation policies, the DOC is considering installing security cameras on buses and vans and is "obtaining estimates to modify the bus configuration to enhance security," said DOC Commissioner Frank C. Sizer Jr. He declined to discuss specifics. The DOC has also decided to ban the playing of commercial radio as "a precaution" against distraction; require the guard in charge of the bus to check each prisoner's restraints as they board and to contact the central transportation office in Baltimore every 30 minutes during trips; and require interior lights to be turned on when the bus's headlights are on.

Johns was indicted for Parker's murder on March 7, 2005. Baltimore County Prosecutor Ann Brobst, who is handling the case, plans to seek the death penalty. She would not say how she knew the murder occurred in her county. (The bus traveled through 4 jurisdictions during its trip--only about 4 miles of which were through Baltimore County.) Michael Stark, spokesman for the Maryland-based Campaign to End the Death Penalty, noted that Baltimore County is one of the state's most aggressive death penalty jurisdictions. "This is a ridiculous gesture on behalf of prosecutors who are trying to make themselves tough," he said.

### **Death On A Cellblock**

But at least the guards were punished in Parker's death, unlike those involved in the death of Ifeanyi A. Iko, a 51-year-old Nigerian immigrant imprisoned at the Western Correctional Institution (WCI) in rural Cresaptown, Maryland.

Iko was killed by guards during a violent cell extraction on April 30, 2004. His death at the prison--where 96% of the staff is white and 76% of the prisoners are black--has raised troubling questions about the degree of force used and whether guards and prison officials deliberately engaged in a cover-up to hide their misdeeds. Officials released only sketchy details, but information gleaned from other sources, including letters written to the *Baltimore Sun* by prisoners who witnessed parts of the extraction that day, paint a disturbing picture.

The day before he died, Iko had been involved in a fight with his cellmate. Both were placed in isolation in separate "cool down" cells. The next day, prison psychologist Janet Hendershot ordered Iko moved to a cell in the "special observation" housing



## Fatal Justice (cont.)

unit for a psychological evaluation. Iko, however, refused.

Jason R. Bell, a prisoner who was four cells down from Iko, reported watching the scene unfold through a crack in his door. As Hendershot and a high-ranking guard tried to convince Iko that he wouldn't be harmed, guards were gathering in a nearby foyer and donning riot gear--shields, body armor, helmets, gas masks and batons.

After warning Iko that he would be removed by force if he didn't cooperate, the lieutenant leading the assault emptied a large can of pepper spray into the feed slot, then another. "I saw Iko's hands and arms come sticking out the slot," wrote Bell. "He was screaming and coughing. They ordered him to turn around, but he never stuck his arms back out." After a third can of pepper spray, the guards rushed in, according to Bell. Though he couldn't see into the cell, Bell reported hearing the sounds of a violent struggle. "I clearly heard Iko scream out, then abruptly go silent," Bell said. "The smell of pepper spray overwhelmed the entire tier."

With his hands cuffed behind his back and shackles on his feet, Iko appeared unconscious as guards hustled him away, said Matthew Himmelright, another prisoner in

the segregation unit. "Iko's head was loosely swaying, and his chest was not visibly moving," he said. "Nor was there any voluntary movement of Iko's eyes or shoulders and feet." At some point the guards had placed a mesh "spit mask" over his head. Prisoner James Bonnet was one of several prisoners who said they saw guards take Iko by in a wheelchair on their way to the special observation unit. "A blue-type mask was covering the face of the person," wrote Bonnet. "The limp body had no movement even when bare feet were dragged on ... blacktop."

About two hours later, prison officials claim, guards discovered Iko lying motionless in the observation cell, tried to revive him, and called an ambulance at 4:37 p.m. However, a recording provided by the Allegany County 911 emergency center says different. Paramedics, who responded within 5 minutes of receiving the call, reported soon after leaving the prison that they had "numerous indications" that Iko had "been down for a little while" and that his body was already showing signs of rigor mortis.

Iko's death was a homicide caused by "chemical irritation of the airways by pepper spray," and the placement of spit mask over his head, the autopsy report determined. The report failed to address the amount of pepper spray used, but three cans was far in excess of the single 2-second burst recommended by DOC training guidelines. The report also

cited "chest compression" as a factor and noted "blunt force injuries to [Iko's] face, back of the neck, left anterior shoulder and upper and lower extremities." The report further said that guards left Iko face-down in the observation cell without removing his handcuffs or the spit mask.

Iko's family is understandably suspicious about his death, partly because prison officials failed to notify them. When the family did contact the prison two weeks later--after finally learning of his death from a *Sun* reporter--they were shocked to learn that his body was about to be released to

the state anatomy board for scientific research. The family also noted that Iko had been vocal about abuses at the prison. "He vowed that once he got out, that he would make sure that the prison was investigated," said his sister, Ada Iko. His brother, Dr. Benny Iko, said he had several letters from Iko in which he discussed being beaten and "attempts to suffocate him."

A grand jury reviewed the case in August 2004 but declined to bring any indictments. The jurors examined written reports and a videotape of Iko's cell extraction and heard testimony from prison personnel. The jurors did not, however, hear directly from prisoner witnesses. Instead, they heard recorded testimony deposited by internal investigators. University of Maryland Law School Professor Doug Colbert, who questioned the thoroughness of the grand jury's two-day investigation, said that was insufficient. "It's hard to believe an inmate witness would have felt free to say everything he heard or observed because there was no guarantee of protection," he said.

The grand jurors did make a number of recommendations, including a suggestion that prison officials improve video techniques used to record cell extractions; additional training on the risks of using certain forms of restraint; and better protocols to determine the condition of prisoners who are removed from their cells by force.

Gary C. Adler, the family's attorney, said the lack of indictments against prison guards was "not unexpected," but he was surprised at how quickly the grand jury concluded its investigation. "Just because a grand jury didn't hand down an indictment doesn't mean that everything that was done was not criminal or not right," he said.

On September 16, 2004, a state legislative panel met to discuss the conditions surrounding Iko's death. But prison officials remained obstinate. They refused to show lawmakers the videotape of Iko's extraction or to answer any specific questions about the incident. Mary Ann Saar, secretary of the DOC, cited a recently launched FBI investigation as the reason. State Senator Bryan E. Frosh, who had been told by the attorney generals office that prison officials could discuss the case, expressed frustration with Saars' decision. "How is it going to sully the [FBI] investigation if you show us the videotape?" he asked. "It is what it is; it's not going to change."

The family has since launched a \$28 million federal lawsuit against prison officials for allegedly violating Iko's civil rights by using "unreasonable and illegal" deadly

### U.S. Torture Information Needed

Because the United States has signed the United Nations Convention Against Torture, they are required to submit reports on the status of US compliance to the Treaty every five years. In May of this year, the US submitted their "Second Periodic Report of the United States of America to the Committee Against Torture". Several national prisoner advocacy groups are planning to issue what is called a "Shadow Report" to supply the Committee with credible evidence of US violations of the Convention which are ignored in the official report. The Convention not only prohibits torture but also "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" committed by a government official. We are seeking testimonies from prisoners on torture and abuse, including isolation and use of devices of torture (stun guns, stun belts, restraint beds, restraint chairs and other restraint devices, spit hoods, black boxes, etc.). Please send testimonies of your experiences and how the authorities dealt with any complaints you made to: Bonnie Kerness, AFSC Prison Watch Project, 89 Market Street, Newark, NJ 07102. We very much appreciate your help.

force, said Adler. Filed in the U.S. District Court in Greenbelt on November 22, 2004, the suit names Warden John P. Galley, Lt. James Shreve, and six guards as defendants. The suit places much of the blame for Iko's death on the atmosphere at the prison and contends administrators failed to appropriately discipline or prosecute brutal guards, thus encouraging them "to believe that misconduct, including assault, battery and other acts of brutality were permissible and would not be punished."

The lawsuit further claims that Iko was already dead when taken from the prison, even though handled as if he were still alive. Had he been declared dead inside the prison, WCI officials would have been required to secure the scene and preserve evidence. "None of the rules and regulations applicable to the circumstances were followed," says the suit.

Adler said the lawsuit isn't just about money. It's also about exposing abusive conditions at WCI. "Ifeanyi believed the abuse in this prison ought to be addressed, and we're carrying out his wishes," Adler said. "Anyone who knows anything about suing prisons and guards, and the difficulties involved, knows this suit is not being filed solely for money."

Conditions at WCI have been the focus of other lawsuits as well. On October 22, 2004, a federal jury awarded \$45,001 to a state prisoner who said guards at the prison slammed his head against a wall and pummeled him while handcuffed in retaliation for filing grievances. The guards were not disciplined and the court later reversed the verdict.

Responding to the deaths of Parker and Iko--and the controversy surrounding the adequacy of the internal investigations--Senator Frosh introduced a new bill in February 2005. The legislation would require the state police to investigate deaths occurring in Maryland prisons and juvenile facilities unless they result from natural causes. "It seems to me that if somebody is in the custody of the [Division of Correction], the state police should investigate so there can be no question of bias, or at least we can reduce the questions that can be raised about the completeness and fairness of the investigation," said Frosh.

In addition to the FBI probe, the U.S. Department of Justice is investigating claims of prisoner abuse at prison.

### Other Deaths

The media spotlight has shone most brightly on the needless deaths of Parker and Iko, but many other Maryland prisoners have

also succumbed to violent and suspicious deaths in recent years.

For prisoners at the Maryland House of Corrections Annex, where multiple stabbings have occurred in the last several years, life seems especially precarious. On January 7, 2002, prisoner Lorenzo Hazel, 35, was killed in an alleged attack by 3 other prisoners. Hazel was stabbed 74 times. On February 7, 2004, the prison was placed on lockdown after 4 stabbings in 4 days--one of them fatal. Damon Bowie, 33, was stabbed by another prisoner after an argument on February 3. He died at the hospital about 2 hours later. On July 7, 2004, guards at the Annex discovered an unidentified male prisoner who had been stabbed in the head and neck. The prisoner was flown to a trauma center in Baltimore, but it's unknown if he survived. Two fatal stabbings also occurred at the prison in December 2004 and January 2005. No further information was available regarding those deaths.

Women are not immune from untimely deaths in Maryland lockups, either. Deborah Epifanio, 34, died at the University of Maryland Medical Center on Sept 14, 2004, four days after being taken there by ambulance from the women's detention center in Baltimore. At the hospital, doctors diagnosed Epifanio with advanced cryptococcal meningitis. Prison Health Services, which provides contract medical care to the state's 24,000 prisoners, disciplined a physician's assistant and three nurses in connection with Epifanio's treatment. Hospital records also noted a head injury, which prison officials said Epifanio incurred in a fight, but no incident report was ever filed. Epifanio's relatives said they spotted prison personnel covering her bruises with makeup when they arrived at the hospital to view her body.

As of May 2004, 37 prisoners, including Iko, had reportedly died at WCI since it opened in 1996. DOC spokesman Mark Vernarelli said the number is not unusually high for a 1,650-man prison. But then again, he gets to go home at night. Vernarelli also said that "Incidents of violence continue to be quite rare in our system." Perhaps he should tell that to the family of Robert George, 29, who was serving a 3-year sentence at WCI for larceny. George was stabbed in the chest as walked back to his cell after lunch. He died at the hospital about 3½ hours later. ■

Sources: *The Baltimore Sun*, *Associated Press*, *Washington Post*, *Maryland Gazette*

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# From the Editor

by Paul Wright

We would like to apologize to readers for the delay in issues between the May and June, 2005 issues. A combination of factors have resulted in issues getting delayed. The first was a trial in Florida against the Florida Department of Corrections over the censorship of *PLN* and a policy prohibiting payment to prisoner writers for their articles. The second has been a longer than expected learning curve as we recently switched to a new desktop publishing program, In Design. Our next several issues will be published fairly soon until we are again caught up on our regular publishing schedule and readers are receiving each month's issue around the first of the month. Please bear with us through this, subscriptions are based on the number of issues mailed by *PLN*, not time, so subscriptions are unaffected.

With this issue of *PLN* we are pleased to announce that *PLN's* website is now fully operational and contains all back issues of *PLN* in both a PDF format (exactly as published) as well as in a fully searchable database. It also contains the full text of all court rulings we have reported as well as a brief bank of pleadings, settlements and much more. *PLN* subscribers will soon be receiving a special charter subscription offer to the website. *PLN's* website is the foremost prison litigation and news source online in the world. At this point no other website offers the quality or quantity of prison and jail

related information that *PLN* does.

All articles and cases on the website are formatted for easy printing to enable friends and family members of prisoners to download, copy and mail the information to prisoners. For those prisoners who lack the outside resources to access *PLN's* website, we hope to be able to provide such a service in the next year or two, depending on *PLN's* resources. Articles and cases can be searched by any one of more than 500 specific topics, by state, by court, by outcome, year, issue published and much more.

The people who have helped make *PLN's* website possible are our webmaster, Carlos Batista, whose mastery of technology has made the website a reality; Peter Schmidt, editor of *Punch and Jurists*, whose federal criminal law website, [www.fedcrimlaw.com](http://www.fedcrimlaw.com), and tireless advocacy on behalf of criminal defendants is inspirational and provides an example of what can be accomplished; Dan Axtell, a *PLN* board member whose advice and experience with data bases and data conversions saved a lot of time and effort; Chris St. Pierre who has been responsible for uploading the text of court cases online and last but not least, Samuel Schwartzkopf and Sam Phillips who had the thankless, but vital, task of actually uploading over 5,000 *PLN* articles into our online database where they can be searched and used.

In addition to new issues of *PLN* we will be continuously adding new materials and information to *PLN's* website. It also has a forum, chat room, guest book and extensive links making it a vital resource. While *PLN* does charge a modest subscription fee to access some portions of the site and its contents, users who are not website subscribers can search for free and need to subscribe only if we have the information they are seeking. By placing over 15 years of content online we are providing lawyers, researchers, students, academics, advocates and prisoners with the most

comprehensive source of prison and jail news and litigation anywhere in a useable, searchable format. We welcome feedback and comments from our readers on the site and its contents.

The month of July, 2005 was a mixed one on the *PLN* litigation front. We won a resounding victory in *Prison Legal News v. Washington DOC* in the Washington supreme court where the court held the Washington Department of Corrections had wrongfully withheld documents I had sought in 2000 over medical neglect and misconduct by its employees. That same month U.S. district court judge John Moore in Jacksonville, Florida dismissed *PLN's* lawsuit, *PLN v. Crosby*, over the censorship of *PLN* by the Florida DOC over *PLN's* ad content by holding the case was moot since the DOC had amended its rules to state publications would not be censored due to ad content. He also dismissed *PLN's* challenge to a Florida DOC rule prohibiting payment to prisoner writers. *PLN* is appealing that decision to the 11th circuit. On August 3, 2005, *PLN* settled a censorship suit, *PLN v. Lehman*, with the Washington DOC. Upcoming issues of *PLN* will have detailed articles on these cases. Unfortunately, censorship and public records litigation consumes a significant amount of *PLN's* limited resources.

Lastly, on a personal note, I am pleased and honored to report that the Petra Foundation, based on New York, has selected me for a Fellowship based on my advocacy and activism over the past 17 years on behalf of prisoners. The Petra Foundation, an all volunteer non profit founded to honor the memory of Petra Shattuck, provides a network and support for those struggling against oppression around the country. I am humbled by the previous 18 years of Petra Fellows who came before me and who join me this year as Petra Fellows. More information about the Petra Foundation can be found on their website at: [www.petrafoundation.org](http://www.petrafoundation.org).

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# Arbitrary Draconian Restrictions on Texas Parolees

by Matthew T. Clarke

Texas parolees have been subjected to a number of draconian measures not necessarily related to their conviction. For instance, parolees who were not convicted of sex offenses have been made to register as sex offenders and take sex offender therapy, parolees with any history of sex offenses (and those with no such history, but who were required to register as sex offenders) have been confined to their homes on Halloween, Thanksgiving and New Years and parolees with any history of DWI or other alcohol related crimes have been instructed to sign pledges not to drive between 7 p.m. New Years Eve and 6 a.m. New Years Day--to be enforced by parole officers checking to make sure the parolees are at home during those times.

## Sex Offender Therapy for Non-Sex Offenders

The arbitrary classification of parolees with no sex offense conviction as sex offenders is seen as particularly onerous as they are required to pay for weekly therapy sessions costing \$20 to \$35 each session, after having had to pay \$150 for an evaluation to determine whether the weekly sessions are needed. The person giving the evaluation is usually the same sex offender therapist who stands to make the money off the weekly sessions, triggering concerns about conflicts of interest. Furthermore, parolees taking sex offender therapy are required to cooperate with the treatment, including admitting having committed the sex offenses. Failure to do so can trigger greater restrictions or even parole revocation.

"How can I admit a crime that never took place? Or how can I show remorse for a victim that never existed?" asked Raymond Young, a convicted burglar with no sex offense history who is being required to take sex offender therapy.

Parolees treated as sex offenders are in a "living hell," according to David O'Neil, an attorney who has many parolees for clients.

"Guilt by association is what we've got in the parole system right now," said O'Neil. "They can't keep their jobs. They can't leave their counties. They get put on curfews. They get put on monitors. They can't make a living. The deck is stacked against them. [The parole board] just puts on provision after provision."

O'Neil agrees that there are parolees who

need strict supervision, "but more and more, the system is chewing up and spitting out the people who this was not designed for."

Sex offender parolees have been required to remain in their homes during Halloween and Thanksgiving and were prohibited from displaying any Halloween decorations or having their porch lights on. Parole officers monitored compliance.

Young was subject to normal parole conditions for about a year after being released from prison. He came under the stringent sex offender restrictions after completing a mandatory sex offender evaluation. Those restrictions virtually ruined his life.

"A lot of guys get out of prison and they don't try to do nothing for themselves," said Young. "I went to work on the back of a garbage truck at BFI until I earned enough money to rent me a semi, take my test, passed it, and now I'm driving trucks."

Under the normal rules of parole, Young could drive his truck throughout the state and earned \$800 to \$1,100 a week. Now, under the sex offender restrictions, he is not

allowed to leave Harris County and earns only \$300 to \$375 a week.

Sean Buckley, an attorney with ten parolees as clients, describes requiring people without sex offenses to admit and accept responsibility for a sex offense as "absolutely perverted because they're forcing a person to lie." His non-sex-offender clients are required to attend group sessions and complain that "when they go in there and they hear these other people, like child molesters, talking about it and having to relive these fantasies, they get sick to their stomachs and they're just appalled that they have to be a part of this."

According to Allison Taylor, executive director of the Texas Council on Sex Offender Treatment, Texas does not license sex offender treatment providers. However, the 380 providers they registered are required to meet specific qualifications to be registered. The council does not consider it a conflict of interest to have the same provider who will profit from providing the treatment perform the initial assessment of whether a

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## Arbitrary Restrictions (cont.)

parolee should receive treatment. Citing her small staff of three, Taylor said she did not know how many sex offenders were being treated by the registered providers. Providers contacted refused to tell how many sex offenders they were treating, claiming it was confidential information.

### New Year's Lockdown for DWI and Other Parolees

State parole officials required parolees with a history of DWI or other alcohol-related crimes to sign pledges that they won't drive between 7 p.m. December 31, 2004, and 6 a.m. January 1, 2005. The pledge not to drive became a lockdown when Kathy Shallcross, deputy director for the parole division of the Texas Department of Criminal Justice, announced that parole officers would monitor compliance, by checking to see that

the parolees are at home. Shallcross said the parole officers would also be checking on sex offenders and other high-risk parolees. She said that failure to sign the no-driving pledge would result in revocation of parole.

State senator John Whitmire, D-Houston, chair of the Senate Criminal Justice Committee, expressed concern about the lockdown. "Punishment is important, but rehabilitation is equally important," said Whitmire. "It appears someone in TDCJ believes these folks should continue to be punished once they are out."

O'Neil questioned whether the holiday driving prohibition is a legal parole condition and advised his clients to sign the pledge under protest.

"I'm watching it carefully," said Whitmire. "What I'm concerned about is we not unduly prevent parolees from having the opportunity to demonstrate that they want to do the right thing."

Noting that the prison system doesn't

provide much in the way of substance abuse treatment, Whitmire said, "It's a hell of a note that these same people they want to lock in their homes on New Years Eve were incarcerated for years with no treatment."

Budget cuts two years ago caused the prison system to virtually eliminate its alcohol and substance abuse treatment programs.

Whitmire also noted that, of 4,000 DWI parolees, only about 100 are receiving treatment for alcoholism.

Shallcross defended the holiday restrictions as a part of a new public safety effort and an attempt to randomly check parolees more often. She noted that, regardless of the offense of conviction, most prisoners have a history of substance abuse with up to 90 percent of the 77,000 Texas parolees being designated as substance abusers when they are released. ■

Sources: *Houston Chronicle*.

## Former Connecticut Governor Rowland Pleads Guilty to Corruption Charges in Juvenile Prison Kickback Scheme

by Matthew T. Clarke

In December 2004, John G. Rowland, 47, former governor of Connecticut, pleaded guilty in federal court to accepting over \$100,000 in bribes as part of a conspiracy by government officials. He faced one to two years in federal prison.

Rowland was the biggest player in a state government full of officials willing to sell out the public interest for cash and other considerations. Rowland became famous when revelations of an ill-gotten cottage, hot tub, and Cuban cigars led to a full-scale corruption scandal, resulting in an impeachment inquiry, state Supreme Court battle, and ultimately Rowland's resignation and guilty plea.

Peter Ellef, Rowland's co-chief of staff, was another big player in the corruption game. He doled out no-bid contracts to LF Designs, a company owned by his son, Peter Ellef II, and Tunxis Management Company, a company owned by the New Britain-based Tomasso family, which paid him off in cash transfers, gold coins, limousine rides to Boston and New York and other gratuities. The Tomasso companies, in turn, funneled \$1.6 million in contracts to LF Design between January 1998 and April 2002. He is also alleged to have used LF Design corporate credit cards for personal expenses amounting to tens of thousands of

dollars. The elder Ellef was also indicted for receiving \$86,500 that Tomasso allegedly paid into a dummy corporation's account set up by Ellef and Lawrence Alibozek, his deputy. Alibozek was also indicted for receiving gold coins from Tomasso. The feds discovered his Tomasso gold coin stash buried in his yard.

Following the well-publicized suicide of troubled fifteen-year-old Tabatha Brendle in the infamous Long Lake School in Middletown, Rowland was faced with a political crisis. Tabatha, the victim of physical and sexual abuse since infancy, had been left unsupervised following an unsuccessful suicide attempt. Not only were the abysmal conditions in the notorious juvenile facility embarrassing to the urban renewal governor, the brutal "school" imprisoned children under the care of the Department of Children and Families. That is the state department charged with preventing the abuse and neglect of children.

Instead of merely showing compassion and fixing the problem, Rowland's administration first handed Tomasso carte blanche for renovating Long Lane, then gave Tomasso a multi-million-dollar contract to build a new facility to replace Long Lane. The no-bid renovation contract worth close to \$2.2 million was given to Tunxis. Another

no-bid contract for \$49 million to build the Connecticut Juvenile Training Center, Long Lane's replacement, "earned" Tomasso Brothers, Inc. \$3.3 million in management fees.

For Rowland, Ellef and the Tomasso's, crime pays, prisons pay, even the suicide of a troubled teenage girl pays....until they got caught, that is.

Now Rowland is preparing for political life after prison. Metamorphosing the announcement of his guilty plea into a political press conference, Rowland said, "Obviously, mistakes have been made and I accept responsibility for those, but I also ask the people of this state to appreciate and understand what we have tried to do over the past 25 years in public service."

Rowland confidant and community activist Rev. Cornell Lewis of Hartford confirms that Rowland intends to keep his hand in the political pot.

"He still has not lost that fervor for getting involved," said Lewis. After talking with him last week, no matter what happens, he's going to remain involved in things that go on in Hartford. He's not going to let that cloud hanging over him deter him from doing what's right." Rowland was sentenced to one year and one day in federal prison on March 19, 2005. ■

# Pennsylvania Jail Prisoner Settles Use-Of-Force Suit For \$15,000

On January 3, 2005, a Pennsylvania prisoner settled his claims of excessive use of force and deliberate indifference against Lackawanna County Prison officials for \$15,000.

According to the complaint, plaintiff Mario Ludovici was arrested on October 13, 2001, on a warrant for unpaid child support and taken to the county prison. Ludovici was inebriated at the time.

After he was booked in; Ludovici was taken to the prison's Medical Lockup area where he was issued sneakers that were too small. When Ludovici asked if he could exchange the sneakers for a larger pair, guard Byron Ortalano tackled him face down on the floor. Ortalano then choked Ludovici as he and three other guards--John Snipes, John Sibio, and James Tolan--handcuffed Ludovici, making sure to squeeze the cuffs tight into his skin. Ludovici was then taken to a cell where either Sibio or Tolan punched him in the right eye and upper left arm.

The next morning, guard David Mattern

noticed bruises and marks on Ludovici's face and neck and filed a report with Warden Thomas Gilhooley and Deputy Warden Robert Hilborn. No action was taken.

Ludovici sued various defendants in the U.S. District Court for the Middle District of Pennsylvania under 42 U.S.C. § 1983 alleging excessive use of force and deliberate indifference. More specifically, Ludovici alleged that by assaulting him the guards violated his Eighth Amendment right to be free from cruel and unusual punishment.

Ludovici further contended that Lieutenant Verne Dittfield, Warden Gilhooley, and County Commissioner Randy Castellani were deliberately indifferent to his safety because: Gilhooley had hired Ortalano, Snipes, Sibio, and Tolan without performing a background check--even though Tolan had a history of psychiatric problems and assaults--and failed to initiate an investigation after Ludovici was assaulted. Dittfield knew that the four defendant guards regularly assaulted new prisoners but failed to

report it. And Commissioner Castellani, though aware of Tolan's prior psychiatric hospitalization, kept this information to himself when recommending to Gilhooley that he hire Tolan.

Rather than proceed to trial, the defendants settled for \$15,000. Attorney David Glassman of the Lewisburg Prison Project in Pennsylvania represented Ludovici on a contingency basis. See: *Ludovici v. Gilhooley*, USDC MD PA, Case No. 3: CV-03-1798. ■

## \$600,000 Settlement In Death Of Unmedicated Wisconsin Prisoner

A lawsuit over the death of a mentally ill epileptic Wisconsin prisoner has settled for \$600,000.

Kelvin Brooks, an epileptic state prisoner with a long history of mental illness was imprisoned at Wisconsin's Green Bay Correctional Facility. For unknown reasons Brooks was isolated in the prison's segregation unit and apparently placed on a restricted "food loaf" diet. The food loaf supposedly caused Brooks to vomit, which in turn made it impossible for him to keep down his anti-seizure medication.

Prison surveillance tapes painted a disturbing picture of Brooks' last day. The videotapes reportedly revealed that Brooks, who was kept naked in the cell, suffered at least three full-blown epileptic seizures on July 12, 2001, and that prisoners in other cells hit their emergency buttons and screamed for help--to no avail. One guard apparently stated that Brooks was faking the seizures in order to get his clothes back. By the time medical responded, Brooks' body was already stiff from rigor mortis.

After his death, a 42 U.S.C. § 1983 lawsuit was brought on Brooks' behalf against the State claiming, apparently, an Eighth Amendment violation for failure to properly train guards in handling prisoner

medical problems. Plaintiff's expert, Dr. Robert Cohen, former medical director for the Rikers Island Correctional Facility' in New York City, reportedly said that Brooks' death could have been avoided with even minimal training. The case settled for \$600,000; the settlement was published on November 1, 2004.

Plaintiff's attorney was Willie Nunnery of Nunnery Law Offices in Madison, Wisconsin. See: *Brooks v. Bertrand*, Court unknown, Case No. OIC 1017. ■

Source: *Wisconsin Jury Verdicts*

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# Federal Prisoner Wins Right To Marry, Fees Awarded

A federal prisoner has settled his lawsuit against the Bureau of Prisons (BOP) for \$175 and permission to marry his fiancée. The court also awarded attorney fees of \$21,537.50 in a separate proceeding.

On November 2, 2000, while imprisoned at U.S.P. Lewisburg in Pennsylvania, plaintiff Rodney Smith sought permission to marry his fiancée, Linda Weitlich. Smith's request was denied first by the unit warden and then on appeal by the BOP Regional Office. On July 17, 2001, the BOP National Office also denied Smith's request stating that "there is no right to marriage," according to Smith's complaint.

On March 5, 2002, Smith filed a civil rights action against the BOP and prison

officials pursuant to *Bivens v. Six Unknown Named Agents*, 91 S.Ct. 1999, (1971) seeking permission to marry Ms. Weitlich.

After he was transferred to U.S.P. Atwater, and while his case was still pending, Smith again sought the BOP's permission to marry in December 2002. The Atwater unit manager noted on Smith's request that the Atwater Unit Team did not believe the marriage constituted a threat "to the security or orderly running of the institution."

On January 22, 2003, the U.S. District Court for the Middle District of Pennsylvania enjoined the BOB from prohibiting Smith's marriage to Weitlich. Nevertheless, Smith's application was again denied in February 2003.

On April 11, 2003, the district court recharacterized Smith's original complaint from a *Bivens* action to a lawsuit under the Administrative Procedures Act and ordered him to file a second amended complaint. However, in September 2003, without admitting liability, the BOP agreed to settle the case by paying Smith \$175 and allowing him to marry his fiancée.

At a separate proceeding, the court held that the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1988) applied to this case and awarded attorney fees of \$21,537.50. Smith was represented by David Glassman of the Lewisburg Prison Project in Lewisburg, Pennsylvania. See: *Smith v. White*, USDC MD PA, Case No. I:CV-02-0353. ■

## \$99,981 In Fees Awarded For Successful Massachusetts Court Access Suit

by Michael Rigby

In a strongly worded opinion chastising Massachusetts officials for over litigating a case in which a prisoner's constitutional right of access to courts was clearly violated, a federal district court awarded attorneys' fees and costs of \$99,981 to the plaintiff. Plaintiff's counsel, a commercial law firm, had volunteered to represent the prisoner, pro bono, at the Court's request.

Daniel LaPlante, a state prisoner in protective custody, sued state officials, pro se, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331 alleging they violated his constitutional right of access to courts. According to LaPlante, officials at the state prison in Cedar Junction denied him physical access to the unit law library. Instead, he was provided only with legal materials requested by precise citation.

In the summer of 2001, the United States District Court for the District of Massachusetts solicited counsel to represent LaPlante. The commercial law firm of Palmer & Dodge volunteered and accepted the case pro bono. The firm immediately filed an amended complaint adding a claim to enforce a previous settlement agreement which covered the exact same issues, *LaPlante v. Maloney*, 96-11116-RCL (USDC D MA 1998).

On January 30, 2003, the Court granted LaPlante's motion for summary judgment and awarded him nominal damages of \$21 and permanently enjoined prison officials

from infringing on his right of access to courts and from violating the previous settlement agreement. The Court further held that LaPlante was clearly the prevailing party within the meaning of 42 U.S.C. § 1988 and that his counsel was entitled to reasonable attorneys' fees and costs. Counsel then applied for attorneys' fees of \$125,085.83. The defendants claimed the amount was "grossly excessive" and that the case was "over-litigated and overbilled."

In examining the issue, the Court first addressed the duplicity of defendants' argument regarding excessive litigation. State officials "raised argument after argument which were the prototypical 'red herrings,'" the Court held. "If the case was over-litigated by any party it was the defendants. The plaintiff had no choice but to respond."

Next, the Court held that staffing the case with four attorneys--a senior associate, a mid-level associate, and a junior associate, all under the supervision of a partner--was not excessive: The firm had no experience with § 1983 or prisoner litigation and "reasonably believed that they had to research everyone of the defendants' diversionary tactics." The Court further noted that Palmer & Dodge was the only firm willing to accept the case, which was "particularly troubling since LaPlante's claims were meritorious."

The Court also agreed with most of the hourly rates--which reflected rates garnered

for counsel in other civil rights cases--submitted by the firm. The hourly rates of \$300 for Daryl Lapp, a partner since 1995, and \$275 for George Olson, a senior litigation associate since 1994, were justified by their expertise. However, the Court reduced the hourly rate for Marc Goldstein, a mid-level associate since 1997, from \$225 to \$150, and for John Bennet, a junior litigation associate since 2001, from \$175 to \$120, holding that the proposed fees were "too steep where their experience does not counterbalance their lack of expertise in the field."

Finally, the Court discounted defendants' claim that the time spent on the breach of settlement claim (which under the agreement specified fees pursuant to § 1988) had to be separated from the latter time dealing with § 1983 prison litigation (under which fees are restricted by the Prison Litigation Reform Act, or PLRA). Rather, the Court concluded that they were inseparable. "[i]n order to answer the most preliminary question litigation," the Court held, "counsel had to understand the agreement, difference between protective custody and population, the Department's considerable discretion in classifying prisoners, and the constitutional protections that apply no matter how the prisoner is classified."

Based on its analysis, the Court awarded LaPlante \$99,981.43 in attorneys' fees and costs. See: *LaPlante v. Pepe*, 307 F.Supp.2d 219 (D MA 2004). ■

# Settlements Reached In Alabama Women Prisoners' Class-Action Suit

by Matthew T. Clarke

On August 23, 2004, U. S. District Judge Myron Thompson signed a settlement order in a class-action civil-rights lawsuit brought by prisoners at three Alabama Department of Corrections women's prisons challenging their conditions of confinement. The suit focused on basic human needs such as adequate living space, ventilation, personal safety, security, medical treatment and mental health care. The order approves two agreements: The Conditions Settlement Agreement and the Medical Settlement Agreement. Together, they require sweeping improvements in the conditions at the three prisons.

## Unconstitutional Prison Conditions

In December, 2002, the court declared conditions at Julia Tutwiler Prison for Women, Edwina Mitchell Work Release Center (later renamed "Tutwiler Annex") and Birmingham Work Release Center unconstitutional. It described conditions at Tutwiler as "a time bomb ready to explode facility-wide at any unexpected moment." *Laube v. Haley*, 234 F.Supp.2d 1227 (M.D.AL 2002). See: *PLN*, Sep. 2003 pp. 32, 33; Oct. 2003 p. 1.; June 2001, p. 35.

Indeed, conditions at Tutwiler and the other prisons were gruesome. Tutwiler had been built in 1942 and intended to house about 360 women. By 2002, it held 1,017 prisoners. Violence was rampant, medical treatment virtually nonexistent and mental health care largely unknown. The situation

at Tutwiler was reflective of the overall situation within the DOC, in which 26,000 prisoners were being housed in prisons designed to hold 12,500, according to DOC spokesman Brian Corbett.

## Shades Of Abu Ghraib

Over the course of the suit, the Tutwiler administration began giving draconian punishment for disciplinary infractions. One such punishment was food restriction in which the prisoner was given a roll for lunch and a roll for supper. Another was forcing prisoners to remain static in uncomfortable positions for long periods of time. The settlement ends this type of abuse.

## Reduction In Population

The DOC is to divert as many prisoners as possible into community corrections placement (such as supervised work release). To that end, it is to conduct classification reviews of the prison population at least every six months with the plaintiffs' lawyers and their agents able to review the classification records to check for and correct errors. Two target population values are 700 or less at Tutwiler, 250 or less at the Annex. If those are achieved for the required period, other sections requiring additional laundry capacity, staffing, and administrative segregation cells are suspended (so long as the population remains that low).

## The Heat, the Heat, the Terrible Heat

A persistent complaint involved the lack of ventilation in very hot Tutwiler buildings. The settlement requires the addition of an exhaust fan to dormitories one through eight and two exhaust fans to dormitory nine, and at least one wall-mounted rotating fan for every three segregation cells, the availability of ice for prisoners, and allowing an additional shower when the temperature exceeds 85 degrees F. The DOC agreed to buy five new ice machines, increasing its ice production capacity 50%. It also agreed to monitor temperatures in the dormitories and allow the prisoners to wear shorts after 3:30 p.m. The DOC agreed not to turn off fans for punishment and to modify the windows at Tutwiler so that the upper row of windows can be opened 45 degrees and the lower row of windows fully opened.

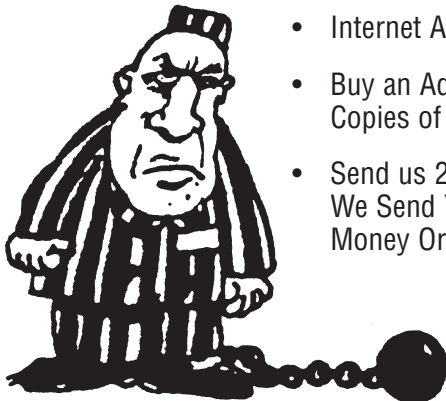
## Recreation Assured

The DOC agreed to build shaded outdoor enclosures attached to each dormitory at Tutwiler (except Dorms 5 and 10). It agreed to allow at least one hour of outdoor recreation a day, five days a week for general population prisoners and 45 minutes a day, seven days a week for segregation prisoners. Recreational equipment (e.g. softball, volleyball and basketball equipment) will be available on the recreation

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## **Alabama Settlement Reached (cont.)**

yards. Prisoners will be permitted and encouraged to form exercise classes.

### **Visitation**

Per the settlement, prisoners are to be allowed two visits per month with family and loved ones.

### **Bugged By Bugs**

Another common complaint was that the prisons were insect infested. In the settlement, the DOC agreed to monthly insect extermination and to make cleaning and disinfection supplies readily available. Bathrooms, bathing areas and living areas will be regularly cleaned and disinfected to control mold and staphylococcus.

### **Maintenance**

The DOC agreed to maintain all critical machinery, including locks, plumbing, electrical systems, roofs, drop ceilings, windows, floors, HVAC systems, laundry systems, dishwashing equipment, cooking equipment, and refrigeration units. This includes establishing a preventative maintenance schedule and making in-house repairs within 24 hours (7-days if DOC has to use out-of-house maintenance personnel).

### **Laundry**

Tutwiler will have at least one 125-pound-capacity washer and one 125-pound-capacity dryer and one press for every 250 prisoners housed there.

### **Programs and Treatment**

DOC agreed to provide drug treatment programs to prisoners sentenced to attend such programs. It also agreed to provide adequate and appropriate vocational, educational, industrial, therapeutic, or other programming to accommodate at least 60% of the women prisoners.

### **Safety and Security**

The DOC agreed to increase staffing to one guard for every 50 prisoners in the dormitories. Guards may not work over 16-hours straight without an 8-hour break. Lines of sight will be cleared. Improved drug testing that doesn't give false positives for approved medications will be implemented. DOC will maintain sufficient segregation cells to house 4% of the female population. DOC will implement a classification scheme with at least three custody levels and audit its implementation. It will also implement a

policy for identifying special needs prisoners such as those emotionally disturbed, mentally retarded, mentally ill, or who pose or are at high risk.

### **Medical Issues**

DOC will be required to provide prisoners medically necessary services in a timely manner. This includes prisoners in work release programs (although they may opt out and see a health care provider of their own choosing at their own expense). There will be a daily sick call (excluding medical contractor holidays) and it may not be held between midnight and 6:00 a.m. Prisoners submitting a sick call slip must be seen by a nurse (or higher-level medical personnel) within 48 hours and the slips must be reviewed by a nurse within 24 hours. Any prisoner seen by a nurse two consecutive times for the same symptoms must be referred to a higher-level practitioner.

Medical staff must be notified when a prisoner is placed in a segregation cell and must promptly review the medical appropriateness of such placement. Segregated prisoners must be monitored daily by health care staff. Guards must monitor each segregation cell every thirty minutes and immediately notify medical staff if a medical problem is detected.

### **Intake**

All newly-arriving prisoners at Tutwiler will be medically screened within 12 hours of arrival. Prisoners at risk for suicide will be immediately referred to a mental health care provider. Tuberculin skin tests will be performed and read at intake. An initial physical examination will be performed on the newly arriving prisoner by a physician, PA or NP within seven days of arrival. This will include a pap test, cervical screening for Chlamydia and gonorrhea, testing for syphilis, and screening for pregnancy.

### **Continuity Of Care**

A policy to facilitate continuity of care will be implemented. If a newly-arriving prisoner can identify her medication, she will be given it if the prescription can be verified by a physician or pharmacist. If verification is not obtained within 24 hours of intake, the prisoner must be seen by a physician or physician's assistant within 48 hours of intake so that the medication can be prescribed. Continuity of medication will be maintained when prisoners are transferred between DOC prisons, to local

hospitals, or to local detention centers. Upon release, prisoners on prescribed medication will be given a ten-day supply of their medication. Longer supplies may be given under some circumstances (severe mental illness or HIV). DOC will cooperate with the Social Security Administration in securing prisoners federal benefits upon release.

### **Medical Services**

DOC agrees to provide medical services in accordance with NCCHC standards. This includes annual pap smears, periodic mammograms and annual TB skin tests. Emergency medical services will be available 24/7. Prisoners will be provided care for pregnancy, gestational diabetes, osteoporosis, menstrual abnormalities, ovarian and cervical abnormalities and menopause in accordance with American College of Obstetricians and Gynecologists standards. Appropriate care, including pain control, shall be available for terminal and elderly patients. Patient education shall be provided by the medical staff. Medical diets shall be provided as needed.

Dental services will be provided and dentists will have current licenses. Dental services will include effective pain and infection control, restoration of carious teeth, extractions, long-term management of periodontal disease, and provision of bridges and dentures. Prisoners will be given the opportunity to have their teeth cleaned at least once every two years. Dental impressions will be made as soon as possible and prisoners given their dental prosthetics within 60 days of the impression being made.

A program will be instituted for control of airborne and blood-borne pathogens. Prisoners with suspected active TB shall be isolated in negative-pressure rooms. DOC shall implement policies and procedures for the treatment of prisoners with chronic medical conditions in accordance with NCCHC guidelines. This includes regular check ups at least once every three months and an individual treatment plan for chronic-condition prisoners. All HIV-positive prisoners shall be vaccinated for hepatitis B.

Prisoners needing prosthetics shall be fitted with one within 60 days of prescription and shall be given follow-up care. Replacement prosthetics for those that no longer fit shall be made available within 90 days.

### **Mental Health**

Dormitory 2 at Tutwiler shall be renovated for use as a mental health housing unit of 40 beds. A mental health auditor shall make on-site inspections at least three times a year. DOC shall ensure the standard



of care for prisoners with serious chronic mental health conditions is consistent with American Psychiatric Association standards. Policies and procedures to ensure treatment of prisoners at risk for suicide, who injure themselves, who suffer from depression or from physical or sexual victimization shall be implemented and crisis intervention and follow-up care provided.

### Staffing

DOC will maintain sufficient medical staff and ensure that they are trained in CPR. Medical staff involved in triage and treatment shall be appropriately trained. Guards will receive training for CPR, Basic First Aid, and education on HIV, hepatitis, TB and recognizing mental illness. Guards will not interfere with medical treatment and shall abide by medical restrictions.

### Pharmaceuticals

DOC shall provide needed medications in a timely manner and keep commonly needed medications in its formulary as well as provide for the timely provision of off-formulary medications. There shall be a general pill call at least three times a day and

provision for prisoners to keep appropriate medications on person.

### Other Medical Provisions

DOC will keep accurate medical records and implement a medical quality assurance program. An independent review shall be made within 30 days of a prisoner's death. The parties agreed to install Dr. Michael Puissis as Correctional Health Care Monitor to monitor compliance with the agreement and report to the court.

### Other Matters

The lawsuit was filed in 2002 with the assistance of the Southern Center for Human Rights (SCHR), a nonprofit Atlanta, Georgia, law firm that advocates for human rights. SCHR Attorneys Lisa Kung, Tamara Serwer Caldas, and Stephen Bright and attorneys Marion D. Chartoff (Montgomery, AL), John A. Russell, III (Aliceville, AL), Gretchen Naomi Rohr (Atlanta, GA), and George E. Schulz, Jr. (Jacksonville, FL) represented the plaintiffs.

The agreements were tentatively approved on July 1, 2004, when DOC was enjoined to abide by them, they expire July

1, 2008. The order was delayed until after a fairness hearing held on July 21, 2004. The court heard testimony from seven prisoners and considered written comments and objections by 81 prisoners on about 350 separate issues. Only 7 of the 81 prisoners opposed the settlement. The court ruled that the settlement was in the best interest of the plaintiff class and that many of the matters objected to were already being addressed by the parties. The court also noted favorably that the population of the prisons had already been drastically reduced and many of the provisions of the agreements were already being implemented.

Upon request of the plaintiffs' attorney, the court will enforce compliance with all aspects of the agreement if, after having the non-compliance brought to its attention, the DOC fails to correct the problem. The parties agreed that the relief granted complies with the PLRA. The court agreed to award plaintiffs unspecified attorney fees. See: *Laube v. Campbell*, 333 F.Supp.2d 1234 (M.D.AL 2004). ■

Additional sources: *Associated Press*, *Montgomery Advertiser*, *Birmingham News*.

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# CCA Finally Loses Contract at Mismanaged Tulsa Jail

by Matthew T. Clarke

For years the Sheriff of Tulsa County, Oklahoma, Stanley Glanz, has been telling anyone who would listen that he, not CCA, should be running the county jail. Now, after five years of CCA mismanagement, he may finally get his chance.

The saga started in the late '80s and early '90s when the previous county jail, located in the top two floors of the county courthouse, became hopelessly overcrowded. A federal judge ordered Glanz to reduce the crowding in the jail. He responded by setting up tents for prisoners and lobbying for a 5/12th cent increase in county sales tax to fund construction of a new jail. The tax increase passed along with a measure setting up the Tulsa County Criminal Justice Authority (TCCJA) to oversee the jail's administration.

The 1,714-bed new county jail is known as the David L. Moss Criminal Justice Center. It was named after a tough-on-crime former District Attorney. The jail was immediately surrounded by controversy when former Tulsa Mayor Susan Savage led a coalition to privatize the new jail's management.

Glanz fought that move all the way to the Oklahoma Supreme Court. However, the courts disagreed with his argument that the TCCJA didn't have the right to remove him from control of the jail.

Forced to submit a bid to TCCJA for the running of his own jail, Glanz lost out to low-bidder CCA in 1999 and CCA found itself responsible for the largest privately-run county jail in the country. Thrown out of his own jail, Glanz has vigorously led opposition to the jail's privatization. Meanwhile, CCA has become the (mis)managing entity

for four other incarceration facilities in Oklahoma (placing Oklahoma in the vanguard of the prison privatization movement), two of which were recently rocked by riots. [*PLN* Jan. 2005, p. 26, see this issue of *PLN*.] Additionally, it was recently discovered that a jail employee had brought drugs with him to work. [*PLN* Apr. 2005, p. 16.]

During the time he spent out of his jail, Glanz has gained a national reputation as an expert opponent to jail privatization.

"I'm pretty well known in the corrections field," said Glanz. "I have a lot of expertise, but none of that is recognized locally. It takes some dedication to run a jail."

If there is one thing CCA has, it is dedication--to the bottom line, not to the proper running of the jail. This is emphasized by the fact that CCA improperly released two prisoners in 1999 and 2000, one of whom was convicted of murder. Both were eventually recaptured, but no one even suggested charging CCA for the cost of the searches. CCA's excuse in both cases was that they were isolated mistakes by low-ranking employees. However, the high turnover rate (75% in less than 2 years) of the poorly-paid jail workers suggests that the problem might actually lie with the inexperience and poor training of new CCA employees. One ex-employee complained of only having received \$9 per hour and having often received only one 1.5-minute break in the course of a twelve-hour shift. He also claimed that the CCA floor guards had a better relationship with the prisoners than with the jail's administration. CCA has also discriminated against its female employees in Oklahoma. Female employees at the CCA North Fork Correctional Facility in Sayre, OK, won \$152,000 in back pay in 2002 based upon a claim of illegal discrimination. A similar, class-action suit has been filed by female CCA employees in California.

Two Tulsa jail suicides have also caused CCA controversy. In September 2004, Darla Lamb, mother of Scott Ray Dickens, a prisoner who committed suicide in the Tulsa jail on December 21, 2002, filed suit in federal court. The suit alleges that CCA disregarded strong indications of Dickens's suicidal state of mind, allowing the father of three to use a bed sheet to hang himself in his cell.

In July, 2004, Michael Andrew Jones committed suicide in the medical facility of the jail using a plastic trash bag. At the

time, he was under observation for seizures. However, in a civil suit filed by his mother, it is alleged that CCA failed to adequately supervise Jones, who suffered from a brain-injury-induced mental condition.

These deaths were two of up to eighteen that occurred in the jail since CCA took over in August, 1999 (the official prisoner-death statistics are ambiguous, possibly because CCA tries to count a prisoner who is not pronounced dead until he reaches the hospital as a non-jail death). At least five of them have been suicides. Early in 2005, CCA settled a suit by the family of a drunken man who was "dumped" in the jail's lobby and ignored by jail officials until they discovered he was dead several minutes later. There have also been two recent suicide attempts by prisoners who hoarded their psychotropic medication which had been given to them in pill form instead of the liquid form specifically required by CCA's contract. Additionally, there was an apparent hanging suicide of jail prisoner Felipe Gonzales, 46, on March 28, 2005. CCA also settled a 2002 suit by a prisoner who had been locked in a cell with another prisoner who was known to be violent toward cellmates.

How does CCA retain its contract in the face of such mismanagement? Political connections and contributions! CCA's pattern of operation is to liberally grease the wheels of the political system with contributions and hire ex-politicos to lobby for the company. [*PLN*, Apr. 2005, p. 22]. It has a lengthy, nationwide history of incurring no political consequences for mismanagement leading to riots and murders within CCA-managed prisons. [*PLN*, Apr. 2005, p. 14; Mar. 2005, p. 26; Jan. 2004, p. 26; Jan. 2005, p. 31; December 2004, p. 24; July 2004, p. 12].

CCA's methods are no different in Oklahoma. The Oklahoma Ethics Commission's list of registered CCA lobbyists includes former state legislator Scott Adkins (sponsor of a law requiring stricter sentences for gun crimes); Fried and Associates, a corporate tax and appropriations specialty firm that includes former state Senate staffers Otie Ann Fried and Brayn Fried, former state representative Jim Fried and Lesa Borin, former employee of former Tulsa mayor, state representative and state senator Rodger Randle. CCA employs Marvin Branham--former campaign consultant for former Mayors Randle and Savage, former County Commissioner Dick and former Tulsa City

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Council member Dewey Bartlett Jr.--as its spokesman and lobbyist in Tulsa.

CCA also keeps its Corrections Corporation of America, Inc. Political Action Committee well funded. During the 2004 election cycle, it slipped \$59,000 to federal candidates across the country, including \$1,000 to Oklahoma federal representative Frank Lucas. CCA also gave \$1,000 to Oklahoma federal Senator Jim Inhofe and \$500 to Lucas in 2002 and contributed \$10,000 to the Committee for the Inauguration and Transition of Oklahoma Governor Brad Henry. CCA's origins reveal its corporate character. It was the 1983 brainchild of former Tennessee Republican Party Chair Thomas Beasley and Jack Massey, who had helped establish Kentucky Fried Chicken and Hospital Corporation of America as corporate icons. Having applied fast-food principles to the medical profession, Massey proceeded to give us fast-food prisons, bastions of low-wage, low-benefit, high-

turnover jobs that teach their employees few marketable skills.

Ultimately, CCA's political connections couldn't save its Tulsa jail contract. Nor is Tulsa the first contract CCA lost. North Carolina took back two prisons CCA had been managing since June 2000 amid concerns about CCA understaffing the prisons.

The drive for the bottom line always leads to pressure to reduce staff and increase the numbers of prisoners. One of the issues in Tulsa is possible manipulation of the prisoner population by CCA to keep daily counts high and maximize profits at the jail. However, according to former Tulsa prosecutor and current Tulsa Bar Association president Phil Frazier, CCA isn't cooperating in the investigation.

"I've been practicing law in Tulsa for 40 years and before CCA it was an orderly and well-run affair at the [old] jail," said Frazier. "But since they've built that [new] jail and CCA has taken over, it's

been an absolute zoo."

The contract to manage the Tulsa jail will be bid in mid-2005. CCA currently charges \$48.60 per prisoner per day and is ensured payment for a least 1,150 prisoners each day, regardless of the jail's actual population. That's 32% higher than its contract-winning bid of \$36.76 in 1999 and made the cost of running the jail \$23 million for fiscal 2003-2004. The price increases has driven TCCJA into a \$2.9 million deficit and CCA has refused to back down on its prices. It may not be clear who will run the Tulsa jail until the bidding is over, but it appears that Sheriff Glanz will beat the \$48.60 rate. Current estimates are that the county would save \$4 million a year by letting the sheriff run the jail compared with CCA. Once again, CCA has proven that privatizing prisons is a bad idea whose time has gone. ■

Sources: [www.urbantulsa.com](http://www.urbantulsa.com), [kfor.com](http://kfor.com), [www.tulsaworld.com](http://www.tulsaworld.com).

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# U.S. Supreme Court: Michigan Appellate Attorneys Have No Third-Party Standing To Sue For Rights Of Future Unrepresented Prisoners

by John E. Dannenberg

The U.S. Supreme Court, sidestepping the important question of the constitutionality of a Michigan state law that prohibited appointment of appellate counsel for indigent defendants who “took a deal” on their criminal convictions, ruled instead that the appellate attorneys who sued under 42 U.S.C. § 1983 to protect all such prisoners’ rights to representation had no “third-party” standing to even bring such a suit. The plaintiff-attorneys unsuccessfully argued that the future loss of income to them from large-scale reduction of their state appellate appointments was in itself sufficient nexus to give them third-party standing. The Court further held that the lower federal courts should have abstained from reaching the constitutionality question until it had first been exhausted in the state courts.

In 1994, Michigan amended its constitution to provide that an appeal by a criminal defendant who pled guilty or nolo contendere was no longer a right, but was subject to

judicial discretion. In response, Michigan judges adopted the correlative policy of not appointing appellate counsel for such defendants. The Michigan Legislature codified this practice in 2000 (Mich. Comp. Laws Anno. § 770.3a), largely prohibiting such appointment.

Two appellate attorneys, Arthur Fitzgerald and Michael Vogler, whose business was substantially funded by their regular appellate appointment, sued Michigan for injunctive and declaratory relief under 42 U.S.C. § 1983 as third-parties, claiming the statute was unconstitutional and would adversely affect future hypothetical clients. They included as co-plaintiffs three present indigent prisoners (John Tesmer, Charles Carter and Alois Schnell) who were unable to gain appellate counsel. The suit (against Attorney General Jennifer Granholm) was brought in U.S.D.C. (D. Mich.), which issued an order holding the practice and statute unconstitutional, thereby enjoining all Michigan state judges. See: *Tesmer v. Granholm*, 114 F.Supp.2d 603 (2000).

The Sixth Circuit U.S. Court of Appeals reversed, (*Tesmer v. Granholm*, 295 F.3d 536 (2002)), holding that *Younger v. Harris*, 401 U.S. 37 (1971) [requiring federal courts to abstain from ruling on constitutional questions until state courts had first been given an opportunity] barred suit by the indigent prisoner co-plaintiffs. Furthermore, the Sixth Circuit held that Michigan’s statute was constitutional.

The Sixth Circuit also held that the attorneys nonetheless had standing to bring the suit as third parties. On rehearing en banc, the full Sixth Circuit agreed with the earlier panel on standing, but now found that the statute was unconstitutional. See: *Tesmer v. Granholm*, 333 F.3d 683 (2003). The U.S. Supreme Court granted certiorari to petitioner John F. Kowalski, an enjoined Michigan state circuit court judge. The Supreme Court conceded Article III standing as to “injury in fact” by assuming that the attorneys’ allegations of future pecuniary loss were sufficient. But it noted that third-party standing here was more tenuous, resting upon proof of a “close” relationship with the person having the [constitutional] right [here, the indigent prisoners’ right to

appellate counsel] and also upon proof of a “hindrance” to the right-holders’ ability to protect their own interests.

The Court found against the attorneys on both counts. First, it found not just lack of a “close” relationship to aggrieved prisoner-clients, it found no relationship at all, because such clients were only hypothetical future ones that presently (after the three indigent co-plaintiffs had been dismissed below) did not exist. Second, the Court rebuffed the plaintiffs’ rejection of the Court’s admonishment that the indigent prisoners could have first taken their complaint to the state and lower federal courts, in pro per.

Plaintiff counsel argued that this went to the heart of advocacy — attorneys are inherently necessary for such complex litigation. The Court disagreed, pointing to a couple of jailhouse lawyers who took such questions (albeit unsuccessfully) through the state courts. From this example, the court concluded that the exception in essence swallowed the rule, and “the lack of an attorney here is [not] the type of hindrance necessary to allow another [i.e., third party] to assert the indigent defendants’ rights.” In other words, an attorney seeking to protect the representation rights of indigent prisoners who are unskilled in the law is barred from proffering third part advocacy solely because a few pro-pers tried and failed.

The Court further chastised the two attorney-plaintiffs for not first taking their own case to state court, accusing the attorneys of forum-shopping by short-circuiting the state courts via a federal forum pre-emptive strike. This was so even in light of the futility apparent from the existence of prior state law rulings on point — albeit not under these plaintiffs’ names.

Accordingly, the Supreme Court reversed, holding that the two attorneys had no third-party standing. The Court did not reach the burning question of the constitutionality of Michigan’s statute § 770.3a in this case but did so subsequently, holding the law was unconstitutional.

Justice Ginsburg’s dissent, joined by Justices Stevens and Souter, went to the heart of the problem. Pointing out that seven out of ten prisoners’ literacy impairments prevented them from completing such basic

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tasks as to “write a letter to explain an error on a credit-card bill, use a bus schedule or state in writing an argument made in a lengthy newspaper article,” the dissent concluded that “an inmate so handicapped surely does not possess the skill necessary to pursue a competent pro se appeal” — the remedy announced by the majority. The dissent noted Michigan precedent which held that notwithstanding a guilty plea, an indigent defendant was still permitted to take appeals for “constitutional defects ..., double jeopardy claims..., jurisdictional defects..., and entrapment claims, mental competency claims and ineffective assistance of counsel.” *People v. Bulger*, 462 Mich. 495, 561

(2000).)

The minority opinion also noted Michigan’s 21-day time-limit to obtain, argue and file an available pro-per 3-page appeal form, but noted the absurdity that literacy-impaired prisoners could properly complete such a form at all, let alone timely and with five copies, while locked in jail. The dissent rejected the majority’s argument that the proven ability of a few pro-per prisoners to file (but lose) their appeals exempted the Court from concerning itself with the vast majority of such prisoners who are literally helpless. “This case is unusual because it is the deprivation of counsel itself that prevents indigent defendants from protecting

the right to counsel,” the dissent bewailed, citing the amicus brief of the National Association of Criminal Defense Lawyers.

The dissent agreed with the attorneys’ selection of the U.S.D.C. forum in the first instance. Had they gone the route of state courts, by the time any relief would have been finalized, thousands of indigent defendants annually would have lost their appellate rights and had to just do the time. Justice Ginsburg concluded eloquently, “The exposure of impecunious defendants to the access-to-appeal blockages in state court makes the need for this suit all the more compelling.” See: *Kowalski v. Tesmer*, 125 S. Ct. 564 (2004). ■

## New Hampshire Prisoner’s Due Process Suit Nets \$54,000 in Fees and Damages

A New Hampshire federal district Court has awarded a prisoner \$20,503 in nominal and punitive damages in a civil rights action alleging Fourteenth Amendment violations. The Court further awarded \$31,000 in attorney’s fees and \$3,900 in costs to the prisoner’s attorney.

While imprisoned at New Hampshire’s Hillsborough County Department of Corrections, prisoner Jason Surprenant filed a 42 U.S.C. § 1983 action alleging he was falsely accused of committing a disciplinary infraction by guard Cesar Rivas. In addition to this claim, Surprenant alleged guard Theresa Pendleton violated his due process rights during the disciplinary hearing. Finally, Surprenant sued Superintendent James O’Mara, Jr., alleging the conditions of the jail’s restrictive housing units were unconstitutional.

The matter proceeded to jury trial. The jury concluded the defendants violated Surprenant’s Fourteenth Amendment rights and awarded Surprenant nominal and punitive damages against Rivas, Pendleton and O’Mara in the amount of \$20,503. The jury rejected two claims that alleged guards Ryan LaVierge and John LeBlanc used excessive force and that O’Mara failed to give Surprenant credit for the time spent in the restricted housing unit.

Following the judgment, defendants moved for judgment as a matter of law, which the Court denied. Surprenant filed under 42 U.S.C. § 1988 seeking an award of \$46,850.50 in attorney’s fees and \$3,897.72 in costs. Surprenant further sought \$1,404 for work done by his counsel in objecting to the defendant’s judgment as a matter of law.

The Court held that an hourly rate of \$135 is appropriate under 42 U.S.C. § 1997e. Using a revised hourly total of 333.10 hours, counsel could receive up to \$44,960.50 in fees.

The Court then had to determine if the fact that Surprenant prevailed on only three of the five claims he raised in his complaint required reduction of the attorney’s fees to be awarded. The Court said the prevailing claims were highly significant and far from frivolous. “Society expects prisoners to be treated humanely, to be provided with a fair disciplinary process when charges are brought against them arising out of the alleged misconduct while incarcerated, and to be free from false accusations by prison staff.” The Court held in reducing the request by only \$10,000, which it said was sufficient to reflect Surprenant’s limited success.

The Court said the reduced fee of \$35,000, still exceeded the cap requirements under § 1997e(d)(2). The Court held the attorney’s fees award must be capped at 150 percent of the monetary judgment of \$20,503. As such, Surprenant’s request for fees must be capped at \$30,754.50.

The Court then concluded that it has discretion to determine what percent, up to 25 percent, of the monetary judgment it must apply to an award of fees. The Court could apply to

satisfy the PLRA. Under this discretion, the Court held that \$1,000 was an appropriate amount for Surprenant to pay toward the attorney’s fees award. Thus, reducing the defendant’s required payment of attorney’s fees to \$29,754.50.

Additionally, the Court held the \$3,897.72 in costs, sought by Surprenant for reimbursement of the fees he paid the Hillsborough County Sheriff to transport witnesses, which were incurred in the course of representation, may be reimbursed as costs under §1988. The decision is unpublished. See: *Surprenant v. Rivas*, 2004 U.S. Dist. LEXIS 16311. It was recently affirmed by the First Circuit Appeals Court. ■

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# Texas Attorney General Clarifies Confiscation Law Governing Prisoner Art Sales

by Michael Rigby

Texas prisoners can sell artwork over the internet and retain the proceeds as long as the value is not increased because of their notoriety, an opinion by Attorney General Greg Abbott has confirmed.

The Attorney General's January 25, 2005, opinion was in response to a judicial inquiry by state Representative Robert Talton (R-Pasadena). Talton had questioned whether death row prisoner James Vernon Allridge III violated state law by selling his artwork over the internet. Allridge sold his art on a Web site for prices ranging from \$10 for a box of greeting cards to \$465 for a large print.

Allridge was sentenced to death in 1985 for fatally shooting a convenience store clerk during a robbery. Before his execution on August 26, 2004, Allridge's art--depictions of monarch butterflies, anemones, koalas, tiger lilies, and the like--had won several awards and gained considerable attention, especially

in Hollywood. A number of celebrities, such as Elizabeth Taylor and Robert Redford, supported Allridge through letters.

Some, including Susan Sarandon and Sting, bought his artwork. Sarandon even visited Allridge on death row.

Allridge is not the only Texas prisoner to sell his artwork. Until the early 1990's, the Texas Department of Criminal Justice (TDCJ) sponsored an annual art show in Huntsville. Prisoners submitted pieces for display and judging, and sold them for whatever they could get.

Most of the people attended those shows because they were interested in the art, not the prisoners or their crimes, said Alice Fisher, who coordinated the shows. "Many of them expressed a great interest in collecting prison art because it represented some deep expression of incarcerated individuals," she said. "It was just a wonderful

opportunity for those artists to exhibit their many talents and strengths."

Many, however, are apparently irked by the success of prisoners. And when money is involved, so much the worse. This sentiment was likely the impetus for a recent change in Texas law, and the basis for Talton's inquiry.

In 2001, the Texas legislature passed two new laws: Criminal Procedure Annotated articles 59.01(7)(B) and 59.06(k)(2). 59.01(7)(A) already provided for the confiscation of money earned by prisoners from book deals, movies, magazine articles, etc., in which the crime was reenacted. 59.01(7)(B) expanded the current law to include the sale of property in which the value is increased by notoriety gained from the seller's crime. 59.06(k)(2) provides for the distribution of confiscated proceeds to crime victims who obtain a monetary judgment or to a general crime victim's compensation fund.

In his opinion, the attorney general noted that 59.01(7)(B) does not proscribe the sale of prisoner artwork, but merely provides a civil post-sale remedy to confiscate proceeds earned in violation of the code. The attorney general further stated that only proceeds earned in excess of the property's fair market value are subject to forfeiture. Thus, because market value is a question of fact, and "[f]act questions cannot be resolved in an attorney general opinion," Abbott could not conclude whether Allridge's artwork was subject to forfeiture under 59.01(7)(B).

Before his execution, Allridge asserted that his artwork was never intended to gain him notoriety. Rather, he saw it simply as a way to express himself and to contribute to society. "My art allows me to give back something purposeful, productive, constructive and meaningful," he said in a message posted on his Web site. "By giving back a small part of me with each piece of art I create, I am giving back to society."

Whether the sale of artwork violates prison policy was not addressed in the opinion. TDCJ maintains a broad, general rule prohibiting the operation of a business, which it has used to punish prison writers and others who earn compensation for their expressive activity which is protected by the First Amendment. ■

## \$800,000 Awarded to Wrongly Convicted Tennessee Man

After maintaining his innocence for 22 years, Clark McMillan was released from prison after DNA evidence cleared him of raping a 16 year-old in 1980. McMillan was released from a Tennessee prison in 2002 after DNA testing revealed a former Memphis resident serving time in Texas for rape had committed the crime McMillan was convicted of.

McMillan was convicted after the victim identified him in a police line up. Throughout his imprisonment, McMillan maintained his innocence. His challenges to the line up were unsuccessful.

Gov. Phil Bredesen exonerated McMillan in August 31, 2004, after a unanimous recommendation of the State Board of Probation and Parole for the exoneration. As a result, the criminal records are expunged and McMillan's full citizenship rights are restored. "It's as much a cleaning of the slate as the legal process affords," said Rob Briley, the Nashville attorney representing McMillan. After the exoneration, the State Board of Claims made a unanimous decision to make its first award for wrongful imprisonment in two decades. Briley sought the maximum allowable award of \$1 million. "You can never put a dollar figure on what

he's been through," said Briley.

The Board of Claims based its award of \$832,456 on McMillan's earning potential. Assuming McMillan, who had limited education and job skills, earned minimum wage at 40 hours a week, his lost wages would total \$185,000. The Board then calculated a pain and suffering award by multiplying that total by 3.5 and added the \$185,000 to that amount.

While Shelby County District Attorney Bill Gibbons did not oppose the exoneration, he tried to dispute the award by telling the Board of Claims his office did not pursue three charges of aggravated rape, five burglary charges, and four charges of robbery with a deadly weapon after McMillan's 1980 conviction.

McMillan received a lump-sum payment of \$250,000. The rest of the money will be put in an annuity that draws dividends. After McMillan's death, the annuity is assigned to his designated heirs. Of particular merit is the work of Briley, who represented McMillan for no charge and will receive no money for his time or costs. ■

Sources: *The Tennessean*; *Associated Press*.

Additional source: *Austin American-Statesman*



# National Prison Reform Commission Started

by Margo Schlanger

Chaired by former Attorney General Nicholas Katzenbach and former U.S. Circuit Judge John Gibbons, the Commission on Safety and Abuse in America's Prisons opened shop in March, 2005 and has held two of four scheduled public hearings – the first in April in Tampa, Florida and the second in July in Newark, New Jersey. The Commission is a private group, organized by the Vera Institute of Justice, in New York. It brings together 21 commissioners – civic leaders with law enforcement backgrounds, prisoners' advocates, former prisoners, corrections professionals (from both jails and prisons), forensic psychiatrists, law professors, and others. Some of the commissioners are very high profile – they include William Sessions, former U.S. District judge and FBI Director; Marc Morial, former Mayor of New Orleans; Gloria Romero, California Senate Majority Leader; and Gary Maynard, Director of the Iowa Department of Corrections and American Correctional Association President-elect. Some are less well known – me, for example. Our common ambition is to understand the most serious problem in our nations' nearly 5,000 detention facilities and recommend ways to make them safer for prisoners, staff, and the public.

Both national and state blue ribbon prison reform commissions have a long history, of course. In the late 1960s, Chief Justice Warren's interest in prisons led the American Bar Association to found a Commission on Correction Facilities and Services. One of its chairs, Robert McKay, also chaired a commission that examined the causes and course of the 1971 riot at New York's Attica prison. The American Friends Service Committee produced an important set of prison reform recommendations in 1971 and its National Commission on Crime and Justice produced another set in 1993.<sup>1</sup> In the late 1980s, California had its Blue Ribbon Commission on Inmate Population Management. More recently, the ABA had another commission, the Justice Kennedy Commission, whose recommendations were largely adopted by the ABA this summer.

Some of these and other prison commissions have accomplished a great deal; others less. In either event, history tells us that gains made are likely to erode over time. To the modern eye, jaundiced perhaps by truth in sentencing, the rise of supermax incarceration, and, most of all, by

the increase of the number of incarcerated persons from about 360,000 in the early 1970s to over 2 million today, many of the Attica Commission's recommendations – for example, to make confinement “the least that is administratively necessary,” including “the maximum amount of freedom, consistent with the security of the institution and the well-being of all inmates, for inmates to conduct their own affairs”, and to reform parole procedures<sup>2</sup> – seem almost to come from another universe. And the Justice Kennedy Commission introduced its attempted intervention by looking back at its predecessor, writing in its final report that “for all of the resources and energy and talent devoted to its work, it appears that the ABA Commission on Correctional Facilities and Services left little lasting impression on the legal landscape, and its work was all but forgotten in the crime war of the 1980's.”<sup>3</sup>

But even a 10 or 20 year improvement seems to me extremely worthwhile. If this new effort is successful at identifying and promoting practicable ways to make detention facilities more safe, humane, and effective, that could benefit millions of people in one year alone, and many more millions before it's time for the next national prison commission. And perhaps the current climate – in particular, the huge modern prisoner populations, the difficult budget situation in state governments, and the public outcry over rape in U.S. prisons and the maltreatment of prisoners of war abroad – is creating a perfect storm for reform. So from my perspective, blue ribbon commissions are looking pretty good, especially as litigated intervention in conditions of confinement grows more rare and more limited.

Our work is just starting. The first hearing was an introduction and overview. Commissioners heard testimony about what is known and unknown about the nature, extent, and causes of violence and abuse by and against prisoners and staff in both jails and prisons. Some of the witnesses were former guards and wardens, others former prisoners, and still others were experts and advocates of various kinds. The second hearing focused on medical care and on systemic and institutional problems (e.g., as overcrowding, the increasing use of isolation, and mental illness), that may or may not drive violence. The third hearing, in November, will examine the world of

the prison and jail guard, looking at issues like recruitment, training, and support; the job stress and its consequences; and what happens to whistleblowers. A fourth and final hearing, in January, 2006, will hone in on oversight and standards issues. We aim to present recommendations to Congress, state governments, and corrections departments around March, 2006, one year after the Commission was formed.

More information about the Commission on Safety and Abuse in America's Prisons can be found at [www.prisoncommission.org](http://www.prisoncommission.org). ■

*[Editor's Note: This piece originally appeared in the Correctional Law Reporter (June/July 2005). Margo Schlanger is Professor of Law, Washington University in St. Louis, and a member of the Commission on Safety and Abuse in America's Prisons. She is a former trial attorney, U.S. Department of Justice Civil Rights Division. You can contact her at [mschlager@wulaw.wustl.edu](mailto:mschlager@wulaw.wustl.edu); her website is [schlanger.wustl.edu](http://schlanger.wustl.edu).]*

## Footnotes

<sup>1</sup>Edwin C. Morgenroth [Chairman] et al., *Struggle for Justice: A Report on Crime and Punishment in America* (1971); National Commission on Crime and Justice, *A Call to Action: An Analysis and Overview of the United States Criminal Justice System, With Recommendations* (Linda M. Thurston, ed., 1993).

<sup>2</sup>New York State Special Commission on Attica, *Attica* (1972), at xvi-xviii.

<sup>3</sup>Report of the ABA Justice Kennedy Commission, at 4 (2004), available at <http://www.abanet.org/media/jkcrecs.html>.

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# Michigan Guard Who Procured Hit On Prisoner Must Pay \$200,000 Damages

by Marvin Mentor

A Michigan federal jury returned verdicts of \$75,000 in compensatory damages and \$125,000 in punitive damages against a Michigan state prison guard who paid one prisoner six cigarettes to viciously pummel another.

Michigan prisoner Barton Allen, serving a life sentence for first degree murder, was attacked while sitting on the toilet in Building 7 (administrative segregation) at Riverside Correctional Facility in Ionia in October, 2001. Fellow prisoner DeShawn Fleming admitted smashing Allen's head against a broken urinal and further admitted that he assaulted Allen solely because Sergeant Dennis Baldwin paid Fleming six cigarettes to do so, (Baldwin had had a minor altercation with Allen six weeks earlier, and wanted to "get even.") Allen, whose injuries required ten stitches and left a 3" scar, is still being treated for recurring headaches from the beating.

In a quintessential display of "correctional justice," Fleming, who confessed to the assault and that he was hired by Baldwin, was administratively infracted and found guilty of the assault, while Baldwin, on the same evidence, was cleared by prison

investigators of any wrongdoing. But Allen exposed the truth in his subsequent civil rights lawsuit against Baldwin.

Filing in pro per, Allen sued for damages under 42 U.S.C. § 1983, alleging violation of his Eighth Amendment rights plus state law torts of assault and battery. [Allen's additional claim of Fourteenth Amendment substantive due process denial was dismissed in favor of the Eighth Amendment protection.]

Baldwin first moved to dismiss on grounds that Allen failed to exhaust administrative remedies through the third level. But Allen *had* submitted his third level appeal -- it's just that the recipient (alleges he) never received it. Since the record showed that Ionia staff also malevolently sidelined Allen's mail from the court (causing a failure-to-respond dismissal that was later reinstated), the court ruled that Allen's act of *sending* the third level appeal satisfied the "available" administrative remedies requirement of 42 U.S.C. § 1997e(a), and the court would therefore not hold any defect in prison mail processing against Allen.

When the case moved to the trial phase,

the court appointed LaRissa Hollingsworth of Grand Rapids, a newly admitted lawyer who had never conducted a trial. When testifying, Baldwin denied any role. He accused Allen and Fleming of staging the fight to make up a phony lawsuit. But the jury implicitly found that Baldwin lied, instead believing Allen, Fleming and a third prisoner, James Jett, who also had been propositioned by Baldwin to do his dirty work.

Allen and Hollingsworth were moved to tears by the jury's August, 2004 verdict. The fledgling lawyer just sat there and "tried to look like I was used to winning." But she wasn't done fighting for her client. She said she will approach the court to prohibit Michigan from applying the award towards the cost of Allen's incarceration. After the three-day trial, Hollingsworth motioned the court for attorney fees and costs. Following 42 U.S.C. § 1997e(d) (2), the court awarded \$604 in costs (assessed against Baldwin) and \$11,772 in fees (assessed against Allen's judgment).

In post-verdict motions, Baldwin claimed that the damages were excessive. His argument that Allen was just a violent con fell flat in light of the hopeless comparison with his own violent and cowardly act of soliciting assault and battery while being paid as a Michigan peace officer. As to the \$125,000 punitive damages, Baldwin pled that it "should be shocking to the Court's conscience" because it is "two to three years times [Baldwin's] annual salary."

The court denied Baldwin's motions, observing that he never raised a *constitutional* challenge to the verdict, nor did he present any evidence of his financial means or net worth.

"Baldwin will not be heard to argue that the award is excessive simply because it is more than he can pay." Moreover, the court opined, even if Baldwin had attacked the award constitutionally, the jury's award was well within the constitutional limits of a single digit ratio between compensatory and punitive damages.

No appeal was taken and the judgments were paid by the state of Michigan.

At the very least, it can be said that Baldwin set a new record for the cost of six cigarettes in state prison. See: *Allen v. Baldwin*, U.S.D.C. (W.D. Mich., S. Div.) Case No. 1:02 CV 294. 🐼

Other source: *Grand Rapids Press*.

## Fifth Circuit Upholds \$5,000 Excessive Force Verdict Against Wackenhut Guard

In an unpublished opinion, the Fifth Circuit Court of Appeals upheld a jury verdict finding that a prison guard used excessive force against a prisoner and awarding \$5,000 in damages.

Mississippi prisoner Thomas Unger sued Wackenhut (now Geo Corporation), various supervisory officials and guard Reginald Blanchard, alleging that he was subjected to excessive force in violation of his constitutional rights.

Prior to the jury's verdict, the district court dismissed, as frivolous, the claims against all defendants but Blanchard. The jury then returned a verdict for Unger, "finding Blanchard had used excessive force against [him]...and "awarding \$5,000 in damages.

Blanchard filed several post-judgment motions seeking to reverse the verdict, but the district court denied them all.

The Fifth Circuit subsequently concluded "there was a legally sufficient

evidentiary basis for a reasonable jury to find that unreasonable force was used, without provocation, by... Blanchard and that the use of such force resulted in an injury to Unger. Therefore, the district court did not err in denying his motion for a new trial." The court also found no error in the denial of "Blanchard's post judgment motion to amend the judgment or" in the refusal to stay the judgment.

The court also rejected the prevailing defendant's claim that the district court erred in denying their motion for attorney's fees and costs. "Although the district court dismissed as frivolous, the claims against those defendants prior to the jury's verdict, its ruling...implied that it did not believe that the facts of the case warranted an award to the prevailing defendants. The record also indicated that the claims against those defendants were not totally vexatious and without any foundation." See: *Unger v. Wackenhut*, 85 Fed. Appx. 387 (5<sup>th</sup> Cir. 2004). 🐼

# PREA Data Collection Efforts Underway

by Michael Rigby

Efforts to implement the data collection requirements of the Prison Rape Elimination Act (PREA) have begun, according to a Bureau of Justice Statistics (BJS) report.

Signed into law by President George W. Bush on September 4, 2003, the Prison Rape Elimination Act [Public Law 108-79] calls for a wide range of measures to combat the burgeoning problem of prisoner rape in the U.S. Specifically, the PREA authorizes, among other things, grant money to fund state efforts aimed at reducing the incidence of prisoner rape, the establishment of national standards, and the collection of statistical data [see *PLN*, March 2004, p. 6].

To date, few studies have addressed the issue of prison rape, according to Data Collections for the Prison Rape Elimination Act of 2003, a BJS status report released on June 30, 2004. As a result, the issue is not well understood. With that in mind, the PREA directs the BJS to collect national statistics on various aspects of prison rape.

Due to the sensitive nature of prison sexual assaults, especially when same-sex attackers are involved, the report notes that prior attempts to gather data through personal interviews and questionnaires have been plagued with low response rates and low reliability. To address these deficiencies, the BJS is developing and testing an interactive computer based survey system known as Audio Computer-Assisted Self-Interviews, or "audio-CASI."

With audio-CASI, respondents will answer audio instructions delivered via headphones using a touch screen. Researchers hope the removal of a personal interviewer--while still maintaining some control over the interview setting--will increase prisoners' willingness to report sensitive information and facilitate the process for those with low literacy skills.

The audio-CASI surveys will ask prisoners about several categories of sexual assault. Categories will include abusive sexual contacts, completed nonconsensual sex acts, and attempted nonconsensual sex acts. The survey will also differentiate between sexual assaults committed by staff and those committed by prisoners.

"The ultimate goal is, one, to truly and finally get valid and reliable data on a very misunderstood and confusing institutional culture," said Richard Tewksbury, Ph.D., a University of Louisville professor under

contract with the BJS to implement the surveys. "Once we have that very reliable set of information, it will be utilized in assessing and perhaps modifying policies and practices." Along with Dr. Tewksbury, who has authored many publications on sexual assaults within correctional facilities, BJS has also contracted with Howard Snyder, Ph.D., Director of Systems Research for the National Center for Juvenile Justice, to work as a consultant on juvenile justice issues.

Noting that even with audio-CASI prisoners may still fear retribution for reporting assaults, the BJS will continue to test other assessment methods. Field testing of the audio-CASI method, slated to begin in spring 2005, will involve a random sample of 2,500 prisoners from up to 25 state and federal prisons and local jails.

Because the assessment of juveniles creates special difficulties, separate efforts are underway to develop audio-CASI surveys more amenable to that situation. Specifically, in many states a parent or legal guardian must give consent for survey participation. Additionally, most states require disclosure of sexual assault incidents to the proper authorities. Therefore, "[t]hese legal and ethical requirements pose special challenges in designing survey methods that will satisfy internal review boards ... and guarantee confidentiality to the youth."

The BJS is also designing paper and pencil interviews (PAPI) and other computer assisted interview (CAI) methods to be used with parolees and prisoners soon to be released from jail. Field tests of up to 30 jails and 20 state parole offices are expected to take place in mid-2005.

Through the surveys, the BJS will produce an annual report of the results. It will also identify the 3 prisons with the highest number of sexual assaults and the 3 with the lowest. Officials from those prisons will then be asked to meet with the National Prison Rape Reduction Commission, an entity established by the PREA to conduct research and develop guidelines.

Test results of audio-CASI, PAPI, and CAI surveys will be available in June 2006. The BJS expects the audio-CASI, PAPI, and CAI surveys of current and former prisoners to be ready for national data collection by the end of 2006.

In addition to the self-reporting surveys, the BJS will also collect institutional records annually. In 2004, the BJS planned to survey

all federal and state prisons, juvenile state prisons, and a representative sample of jails and privately or locally operated juvenile prisons. Through collection of institutional data, the BJS hopes to determine, by gender, the number of prisoner-on-prisoner and staff-on-prisoner sexual assaults; how the incidents are recorded; what information is recorded; where the assaults occur; and what additional information is available.

The Bureau of Justice Assistance has also begun the task federal grant money to improve education and training programs reducing prison rapes. At least three states--Michigan, Rhode Island, Pennsylvania--received funds in 2004.

The Michigan Department of Corrections (DOC) plans to use its \$1 million grant to include information about vulnerable prisoners and sexual predators in its training curriculum for medical and mental health personnel and investigators. The Rhode Island DOC is using its half a million dollars to address a wide range of issues, including identifying potential predators and victims, improving investigative efforts, and training staff. The Pennsylvania DOC says it will match its nearly \$600,000 grant with another \$605,746 and plans to work with Pennsylvania Coalition Against Rape "to develop education and training curriculum and informational brochures," said Pennsylvania Corrections Secretary Jeffrey Beard. A major problem not addressed by the BJS though is the fact that the FBI does not include sexual assaults that occur in detention facilities in its crime statistics. ■

Additional sources: *Corrections.com*, *Pennsylvania Department of Corrections press release*

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# Another CCA Prison in Oklahoma, Another Riot

by Matthew T. Clarke

On March 22, 2005, a riot at a private prison run by Corrections Corporation of America (CCA) near Cushing, Oklahoma, resulted in the death of one prisoner and injuries to fifteen others, one of them critically. No guards or other CCA employees were injured.

Adam Gene Lippert, 32, suffered a fatal stab wound to the chest during the riot at the Cimarron Correctional Facility (CCF). Lippert was serving a 10-year sentence for a drug-related crime. He allegedly bore tattoos identified with the Aryan Brotherhood. He arrived at CCF on December 2, 2004. He died at the Cushing Regional Hospital 90 minutes after the riot was quelled. He had been beaten and stabbed multiple times.

Lucky Miller--a police sergeant in Stroud, Oklahoma, who grew up with Lippert in Davenport, Oklahoma, and arrested him for the conspiracy to manufacture methamphetamine charge that sent him to CCF--described Lippert as a good person whose life had spun out of control due to drugs and alcohol.

"I've known Adam my whole life," said Miller. "I liked Adam. Deep down he was a good person. Drugs and alcohol started controlling his life. I hate it that he got killed. He's got a baby."

According to CCA, the fight broke out between rival racial gangs who were being allowed to recreate together in the prison's gym at around 1:20 p.m. CCA stated that prisoners from one gang broke into a storage room containing aluminum softball bats and horseshoes which were then used to attack the other group. Later investigation showed that the prisoners checked out the bats and horseshoes and that the fight occurred on the recreation yard located next to the gym. The fight lasted about ten minutes during which no tear gas was deployed and no guards became involved. According to Oklahoma ACLU staff attorney Tina Izadi, the ACLU is investigating the guards' lack of response and the recreating of rival gang members simultaneously in the same gym. Both of these sound like problems caused by poorly-trained guards.

Linda Hurst, the prison's spokesperson, estimated the number of prisoners in the gym at the outbreak of the fight at 180 and the number of participants in the "altercation" at "between 40 and 65." Hurst emphasized that the 40-to-65-man armed melee was not to be called a riot.

"It's a prison," said Hurst. "Things like this do happen."

CCF did not initially notify state officials regarding the riot, but notified the Oklahoma State Bureau of Investigation once officials realized that a homicide had occurred. Cushing Police Chief Bill Myers was informed about the riot six minutes after it was quelled. He responded by providing extra security for the prisoners who were taken to area hospitals and to guard the prison's perimeter.

CCF is a 960-bed medium-security prison owned and operated by CCA since it was built in 1996 at a cost of \$35 million. It currently houses 967 Oklahoma state prisoners, 445 of whom are classified as violent. CCA currently houses 4,469 Oklahoma state prisoners in four Oklahoma private prisons, charging \$44.17 per prisoner per day.

This is hardly the first riot at a CCA-run prison. It's not even the first one at a CCA-run prison in Oklahoma. In June, 2004, a riot between rival Hispanic gangs at the CCA-run Diamondback Correctional Facility near Watonga, Oklahoma, left two prisoners critically injured. That riot lasted more than four hours, much longer than CCA officials admitted. The Arizona Department of Corrections, which housed some prisoners there, issued a report that blamed CCA for the riot. [*PLN*, Jan. 2005, p. 31].

Oklahoma prisoners have been feeling the aftershocks of the Cushing quake. On March 24 and 25, 2005, violent altercations between black and white prisoners occurred at the Oklahoma State Penitentiary in McAlester. Two prisoners suffered multiple stab wounds in those incidents. On April 24, 2005, there was a melee at the Dick Conner Correctional Center near Hominy, Oklahoma. One prisoner was injured sufficiently to require hospitalization in the fighting, which involved white, Hispanic and Native American prisoners battling black prisoners.

State Representative Terry Harrison, D-McAlester, described the situation in the state prisons as a ticking bomb fueled by a lack of guards caused by insufficient funding.

Six prisoners have been charged with the first-degree murder of Lippert under an Oklahoma law that provides for the charging of all participants in a riot that results in a killing and allows for the death penalty. Eric Manquel Johnson, an Oklahoma state prisoner sentenced to life-without-parole for

a 1992 murder, was identified on a videotape of the riot as making stabbing motions toward Lippert.

Court documents state that the other five prisoners charged with Lippert's murder also committed other crimes during the riot. Shawn Paul Byrd, who has 17 convictions for drugs and illegal firearms, allegedly stabbed prisoner Steven R. Pigg. Eugene Gutierrez, who is serving a ten-year sentence for running a roadblock and possession of a stolen vehicle, was also allegedly captured on videotape stabbing prisoner Jason Mallard in the neck. The videotapes also allegedly show prisoner Cedric Dewayne Poore, who is serving a 35-year sentence for robbery, beating prisoners Marvin Harm and James Watkins with a bat. Sedarfes L. Moore, who was convicted of cocaine possession and is serving a ten-year sentence, is also shown beating Harm with a bat. CCF guard Justin Luckinbill stated that he ordered Moore three times to stop, but Moore merely stared at Luckinbill as he continued to beat Harm with the bat. Jason J. Williamson, who has a 22-year sentence for drugs, allegedly beat prisoner Jeffery Parnell repeatedly with a bat, as shown on the videotape, which also shows him beating other unidentified prisoners with the bat.

Oklahoma Department of Corrections Investigator Tim Coppick reported that CCA guards started noticing black and white prisoners grouping on opposite sides of the recreation yard at around 1:00 p.m. According to Oklahoma State Bureau of Investigation spokeswoman Jessica Brown, the fighting started when about 40 black prisoners, armed with bats, horseshoes and knives, rushed about 15 white prisoners on the prison's recreation yard.

"The riot only lasted a few minutes, but when the mayhem was over, Lippert had been beaten and fatally stabbed, and more than a dozen other inmates were seriously injured," according to Payne County District Attorney Rob Hudson. "This became an issue between whites and blacks. It's gang-related."

"Our ... goal right now is to certainly ask for the death penalty on those that are directly responsible; that are the reasons for the death of Lippert," said Hudson. ■

Sources: Oklahoma C.U.R.E., *The Oklahoman*, *Tulsa World*, *Associated Press*, [www.channeloklahoma.com](http://www.channeloklahoma.com), *Honolulu Advertiser*, [endinews.com](http://endinews.com).

# Army Prison Ban On PLN Containing Postage-Stamp-Exchange Ad Is Enjoined, But Ban On Internet Mail Upheld

by John E. Dannenberg

The U.S. District Court (D. KS) enjoined Ft. Leavenworth prison officials from banning *Prison Legal News* issues carrying advertisements from The Greenback Exchange that offered to send Greenback's information packet to inquiring prisoners for three postage stamps. Separately, the court upheld the United States Disciplinary Barracks (USDB) regulatory ban on prisoner receipt of Internet-generated photocopies of legal material not coming directly from a publisher or commercial vendor.

Craig Waterman, serving 20 years at USDB Ft. Leavenworth, filed a pro se habeas action in district court complaining that the prison mailroom's policy of rejecting incoming mail containing photocopies of publications or materials not coming directly from publishers or commercial vendors (e.g., Internet-generated mail) was unconstitutional. Waterman had been mailed copies of legal case material copied off of the Internet, but the mailroom had intercepted and rejected them as being in violation of USDB Regulation 28-1, Paragraph 5-1 a(2)(1), which prohibits mail that "did not come directly from the publisher or vendor...."

Leavenworth is a high-security facility and upholding its security regulations was important, the court noted. But Waterman, after exhausting his administrative remedies within USDB, claimed that restricting this mail violated his First Amendment rights (citing *Thornburgh v. Abbott*, 490 U.S. 401 (1989)). Notably, *Thornburgh* provides for a "reasonableness" test under the template of *Turner v. Safley*, 482 U.S. 78 (1987) to weigh the prison's "legitimate penological interests." Since denial of legal information raised obvious concerns about access to the courts, the court looked at Waterman's available *Turner* alternatives.

The court found that Leavenworth maintained a "modern, up-to-date law library." Its main library has five computer workstations running Westlaw's LawDesk legal research software. There are a total of sixteen such workstations throughout the prison. The software, updated regularly, includes Federal Reporters, Federal Supplements, Supreme Court Reports, U.S. Code Annotated, Military Justice Codes (Titles 10 and 32), Military Justice Reporters, Military

Judge's Benchlaw, American Jurisprudence, Manual for Courts-Martial and the Military Criminal Law Benchbook. Additionally, the main library contains shelved volumes.

Weighing Leavenworth's claimed security concerns regarding screening of incoming mail against Waterman's claimed restriction of Internet-generated legal resource material, the court found in favor of Leavenworth because Waterman had access to adequate prison-supplied legal resources. However, readers should note that this is a narrow ruling, similar to the one cited by the court (*In re Collins*, 86 Cal.App.4th 1176 (2001) [see *PLN*, Aug.2001, p.12]), wherein the plaintiff did not present evidence countering the prison's claimed rational connection to a legitimate penological interest. In fact, most jurisdictions have found that a blanket restriction on Internet-generated mail does not, per se, have such a rational connection. See, e.g., *Clement v. California Department of Corrections*, 220 F.Supp.2d 1098 (2002) [enjoining California prison policy banning Internet-generated information and distinguishing and disagreeing with *Collins*] (*PLN*, Feb.2003, p.19). This type of internet ban case will be difficult for pro se prisoners to win absent expert testimony.

As to the advertisement-content-based ban on *Prison Legal News*, the court overruled USDB's assertion of encouraging criminal activity or rules violations. USDB regulations prohibit prisoners from trading unused postage stamps for money. The Greenback Exchange advertises in *Prison Legal News* a service that will buy stamps at a discounted value. However, the court pointed out that the ad itself does not encourage prisoners to trade their stamps. The language of the ad only invites readers to send in three postage stamps, in exchange for which Greenback will mail them "details & application" on its stamp-exchange operations. As such, the court found that responding to the ad did not in itself violate any USDB regulation nor encourage "criminal activity," and thus the ban on *PLN* was an "exaggerated response" to security needs (citing *Turner*, 482 U.S. at p.90). The court wryly observed that USDB permits *Playboy* and *Muscle and Fitness* magazines, both of which contain advertisements for "hardcore pornography, male enlargement supplements, and other prohibited muscle

building supplements."

Accordingly, the court upheld the ban on Waterman's Internet-generated legal material but "enjoin[ed] defendant from denying access to *Prison Legal News*, Volume 15, on the basis that the advertisement concerning postal stamps encourages or instructs in the commission of criminal activity or institutional violations." Neither party appealed. *PLN* was not made aware of the USDB ban on *Prison Legal News*, notification of which is protected under the Fourteenth Amendment, nor was it informed of the pro per litigation until the ruling had issued. *PLN* asks that readers inform it of any censorship of *PLN* related materials and not undertake such litigation pro se. See: *Waterman v. Commandant, U.S.D.B.*, 337 F.Supp.2d 1237 (D KS 2004). 📧

## Are You a Non-Violent Drug Offender Who Has Been Raped or Sexually Abused While in Custody?

If so, Stop Prisoner Rape wants to hear from you.

SPR, a national human rights organization dedicated to ending sexual violence against men, women, and youth behind bars, is launching a pioneering project built around firsthand accounts of non-violent drug offenders.

Please contact Andrea Cavanaugh at SPR, 3325 Wilshire Blvd. Ste. 340, Los Angeles CA 90010 213/384-1400 x.106 [acavanaugh@spr.org](mailto:acavanaugh@spr.org)

# Brain Dead California Prisoner Guarded Around The Clock

A California parole violator, who was declared brain dead from being shot in the head by a guard at 6,100 bed Wasco State Prison during a lounge-area fight, was guarded at a nearby Bakersfield hospital at a cost of \$1,056/day in overtime. \$30,000 later, after much adverse publicity, the prisoner was credited with time served and discharged to his family by California Department of Corrections (CDC) officials.

Daniel Provencio, 28, a former high school wrestler and construction worker, had served 3 ½ years on drug charges. He was returned to prison on a parole violation in August, 2004, for drunken driving, gang affiliation, evading arrest and gun possession. He was felled by a 40 mm. rubber projectile, designed for shooting only arms and legs, fired by a guard on January, 16, 2005. While on a ventilator and feeding tubes in intensive care at Mercy Hospital in nearby Bakersfield, he was covered by two CDC guards 24 hours per day, while shackled to the bed. There had been no upgrade in his initial brain-dead diagnosis, but after twenty days, besieged CDC officials agreed to drop one guard and remove the shackles.

Other recent examples of outside hospital

CDC guard costs are \$81,745 (55 days) for a heavily sedated prisoner and \$55,305 (45 days) for a paraplegic with a lung infection. And, after an October 2003 beating by his cellmate at California State Prison, Solano, brain-damaged prisoner Edward Rister lay hospitalized in a comatose state for 16 months. His continuous guarding costs as of February, 2005 exceed \$600,000. When queried, Governor Arnold Schwarzenegger called the guarding of brain-dead prisoners "ludicrous." Senator Gloria Romero called the policy "totally crazy. There's no reforms, there's no rehabilitation going on." CDC said it was reviewing its "public safety is paramount" policy, which costs \$61 million per year in overtime to guard and transport ill prisoners. Provencio's mother, Nancy Mendoza, asked, "Why do they keep him? How does a dead man do time?" Provencio's wife and four-year old son had hoped for a miracle, and didn't want to pull the plug on Daniel's life support equipment.

On February 14, 2005, Provencio was technically discharged from parole by the Board of Prison Terms. But his condition was too critical to permit him to be transferred to a hospital in the family's home town of Ventura, CA. Provencio finally succumbed from his bullet wounds at Mercy Hospital on March 4, 2005. Although responsibility for his high post-discharge medical costs was in dispute, this may now be resolved in favor of Provencio's family in light of the March 9, 2005 autopsy report that revealed that the supposedly non-lethal rubber bullet caused fatal brain injuries.

The question of the name of the guard who shot Provencio remains unresolved. The *Bakersfield Californian* newspaper has sought internal CDC investigations records, but CDC will not provide them. The *Californian* contends this policy is contrary to that of other law enforcement agencies, which routinely release the names of officers involved in shootings. CDC spokesman George Kostyrko said they will not do so without a court order, citing the Peace Officer Bill of Rights as protection. *Californian* city editor Bob Christie responded that "these are unequivocally public records."

Lance Corcoran, vice president of the prison guards union (CCPOA), said that releasing such names can and has brought threats from prison gangs and has resulted in guards being placed on "hit lists." In fact, such is the purported case of New Folsom prison guard Sam Bess, who shot and killed a "skinhead" who was stabbing another prisoner in the yard on November 30, 2004. Bess, noting that he took a life to save another, complained in March, 2005 that he now has a murder contract out on him because his prison staff didn't do their job in segregating the known disruptive assaulter earlier. In the past twenty years, California prison guards have shot and killed dozens of prisoners while only one guard has been killed by a prisoner. ■

Sources: *Los Angeles Times*, *San Jose Mercury News*, *Sacramento Bee*, *San Francisco Chronicle*, *Associated Press*.

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## California Prison Guard Gets Time For Setting Up Prisoner Beating

On February 17, 2005, a former guard at Salinas Valley State Prison (SVSP), who set up a gang initiated attack on a prisoner, was sentenced in Monterey Superior Court to two years and eight months in state prison.

On November 17, 2004, former guard Leon Holston took a deal for filing a false report and for assault with force likely to produce great bodily injury. In exchange, the Monterey County District Attorney agreed to a maximum four year sentence and to drop three other charges. Holston's convictions stem from an August 14, 2003 attack on prisoner "Tillis" that Holston helped arrange. Holston was in charge of a cellblock housing members of a San Francisco street gang, who beat Tillis unconscious.

Holston also allegedly aided the gang members communicate with other gang members both in and outside of SVSP (the dropped charges).

In the week prior to Holston's plea bargain, nine other SVSP guards were formally fired in connection with the beating of prisoner Rafael Serrano in October, 2003. The nine guards were implicated in the "Green Wall" code of silence guards' gang at SVSP. [See prior issues of *PLN* for details on guard gang activities in California prisons.]

At sentencing, Holston apologized to the court, his family and the California Department of Corrections. No mention was made of victim Tillis. ■

Source: *Monterey Herald*.



## \$21,213.76 in Fees/Costs Awarded for Discovery Sanctions by NY Jail Officials

A federal court in New York awarded \$20,950 in fees and \$263.76 in costs as a sanction against jail officials related to discovery violations.

Gary Smith, a former Rikers Island jail prisoner filed suit claiming that jail officials failed to protect him from assault while he was in custody. On October 23, 2003, the United States District Court for the Southern District of New York entered an order concluding that defendant jail officials "had failed, over a period of time, to meet their discovery responsibilities, and had failed... to comply with a prior discovery order." It also found that defendants' "opposition to plaintiff's original requests, to his subsequent application to compel and finally, to his motion for sanctions was not substantially justified[.]" The court then "awarded plaintiff the expenses of his motion, including reasonable attorney's fees."

Plaintiff's counsel submitted a fee application, claiming "to have spent 138.2 hours on discovery issues arising from defendant's failure to produce documents,...

Based on that billing and a claimed hourly rate of \$295, he [sought] a fee award of \$40,769.00. Plaintiff also document[ed] out-of-pocket expenses totaling \$263.76[.]" for a total of \$41,032.76 in fees and costs.

The court granted the fee award over defendants' objections, but reduced the attorneys' fee portion by approximately \$40,769 to \$20,950.

Applying the "long-accepted lodestar method of determining attorney's fees[.]" the court noted that it "must...determine how much [of counsel's claimed time] was 'reasonably' expended." It then found that the hourly rate of \$295 was "somewhat excessive" and should be reduced to "an hourly rate of \$250.00 for a relatively junior solo practitioner."

The court then agreed with defendants that "a significant amount of counsel's recorded time was spent on ministerial tasks – for example, copying and assembling papers and mailing them – and that this type of work is properly compensated at a rate appropriate for clerical work, which recent

precedent sets a \$50.00 an hour...Similarly, travel time will be compensated at a rate of one-half the approved billing rate, or \$125.00 an hour."

Next the court acknowledged "the degree of arbitrariness of this process," but concluded "that the nine hours spent on travel should be reduced by one-third to six hours, and that the 6.2 hours spent on ministerial tasks should likewise be reduced by approximately one-third, to four hours. As for substantive work...[the court concluded] that the 123 listed hours should be reduced to 80 hours."

Applying these reduced rates, the court calculated the reward, finding "[t]he 80 hours billable at \$250.00 trigger fees of \$20,000.00. The Six travel hours billed at \$125.00 yield \$750,000 and the four hours for ministerial tasks billed at \$50.00 yield and additional \$200.00. Thus, the total fee award is \$20,950.00. "The court awarded the entire \$263.76 in costs, for a total award of \$21,213.76. The decision is unpublished. See: *Smith v. Wettenstein*, 2003 U.S. Dist. LEXIS 22649 (SDNY 2003). █



**James J. Hamm, J.D.\***  
**Donna Leone Hamm, Judge (Ret.) \***  
**Criminal Justice Consultants**  
**139 East Encanto Drive**  
**Tempe, Arizona 85281**

[jameshammconsultant@yahoo.com](mailto:jameshammconsultant@yahoo.com) (480) 966-8116 [donnaleonehamm@yahoo.com](mailto:donnaleonehamm@yahoo.com)

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# Washington DOC Settles Contempt Action For \$500,000; Money To Fund Patient Advocate

by Michael Rigby

The Washington Department of Corrections has agreed to pay \$500,000 to settle a contempt action stemming from alleged violations of a consent decree governing medical care at the Washington Corrections Center for Women (WCCW). Pending approval by the court, roughly half of the money will be used to pay attorneys' fees and costs, while the rest will be used to hire an independent Patient Advocate to help prisoners address complaints about health care services at the prison.

In September 1993, five prisoners at WCCW filed a class action lawsuit in federal district court alleging that health care at the prison was so abysmal as to be unconstitutional. In January 1995, the parties entered into a consent decree requiring prison officials to improve health care services—including mental health care and dental services—at WCCW.

In the spring of 1999, a trial was held in the U.S. District Court for the Western District of Washington to consider termination of the consent decree. Noting that proper notice had not been given to the defendants regarding alleged medical care violations, the district court examined only plaintiff's alleged violations of dental and mental health care. The court also refused to consider plaintiffs' motion to find prison officials in contempt for violating the decree's medical care provisions. After the trial, the court determined that the defendants had

substantially complied with the dental and mental health portions of the agreement and terminated the 1995 decree. Plaintiffs appealed.

On review, the U.S. Ninth Circuit Court of Appeals upheld the district court's findings regarding compliance with the mental and dental health care provisions and finalized termination of the consent decree effective April 26, 2002. However, the Ninth Circuit further held that the district court's refusal to consider plaintiff's contempt motion for past breaches of the decree was an abuse of discretion and remanded the case for reconsideration of the motion. *Hallett v. Morgan*, 296 F.3d 732 (9th Cir. 2002) [See *PLN*, June 2003, p. 27].

In their motion to find prison officials in contempt, the plaintiffs alleged numerous instances of noncompliance, including the DOC's failure to: maintain adequate numbers of sufficiently qualified health care professionals; make current written policies and procedures available to medical personnel; implement a centralized data collection system to capture medical data; provide prisoners with necessary follow-up care; or provide appropriate chronic disease management and gynecological care.

Plaintiffs also contended that the DOC failed to ensure that health records were complete and contained specified information, and failed to adhere to agreed upon protocols for medication dispensation and

administration, including allowing Nurse Practitioners to prescribe medications and requiring sick prisoners to wait outdoors during inclement weather for medication, "a cruel disregard for the health of sick prisoners...." In addition, plaintiffs contended that prison officials remained unduly in control of medical decisions.

To resolve the contempt issues, the parties entered into mediation on November 12 and 13, 2003. A settlement agreement was ultimately reached which, when approved by the court, will resolve plaintiff's contempt motion and result in the final dismissal of the case.

Under the agreement, the DOC would pay \$500,000 into a settlement fund which would be administered by King County Superior Court Judge Steven G. Scott. Judge Scott determined that of the total, \$81,898 would be used to cover litigation costs, and \$125,000 used to pay plaintiffs' attorneys' fees. Judge Scott noted that plaintiffs' actual attorney fees, based on hourly rates, were \$860,000 and that, even though attorneys in these types of cases typically perform much of their work pro bono, it would be unreasonable "to expect counsel to accept less than 25% of the total recovery, especially where their actual fees were well in excess of the settlement amount."

The remaining \$239,000 would be used to create a fund to benefit the prisoners. Ultimately, attorneys and representatives for the plaintiff class decided the best use of the fund would be "to have it managed by a non-profit organization [the Legal Foundation of Washington agreed to manage it] not associated with the Department of Corrections to be used, for as long as the Fund lasts, for the purpose of hiring an independent Patient Advocate to assist prisoners in addressing their complaints about health care services at WCCW." Specifics were not available.

After some legal wrangling over wording and content, the settlement notice, which provides the plaintiff class with an opportunity to object, was approved on March 30, 2004. A hearing to decide whether or not to approve the settlement was pending.

Plaintiffs were represented by Columbia Legal Services, Institutions Project, 101 Yesler Way, Suite 301, Seattle, Washington 98104. *PLN* has reported on this case extensively. See indexes for more. See: *Hallett v. Stewart*, USDC WD WA, Case No. C93-5496-FDB. ■■

## Los Angeles County Settles Parolee's Overdetention Suit For \$80,000

Los Angeles County paid \$80,000 to settle a California parolee's overdetention suit that alleged failure to process release information for one week.

On June 4, 2001, William Green was arrested by his parole agent on a violation for failing to register as a sex offender. On July 6, 2001, he had a revocation hearing before the Board of Prison Terms (BPT). The BPT released Green's parole hold and ordered his release. That same day, the California Department of Corrections (CDC) tele-typed authorization for the release to the Los Angeles County Jail. But because of an erroneous routing code, the Sheriff's Department did not receive the release. Sheriff's deputies refused to release Green

even though he advised them that the BPT had so ordered. Green called his parole officer on July 7 and told him of the problem. The matter was not resolved until July 13, 2001, when the release was reconfirmed by FAX. Mr. Green was released 12 ½ hours later.

In his 42 U.S.C. § 1983 civil rights suit against Sheriff Leroy Baca, Green claimed \$50,000 in emotional distress, \$1,000 in lost wages and \$150,000 in attorney fees. Los Angeles County settled for \$80,000 on March 8, 2005, after incurring \$176,080 in private attorney fees and \$13,278 in legal costs defending the suit. See: *Green v. Baca*, U.S.D.C. (C.D. Cal.), Case No. CV 02-04744 MMM. ■■



# Alabama Workers' Comp Act No Bar to Psychological Torts

The Alabama Court of Appeals held that Alabama's Workers' Compensation Act is not an exclusive remedy for tort claims of employees alleging purely psychological injuries.

Three female employees of Correctional Medical Services, Inc. (CMS) brought suit against CMS employees of the Alabama Department of Corrections and others, for an incident that occurred on August 31, 2000, in the health-care unit at the Fountain Correctional Facility.

While working in the health-care unit, plaintiffs heard a guard scream. Shortly thereafter, one plaintiff was "captured by one of several prison[ers]...and was led at knifepoint into an interior hallway[.]" She was released later and was not physically harmed, while she was held hostage. The other two plaintiffs "were able to avoid being captured by barricading themselves in a 'break room.'" They did not sustain any physical injuries during the incident.

Plaintiffs "alleged that CMS had 'negligently, wantonly, recklessly and intentionally failed to formulate, implement

and oversee policies and procedures for the protection of the [employees] from the wrongful conduct of the prison population' and that the employees had been 'terrorized' and 'caused to suffer severe and continuing mental anguish and emotional distress' as a proximate result of CMS's omissions."

The trial court granted summary judgment to CMS, concluding that plaintiffs' exclusive remedy was a claim under Alabama's Workers' Compensation Act, §25-5-1 et seq., Ala. Code 1975, (the Act).

The sole issue on appeal was whether the Act bar[red] the employee's tort claim. In holding that it did not bar the action, the court noted that the term "injury" under the Act "expressly 'does not include a mental disorder or mental injury that has neither been produced nor been proximately caused by some physical injury to the body.'"

The court then observed that it previously held that the Act's exclusivity provisions did not bar actions in factually similar cases. See: *Jones v. Colonial Banc Group*, 735 So. 2d 1163 (Ala. Civ. App.

1998) (citing *Busby v. Truswal Systems Corp.*, 551 So.2d 322 (Ala. 1989)).

The court reversed the grant of summary judgment to CMS and remanded, concluding that "[t]he holding of this court in *Jones* compels us to conclude that the employees' tort claim against CMS is not barred by the exclusivity provisions of the Act because the employees are undisputedly not seeking recovery for an 'injury' within the scope of the Act." The court explained that although the alleged tortious conduct was arguably not comparable to *Jones*, "the claimed result of that conduct [was] the same: emotional distress that has not been produced or proximately caused by a physical injury to the body so as to be within the scope of §25-5-1(9)."

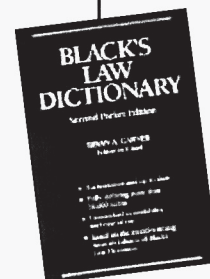
The court made clear, however, that its "conclusion should not be construed as indicating that the employees are necessarily entitled to prevail on their tort claims[ ]" because the issue of liability was not before the court. See: *Bullin v. Correctional Medical Services, Inc.*, 2004 Ala. Civ. App. LEXIS 864 (Ala. Civ. App. 2004). ■

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# U.S. Supreme Court: State Prisoners May Challenge Unconstitutional Parole Procedures Under § 1983 If Earlier Release Doesn't Necessarily Follow

by John E. Dannenberg

The U.S. Supreme Court held that state prisoners attacking the constitutionality of procedures used in either parole-eligibility or parole-suitability proceedings may avoid the state-court exhaustion requirements of federal habeas corpus (28 U.S.C. § 2254) and instead bring their actions immediately under 42 U.S.C. § 1983, providing that the relief sought would not necessarily invalidate or shorten state-imposed confinement. If earlier release is sought, however, the action may be brought *only* in habeas corpus.

Ohio state (life) prisoner William Dotson complained that Ohio's parole authority violated his due process and Ex Post Facto rights by denying him parole *eligibility* for five years in 2000, based upon a harsher eligibility guideline established in 1998. He asked not for release, but for a new hearing under the earlier rules. The U.S. District Court (N.D. Ohio) denied relief, holding that any action challenging parole denial must be brought in habeas corpus.

Separately, Ohio state prisoner Rogerico Johnson, serving 10-30 years, was denied parole suitability in 2000, also based upon the harsher 1998 Ohio regulatory changes, and likewise sought a new hearing under the earlier guidelines, which the U.S. District Court rejected because it was not brought in habeas corpus. The Sixth Circuit U.S. Court of Appeals consolidated the two cases and

reversed (329 F.3d 463 (6th Cir. 2003); *PLN*, Apr. 2004, p.17).

On Ohio's petition for certiorari, the U.S. Supreme Court affirmed the Sixth Circuit. In an 8-1 ruling, the Supreme Court breathed fresh air into the plight of legions of prisoners nationwide, who have found themselves sandbagged by politicized parole boards and state courts that transmogrify the "rules" of parole suitability and eligibility each passing year - retrospectively making them harsher than their earlier sentence/parole guidelines.

The Court's bright-line rule is easy to follow. If a party challenges the parole authority's procedures as being unconstitutional, and the relief sought is a new (and fair) hearing, the complaint may be filed under § 1983. But if the relief sought from an unconstitutional denial of parole is the court-ordered foreshortening of state-imposed incarceration, the party must use habeas corpus.

The importance of this distinction is difficult to overstate. Following the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), the rules for 28 U.S.C. § 2254 state prisoner habeas attacks have become very restrictive. In addition to the one-year time limit to bring a § 2254 action after exhausting state administrative and court remedies (see, e.g., *Redd v. McGrath*, 343 F.3d 1077 (9th Cir.2003), *PLN*, Feb.

2005, p.26), claims are limited to those already plainly adjudicated by the U.S. Supreme Court at the time the rights were violated.

On the other hand, § 1983 civil rights complaints require exhaustion of state administrative (but not state court) remedies prior to filing in federal district court. And the exclusion of claims not previously adjudicated by the U.S. Supreme Court does not apply. In fact, the relative parole-related benefits/distinctions of § 1983 and § 2254 are now so

plain that a stymied life prisoner might well want to file under *both* statutes: § 2254 to gain liberty interests and § 1983 to challenge unconstitutional procedures.

In the instant case, Dotson sought injunctive relief for "an immediate parole hearing in accordance with statutory laws and administrative rules in place when he committed his crimes." Johnson expressly sought "a new parole hearing conducted under constitutionally proper procedures and an injunction ordering the State to comply with constitutional due process and *ex post facto* requirements in the future."

Reviewing its precedent in *Preiser v. Rodriguez*, 411 U.S. 475 (1973) [§ 1983 may not be used to challenge fact or duration of confinement], *Wolff v. McDonnell*, 418 U.S. 539 (1974) [§ 1983 may not be used to recover disciplinary good-time credit loss], *Heck v. Humphrey*, 512 U.S. 477 (1994) [§ 1983 damages only claim may not be used to circumvent habeas corpus if proof of damages would necessarily invalidate underlying conviction or sentence] and *Edwards v. Balisok*, 520 U.S. 641 (1997) [cannot use § 1983 to prove the deceit and bias of a disciplinary decision-maker to invalidate loss of good-time credits, *but future* use of unconstitutional procedures could be enjoined], the court held that if the relief sought "would not *necessarily* invalidate state-imposed confinement," it *may* be brought in § 1983. But any claim for relief that would necessarily gain relief from such confinement would fall within "the core of habeas corpus" and must be so brought.

This new decision essentially overrules *Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997) ["A challenge to the procedures used in the denial of parole necessarily implicates the validity of the denial of parole and, therefore, the prisoner's continuing confinement."] See: *Wilkinson v. Dotson*, 125 S. Ct. 1242, (2005). ■

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# Prisoners of Love: Good Advice for Those Separated By Walls But United by Love, Dreamcatcher Books, 293 pages, \$17.95

*Book review by Matthew T. Clarke*

If you want to know the mechanics of how a Texas prison is run, you should read *Behind the Walls* by George Antonio Renauld [PLN Aug. 2003, p. 29]. It gives all the details on the inner workings of a large prison system, much as the owner's manual gives all the details on how to operate your car. However, just as the owner's manual can never convey the emotional pleasure driving can be, Renauld relates merely the unemotional mechanics of imprisonment--the rules, the programs and the furnishings. If you want to know how it feels to have a loved one in prison, read Toni Cyan-Brock's *Prisoners of Love*. Cyan-Brock goes beyond describing the mechanics, delving into the emotional impact imprisonment has on prisoners and their loved ones.

*Prisoners of Love* is a collaborative project by Cyan-Brock and the people who responded to her requests for contributions. It is largely a first-hand-experience book, but addresses general situations as well as the specific ones encountered by the contributors. Cyan-Brock also puts out a Prisoners of Love Newsletter (\$20/year, P. O. Box 32531, Amarillo, TX 79120) and runs a website: [www.prisonersoflove.com](http://www.prisonersoflove.com). All three focus on issues of importance to prisoners and the people that love them.

In one sense, the book is a vivid description of the trials, tribulations and occasional triumphs of people who love prisoners and the prisoners they love. On another level, it is a how-to book on maintaining relationships under adverse conditions. Many of the book's suggestions might well apply to families separated by military service, severe ill health, or other circumstances.

Cyan-Brock doesn't leave out the touchy and difficult situations, such as marriage, divorce, disease and death, addressing the subjects with a refreshing frankness rarely heard in a prison's visiting room. Her openness and the openness of the other contributors to the book remind us that these milestones of life, whether joyful or sad, are shared by all, uniting us in our humanity, prisoner and free citizens alike.

Cyan-Brock addresses oft overlooked subjects that are much in need of discussion. This ranges from how illiteracy negatively impacts the relationship between prisoners and their loved ones to the factors one should consider when contemplating a move to be closer to a loved-ones' prison-of-assignment and the advisability of taking blood tests for HIV, HCV and TB immediately prior to or immediately after release even if neither partner has engaged in risky behavior.

The book also gives useful advice on how to deal with prison guards and bureaucrats and includes an interview with a prison chaplain that helps explain some of the limitations they operate under. Perhaps the most valuable thing the book does is remind us that prisons are not institutions of steel bars, fences and rules--they are institutions of people. Human beings run them and human beings are imprisoned in them. Bearing that in mind makes it easier to understand the sometimes seemingly mindless decisions by the prison administration and the prisoners.

The book suffers a bit from a pop-psychology feel in places, but that is more than made up for in the clear and lucid sections describing the problems prisoners of love encounter and the suggestions for solving them. I recommend reading the book before you need its advice. It is well organized into twenty-four topical chapters that make finding the advice and suggestions for a particular situation easy when needed. However, because we don't always think clearly in a crisis, it is better to read the book while calm and know to refer to it later.

*Prisoners of Love* may be ordered from Dreamcatcher Books, 2607 Wolflin Ave. PMB 121, Amarillo, TX 79109. [www.dream.catcherbooks.com](http://www.dream.catcherbooks.com) (\$17.95). ■

## Maricopa County, Arizona, Settles Wrongful Imprisonment Suit For \$1.4 Million

On April 6, 2005, a man falsely imprisoned for a decade on Arizona's death row settled with Maricopa County for \$1.4 million.

Ray Krone, once dubbed the "snaggletooth" killer, was sentenced to death in 1992 based on testimony that his bite matched a mark found on the victim. He was released in 2002 after DNA testing exonerated him. Since his release from prison Krone has had dental work done to repair his teeth.

Krone, 48, sued the Maricopa County Attorney's Office and the Phoenix Police Department in federal court claiming the wrongful conviction had resulted from prosecutorial misconduct, fraud, perjury, and police incompetence. The suit against Phoenix is still pending.

Of the \$1.4 million settlement, Maricopa County will pay \$722,000; insurance will pony up the rest. With the money, Krone, who lives in Pennsylvania, intends to buy some property for his parents and a home for himself.

Krone said he's glad this chapter in his life is nearing an end, though he's still dissatisfied. "Material things don't make up for the simple right and wrong," he said.

Krone also noted that those responsible for his ordeal--police and prosecutors--have never apologized for what they did. "We all make mistakes," he said. "But you look a person in the eye, you shake their hand and you tell them you're sorry. They've never attempted to do that." ■

Sources: *The Arizona Republic*

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# RLUIPA Upheld by U.S. Supreme Court

by John E. Dannenberg

A unanimous United States Supreme Court held that § 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc-1(a) (1-2), which proscribes the government from imposing a substantial burden on the religious exercise of incarcerated persons, does not thereby offend the First Amendment's Establishment Clause by implicitly putting government in the business of fostering religious practice. While ruling that all religions are thus protected, even "non-mainstream" ones, the court noted that accommodation of religious practices would necessarily be tempered by deference to prison administrators' need to maintain discipline, order, safety and security within penal institutions. In so holding, the Court overruled the Sixth Circuit U.S. Court of Appeals which held that § 3 of RLUIPA was facially unconstitutional. (See: *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003).)

State prisoners Jon Cutter and John Gerhardt had successfully sued the Ohio Department of Rehabilitation and Correction (ODORC) for accommodation of the practice of Satanist, Wicca, Asatru and

Church of Jesus Christ Christian religions. They had complained that ODORC inhibited their religious practice by retaliating and discriminating against them for exercising nontraditional faiths, denying them access to religious literature, treating them disparately from others practicing mainstream religions by denying group worship, forbidding their religious dress and appearance codes, withholding religious ceremonial items and failing to provide a chaplain trained in their faith. ODORC stipulated for purposes of the litigation that the petitioners were members of bona fide religions and were sincere in their beliefs. See: *Gerhardt v. Lazaroff*, 221 F.Supp.2d 827, 833 (S.D. Ohio 2002).

On appeal, the Sixth Circuit reversed, endorsing ODORC's argument that RLUIPA was constitutionally flawed because it had the impermissible effect of putting prisons in the business of advancing religion. Specifically, the court found that enforcing the district court's ruling would literally foment religious exercise, wherein devious prisoners would be encouraged to use the pretext of a non-mainstream religion as a ruse to gain privileges they would otherwise not be entitled to, i.e., "affording religious prisoners rights superior to those of nonreligious prisoners." The Sixth Circuit relied upon its reading of Title VII of the Civil Rights Act of 1964 that religious accommodations must "come packaged with benefits to secular entities," and finding none here, held that the unbalanced result favoring only religious prisoners thereby ran afoul of the Establishment Clause.

The Supreme Court found this analysis unavailing. First and foremost, the Court noted that such a view would mean that all manner of religious accommodation would fail, and that Ohio's present pro-

viding of chaplains and worship services for mainstream religions would be just as unconstitutional. ODORC retorted that if RLUIPA were applied to any "religion" conjured up by scheming prisoners, it would have the undesirable effect of stimulating burdensome litigation that would overwhelm institutional resources.

The United States of America intervened in support of its statute, arguing that RLUIPA, which is grounded in part in the Spending and Commerce Clauses because it presumes the state's acceptance of federal funds for its jurisdiction to attach, is optional to the states who elect to accept federal funds for prisons. States can opt out of compliance with the RLUIPA merely by foregoing federal funding for their prison systems. Thus, RLUIPA cannot be said to unilaterally "establish" religion because it does not mandate the state to accept federal grants for prisons. Moreover, the United States reported that "the federal Bureau of Prisons [BOP] has managed the largest correctional system in the Nation under the same heightened security standard as RLUIPA without compromising prison security, public safety or the constitutional rights of other prisoners." The BOP operates under the earlier Religious Freedom Restoration Act of 1993 [since held not applicable to the states, see: *City of Boerne v. Flores*, 521 U.S. 507 (1997), but still applicable to the federal government.

In any event, the Court held, RLUIPA is not lop-sided in favor of burdensome prisoner actions because the need to maintain discipline, order, safety and security in penal institutions must always be balanced against *any* accommodation of prisoners' constitutional rights, religious or otherwise. The bottom line is that "religious practices" that are inconsistent with prison security, e.g., use of peyote or wine, performing rites desecrating other persons' race or religion, or sacrificing virgins, will be easily managed by nominal prison regulations.

In closing, Justice Ginsburg wrote that reasonableness would be the litmus test. "Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as "applied challenge would be in order." See: *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). ■

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## Jury Trial in Prison Violates Oregon Constitution

The Oregon Supreme Court held that conducting a prisoner's jury trial within a prison violates the impartial jury guarantee of the Oregon Constitution.

Gary Cavan, a prisoner at the Snake River Correctional Institution (SRCI) was charged with several crimes stemming from his assault of an SRCI guard. "Based on [Cavan's] extensive disciplinary record in the prison system, his involvement in an earlier violent escape attempt at another facility, and the unprovoked nature of [the] attack," the trial court granted the state's request to hold Cavan's jury trial in a courtroom constructed within the SRCI visiting room.

Following his convictions, Cavan appealed, arguing that holding his jury trial in prison "violated his state and federal constitutional rights to a public trial by an impartial jury." The Oregon Court of Appeals disagreed, affirming his convictions. *State v. Cavan*, 185 Or. App. 367, 59 P.3d 553 (2002).

The Oregon Supreme Court granted review, noting that the case "present[ed] an issue of first impression under 'the Oregon Constitution and require[d] the Court to 're-visit the question of the scope of [Oregon's] impartial jury guarantee.'" The Court then concluded that the Court of Appeals erred in holding that Cavan's impartial jury claim was not cognizable under the Oregon Constitution.

Turning to the merits of the claim, the Court indicated that it "must focus on the nature of the SRCI prison environment and its likely effect on the jury." It then "refuse[d] to accept the states underlying (but unstated) premise that, without evidence to the contrary, [the court] should presume that jurors are indifferent to their surroundings. Our 200-year American jury trial tradition informs us that exactly the opposite is true."

Ultimately, the Court held that conducting Cavan's jury trial in SRCI violated his right to an impartial jury under the Oregon Constitution. "Defendant was charged with assaulting a [guard] employed in the very facility in which the trial was conducted. Thus, the jury had to rely on the prison administrators and the victim's fellow [guards] for their safety throughout the trial. That, combined with the state's portrayal to the jury that defendant was so dangerous that he could not stand trial in the public courthouse, created a trial environment that was incompatible with sustaining the level of jury impartiality de-

manded by ... the Oregon Constitution."

The Court noted that a review of cases from other jurisdictions revealed "that only one jurisdiction, Utah, unequivocally allows trials in prisons. Four jurisdictions completely disallow the practice, while three others limit the practice, depending on the nature of the prison facility and safety concerns." However, the Court also indicated that its ruling "should not be read

to prohibit any other kind of court proceeding, such as an arraignment or hearing before a judge sitting without a jury, within a prison."

Having resolved Cavan's impartial jury claim under the Oregon Constitution, the Court found it unnecessary to address his other state and federal constitutional claims. See: *State v. Cavan*, 337 Ore. 433, 98 P.3d 381 (2004). ■

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# Supreme Court Decision Orders Release of 920 Mariel Cubans; ICE: Dumps them In the Streets Without Aid

By Mark Wilson

In a 7-to-2 decision, the United States Supreme Court expanded upon its earlier decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), holding that aliens who are ordered removed and who are inadmissible under 8 U.S.C. § 1182 may be detained "only as long as 'reasonably necessary' to remove them from the country." It also reaffirmed "that the presumptive period during which the detention of an alien is reasonably necessary to effectuate his removal is six months [ ]" beyond the expiration of the 90-day removal period allowed by 8 U.S.C. § 1231(a)(1)(A). The Court's decision requires the release of 747 Cuban Mariel refugees (Marielitos) and 173 non-Cuban detainees, or 920 refugees, nationwide. The case originally arose in

Seattle, Washington. The two petitioners in this case were Cubans who emigrated to the United States in 1980 during the Mariel boatlift and who were convicted of assorted crimes and served their sentences. At no point did they become US citizens.

The Immigration and Customs Enforcement (ICE) agency took them into custody and they were found to be deportable aliens due to their criminal convictions. However, because Cuba does not accept deportees from the United States, ICE was going to hold the men indefinitely as deportable aliens. With this decision the supreme court reaffirmed its earlier decision that deportable aliens who cannot be deported to their country of origin within six months must be released.

"This is a Supreme Court decision," said Manny VanPelt spokesman for the United States Immigration and Customs Enforcement, or I.C.E., in Washington, D.C. "Its something we disagreed with. There were individuals who argued for it, and this is the end result. There are criminal aliens being released into the community." According to VanPelt, this includes "murderers and rapists" who the government has long been unwilling to release. "We're simply complying with the Supreme Court's decision. Despite their histories, the court has mandated that we release them," complains VanPelt.

Truth be told, immigration officials are unceremoniously dumping these refugees in

the street "with little more than the clothes on their backs and immigration cards that read simply, 'paroled for humanitarian reasons.'"

In response to criticism that ICE is abandoning these refugees in foreign communities with no money, transition or housing assistance, "VanPelt says about U. S. Department of Homeland Security is not running a 'chauffeur service' or offering rehabilitation to 'alien criminals,' who in some cases have been incarcerated for two decades." Rather, sounding of sour grapes, "VanPelt said it is now up to those who championed the Marielito cause to 'step up to the plate' and help them."

One of many people who are trying to do just that is Salvador Longoria, a Cuban-American attorney in New Orleans. "It's almost like sabotage," says Longoria. "They lock up these people for so long, then they just dump them in the street. They're going to get arrested and then -- ah ha! -- these people should'nt have been released to start off with, they'll say. They're a danger. It's not right." Sue Weishar, director of immigration and refugee services for Catholic Charities at the Archdiocese of New Orleans, agrees, "It's very crazy!" See: *Clark v. Martinez*, 125 S. Ct. 716 (2005). ■

Additional Sources: *The Times-Picayune*; *Miami Herald*

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# Massachusetts Law, Not PLRA, Applies to Attorneys Fee Award in State Court § 1983 Action for Native American Rights

A Massachusetts Superior Court has held that the determination of an appropriate attorney's fee in a 42 U.S.C. § 1983 Action is governed by Massachusetts common law and practice and not the federal Prison Litigation Reform Act (PLRA). This action was filed by prisoners in the Massachusetts Department of Corrections (MDOC), alleging violation of their state and federal constitutional right to freely exercise their religious beliefs.

The prisoners, in particular alleged unlawful discrimination by MDOC for failing to allow them to participate in a Native American Purification sweat lodge ceremony. In 1995, the prisoners obtained preliminary injunctive relief, but were not successful at trial in 1999. At the suggestion of the Appeals Court in October 2001, the parties entered into settlement discussions that resulted in a final settlement.

In determining if the prisoners were a prevailing party entitled to attorney fees, the Superior Court found the prisoners were warranted in stating that "the success of this litigation marks an historic milestone in the treatment of Native American spiritual practices in Massachusetts as elsewhere, where centuries of disrespect and suppression have burdened whole communities." To prevail, the prisoners' attorneys were required to investigate and present evidence of spiritual practice of Native Americans that are not widely known or understood.

Before the court was the attorney's request of attorney fees and costs in the amount of \$153,560.62 for services rendered between 1992 and 2003 that led to the injunction relief and settlement agreement. The MDOC requested a reduction of fees because of alleged duplication of services, alleged inadequate documentation, and a claim of lack of proportionality between fees sought and relief obtained. In rejecting these arguments, the court found the litigation was complex and demanding, the legal work was not divisible

among counsel, and it extended over a great many years.

The Court held that attorney Peter P. D'Errico was entitled to per hour fees of \$100 for out-of-court work and \$125 for in-court work. It also held attorneys Robert Doyle and William A. Norris were entitled to per hour's fees of \$120 out-of-court work and \$150 for in-court work. The attorneys, however, failed to distinguish the work hours in the motion. D'Errico charged for

620 total hours, Doyle 520 hours, and Norris claimed 177 hours of work. The court allowed counsel to file amended affidavits to permit the filing of a proper attorney's fee award order.

The importance of this case lies in the fact the court held that Massachusetts law applied, and not like PLRA, when awarding attorney fees in this civil rights action. See: *Trapp v. Dubois*, 17 Mass. L. Rptr. 515, 2004 WL 856601 (Mass. Supr. 2004). ■

## California Guard Wins \$10 Million Default Judgment Against Assaultive Prisoners

A guard at California State Prison Los Angeles (CSP-LA) in Lancaster, who was allegedly injured by two prisoners, was awarded a \$10,253,792.57 default judgment against them in Los Angeles Superior Court on March 17, 2005.

Guard Demont Blunt, 25, was repeatedly kicked in the head on April 2, 2004 when he was attacked by two prisoners, allegedly Gregory Haines and Harold Wesley. However, prosecutors declined to file charges against Haines and Wesley because of insufficient evidence to prove that they were the actual perpetrators. Nonetheless, they remain in solitary confinement at other prisons where they were transferred.

While candidly admitting that Blunt never expects to collect any of the judgment,

CSP-LA spokesman Lt. Charles Hughes said, "It's not about the money, it's all about the accountability. These two inmates will never have anything in their lives that doesn't have Officer Blunt's name on it." Blunt is allegedly paralyzed on one side and seeks a medical retirement.

Hughes started the California Staff Assault Task Force (CSATF) 1 1/2 years ago to sue prisoners. (See: *PLN*, Aug. 2004, p.24.) The group reportedly now has 5,800 members who pay \$10/month dues. CSATF hired Lancaster attorney R. Rex Parris to represent Blunt. CSATF claims to have won 60 small claims lawsuits against California state prisoners who injured prison staff. ■

Source: *Los Angeles Daily News*.

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# \$1 Million L.A. County Jail Rape Award Overturned

by Marvin Mentor

The California Court of Appeal, in an unpublished opinion, reversed a Los Angeles (L.A.) County jury verdict that had awarded \$1 million in damages to a jail detainee who was brutally beaten and raped in his L. A. County Jail module while waiting twenty hours to be administratively released after the superior court had so ordered. The jury award of \$25,000 for over detention (see: *PLN*, July 2002, p.21) was sustained, however.

When Jay Reynolds, 36, was stopped on March 8, 1999 for a traffic violation, he was arrested after the officer discovered a valid South Dakota warrant for failure to pay child support. Pending extradition, Reynolds was jailed (no bail) with six seasoned violent offenders in L.A. County Jail Module 4300, a high security cell. However, on March 17, charges were dismissed when it was determined that Reynolds' relatives had arranged to pay his arrears in South Dakota.

The L.A. Superior Court ordered Reynolds released at 11:30 a. m. on the 17th. But getting out of the 20,000 prisoner L.A. County Jail can take time. Nonetheless, unreasonable administrative over detention awaiting release has been held actionable against the County. (See: *Streit v. County of L.A.*, 236 F.3d 552 (9th Cir. 2001), *PLN*, Feb. 2002, p.26; *Cortez v. County of L.A.*, 294 F.3d 1186 (9th Cir. 2002), *PLN*, Aug. 2003, p.13.)

But over detention was the least of Reynolds' angst. After being returned to Module 4300 at approximately 8:45 p.m., he found his cellmates of seven days drunk on pruno. When he told them he had been ordered released [but the administrative release pass was not generated until 7:41 a.m. the next morning], two of the six turned on him. Cellmates Crudup and Jackson proceeded—over a period of two to three hours—to anally rape Reynolds three times and to beat and repeatedly kick him, pick him up by the hair, and choke him. Jackson forced Reynolds to orally copulate him for 5-10 minutes. "Trustee" prisoners had watched, but said nothing. Although hourly cell checks are required for Module 4300, not one check was made all night. Reynolds finally got guard Wargo to let him out at 6:00 a. m. Reynolds was taken to the clinic, where, during treatment, a pubic hair was removed from his mouth. He was released to relatives at 10:00 p.m. on the 18th.

On the County's appeal of the verdicts, the court upheld the \$25,000 over detention verdict for violation of the Fourth Amendment's protection against unreasonable search and seizure. The appellate court relied upon *Tennessee v. Garner*, 475 U.S. 1 (1985) and *Terry v. Ohio*, 392 U.S. 1 (1968) to determine that the County's restraint on Reynolds long after his court-ordered release was objectively unreasonable. The court re-

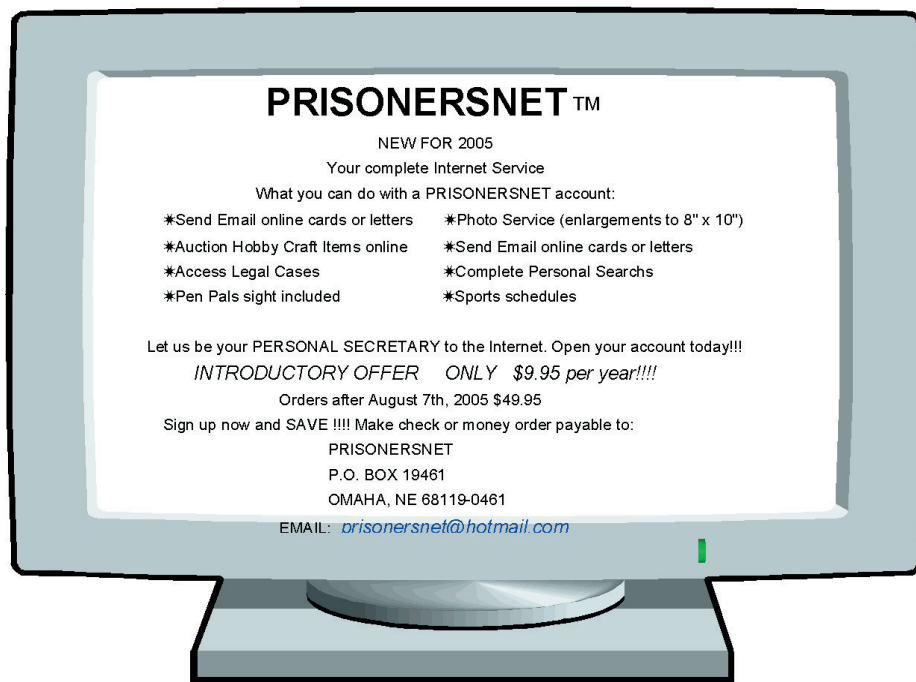
jected the County's attempt to recharacterize the claim under the Fourteenth Amendment instead, finding there was no requisite lack of due process of law after Reynolds' release had been adjudicated.

The \$1 million award for the rapes/beatings was reversed, however, on the legal theory that although placing Reynolds in Module 4300 was a proximate cause of his injuries, it was not reasonably foreseeable to L.A. jail officials that after seven days of peaceful coexistence in Module 4300, Reynolds would be in peril during his final night there. That is to say, the events of pruno and the assaults were "intervening superseding causes" which extinguished L.A. County's liability.

The court distinguished the two elements of causation: (1) cause in fact and (2) legal causation. The County conceded that their actions amounted to cause in fact, but argued that the lack of reasonable foreseeability insulated them from a finding of "legal causation." Although the cellmates' criminal conduct was actionable under 42 U.S.C. § 1983, the court had jurisdiction to re-determine under state standards whether foreseeability was reasonable enough to establish any duty owed Reynolds to prevent his injuries. Since the record showed no prior similar incidents to put the County on notice, and since no problem had occurred in Module 4300 during Reynolds' previous seven days, the County could not be held to know or predict the brutal results.

Separately, citing *Streit* and *Cortez*, *supra*, the appellate court rejected the County's claim that the Sheriff was a state actor, immune under the Eleventh Amendment. And the court rejected Reynolds' Eighth Amendment-based cross appeal because as a pretrial detainee, he was only protected by the Fourteenth Amendment (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

Finally, because the damages had been drastically reduced, the court granted L.A. County's appeal of the award of \$227,500 in attorney fees and \$11,812.22 in costs for re-determination in light of the degree of success dictated by the controlling fee statute, 42 U.S.C. § 1988. The lengthy opinion is unpublished. See: *Reynolds v. County of L.A.*, California Court of Appeal, Second Appellate District, case Nos. B 157249 and B 163468, (November 10, 2004) (unpublished). ■



# \$12,003.74 in Fees/Costs Awarded in Excessive Force Use; PLRA Fee Cap Inapplicable to Stipulated Settlements

A federal court in New York awarded Attorneys' fees of \$10,858 and costs of \$1,144.95 for a total of \$12,003.74 against a guard in an excessive force case.

New York prisoners Lorenzo Romaine brought suit against Boyce Rawson, a guard at Mont McGregor Correctional Facility, alleging the use of excessive force and seeking \$4 million for his injuries.

Following a bench trial, the court found "that defendant used excessive force in violation of the Eighth Amendment and award[ed] plaintiff \$1,000 in compensatory damages and \$500 in punitive damages." See: *Romaine v. Rawson*, 140 F. Supp. 2d 204 (NDNY 2001).

Rawson appealed. To settle the appeal, "the parties agreed to file a joint motion to vacate the district court's decision, and plaintiff agreed to accept \$1,500 plus interest in settlement of all claims. "The stipulation vacated the district court's liability finding, and the district court refused to grant the motion stating:

"Where the parties in a § 1983 case brought by an inmate do not adequately represent the public's interest in creating a record of prison abuse, the Court must ensure that this interest is not seriously undermined. If defendants are allowed to use the threat of appeal to pressure inmates to accept settlement agreements which effectively exonerate defendants, violations of prisoners' civil rights will go unrecorded."

*Romaine v. Rawson*, No. 99-CV-603, Slip Op... (NDNY November 11, 2003).

The Court refused to vacate its decision because of the overriding interest in holding responsible the prison guard who violated Romaine's civil rights.

The Second Circuit, however, ordered entry of the stipulation. Thereafter Plaintiff filed a motion for attorney's fees and costs in the amount of \$73,484.

The court first found defendant's argument that the fee application was untimely to be disingenuous, because it was timely under the terms of the stipulation. Next, the court found it unnecessary to address the merits of plaintiff's claim that the hourly fee cap of the Prison Litigation Reform Act (PLRA) – 42 U.S.C. § 1997e(d)(3) – violates the equal protection clause. "The constitutionality of this provision does not

alter the amount that the Court will award to Plaintiff's attorneys." The court observed, however, that a sister court recognized in *Carbonell v. Acrish*, 154 F. Supp. 2d 552 (SDNY 2001) that "every Court of Appeals that has addressed the issue...has upheld its constitutionality."

The court then rejected defendant's request to limit plaintiff's fee award to 150 percent of the judgment, pursuant to 42 U.S.C. § 1997(d)(2), because "the Second Circuit has ruled that the limits [of that section] do not apply to a litigation that was resolved by a court-ordered stipulation. *Torres v. Walker*, 356 F.3d 738 (2d Cir. 2004)."

Due largely to the fact that plaintiff's counsel caused the court's liability finding to be vacated, the court found that plaintiff's request \$73,484 in attorney's fees was unreasonable. "Plaintiff's attorney...must recognize that by agreeing to vacate the Court's judgment in settlement of the appeal, they dismissed the finding of liability that they had won for their client. The result is that their initial achievement is diminished. On a \$4 million complaint for relief, they obtained a \$1,500 settlement with no admission nor finding of liability... the proof of an actual violation was lost when Plaintiff and his attorneys asked this Court to vacate its findings. Their request [ ] for \$73,484...[is] therefore completely unreasonable."

"Given the limited success in Plaintiff's action "the court awarded attorneys fees in the amount of \$40 per hour and travel time billed at half the hourly fee, for a total fee of \$10,498.80. The court indicated "although slightly high," this fee was "reasonable in light of the limited success and ...sufficiently proportionate to the settlement." It then awarded costs of \$1,144.94 for a total award of \$12,003.74. The decision is unpublished. See: *Romaine v. Rawson*, 2004 U.S. Dist. LEXIS 7998 (NDNY 2004).

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## Former Wackenhut Guard Awarded \$600,000 For Wrongful Termination

A federal jury in Fresno, California, has awarded \$600,000 to a former guard at the Taft Correctional Institution (TCI) for wrongful termination. TCI is a private prison operated by the Geo Group, formerly Wackenhut Corrections Corporation [see *PLN*, June 2004, p.16]. TCI houses federal prisoners.

John Elliot, who began working as a guard at TCI shortly after it opened in 1997, claimed in his lawsuit that he was retaliated against by two wardens for writing letters and memos alleging the prison was unsafe for both guards and prisoners. After writing several memos to Wackenhut officials, Elliot wrote to United States Senators Deanne Feinstein and Barbara Boxer, and then to Congressman Henry Hyde, chairman of the House of Representatives committee that oversees the Bureau of Prisons, said his attorney Philip Ganong. Elliot also wrote to a reporter for the *Los Angeles Times*.

Ganong says Elliot believed a number of conditions contributed to a dangerous environment at the prison, including ongoing criminal activity by the prisoners. "He believed (Wackenhut) was engaging in unsafe workplace practices, essentially that a criminal enterprise was being allowed to run and be run from the prison by prisoners

over the phone." Elliot also contended that there was "intimidation of weaker prisoners by stronger prisoners." "He thought it was unsafe for inmates, guards and the community," Ganong said.

In 1999 Elliot was suspended without pay, first by Warden John Campbell, then his successor, Ray Andrews. Ganong said the suspension was retaliation for Elliot's letter writing campaign," which Elliot claimed was protected speech.

In 2000 Elliot sued the wardens and Wackenhut for wrongful termination. According to Ganong, the jury ruled that Elliot's complaints were protected by federal "whistleblower" laws. Ganong said the jury ultimately ruled in Elliot's favor holding that Andrews "acted maliciously and despicably but (Wackenhut) did not ratify the behavior." Elliot was awarded \$600,000, which the Geo Group paid in full in July 2004, Ganong said.

Elliot's case also led indirectly to a class-action suit against Wackenhut concerning overtime pay for employees at TCI and other prisons. The parties in that case have reached a tentative settlement. ■

Source: *Midway Driller*

## Tennessee Public Records Act Requires Delivery Of Records To Prisoners

The Tennessee Court of Appeals has held that the state's Public Records Act requires a District Attorney General not only to make public records available, but to copy and deliver records requested by prisoners.

Jaxie Raymond Jones, a Tennessee state prisoner in the Northeast Correctional Complex, filed a petition against Joe C. Crumley, Jr., District Attorney General for the First Judicial District of Tennessee, seeking delivery of records pertaining to a Washington County criminal case that were in Crumley's possession. The trial court ordered Crumley to produce the records pursuant to Tenn. Code Ann. § 10-7-503(a)(1999), and Crumley appealed.

The Tennessee Court of Appeals (COA) at Knoxville affirmed. The decision was a reaffirmation of the COA's earlier ruling in *Waller v. Bryan*, 16 S.W.3d. 770 (Tenn. Ct. App. 1999).

In *Waller* the COA held that "If a citi-

zen can sufficiently identify the documents which he wishes to obtain copies of so as to enable the custodian of the records to know which documents are to be copied, the citizen's personal presence before the records custodian is not required." The *Waller* court did, however, hold that a per copy fee could be imposed in order to recover costs associated with producing and delivering the copies.

The COA declined Crowley's request to reexamine *Waller*, asserting that it was the proper interpretation of the legislature's intent. As such, the Court noted that any argument Crumley had with the law should be taken up with the Tennessee General Assembly. The case is unpublished. See: *Jones v. Crumley*, 2004 Tenn. App. LEXIS 612. ■

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# Court Holds Temperatures on Florida's Death Row Constitutional; Class Action Exhaustion Explained

By David M. Reutter

The Eleventh Circuit Court of Appeals affirmed a Florida District Court's order denying that prisoners' cell temperatures on Florida's death row constitute cruel and unusual punishment. This civil rights action was filed by Jim E. Chandler and William Kelley, prisoners on death row at Union Correctional Institution's Northeast Unit (UCINU).

Shortly after the action was filed, the District Court on December 4, 2000, certified a class consisting of, "all persons who are assigned to [U.C.I.N.U.] or who in the future will be assigned to that unit." After the court convened a bench trial, which included the court visiting UCINU, it denied relief on the merits. The prisons then appealed.

Before the Eleventh Circuit turned to the merits of the claim, it addressed the class exhausting their administrative remedies under the Prison Litigation and Reform Act (PLRA). The record shows that Chandler exhausted all three levels of the grievance process provided by the Florida Department of Corrections.

The Eleventh Circuit held that when "one or more class members has exhausted his administrative remedies with respect to each claim raised by the class." The PLRA is satisfied because "vicarious exhaustion" occurred.

UCINU was built in the early 1990's. It is home to over 300 death row prisoners. Its six wings of two floors are made of concrete. The twenty-eight cells on each wing are arranged back-to-back in rows of fourteen. Each cell front faces an outside wall that has two windows in front of it. Between the cell fronts and the wall is a bifurcated walkway. The outer walkway or "secure catwalk," is immediately adjacent to the exterior walls. The inner walkway is immediately adjacent to the cell fronts. Bars separate the outer and inner walkways, which together are between eight and ten feet wide.

Between the backs of the cells is a pipe chase that contains plumbing, duct work, and electrical wiring. The chase accommodates two systems: the winter heating system and the summer ventilation system.

The heating vents are on the back wall of each cell about seven feet above the floor. Air enters the return vents, travels through the furnace, and re-enters the cells through the

supply vents. During the summer, staff was running the "air handlers" or in other words, running the furnace without heat. Prisoners then made "air deflectors" to direct the air on them. Citing security reasons, guards forbid use of the deflectors. Then prison engineers recommended guards no longer activate the air handlers during the summer. Because Florida believes its prisoners should not live better than its poorest residents, its prisons are not air conditioned. Moreover, prisoners are prohibited from possessing personal fans and no fans are on the death row wings.

Instead, UCINU cools itself by cyclically exchanging the air with the outside environment. To do this, each cell has an exhaust vent four feet off the floor on the back wall. Air enters the prison through the two windows across from each cell, crosses the walkways, and enters the cell, and goes through the vent into the chase where it is exhausted by fans. This is the only system employed to provide relief from the stifling heat of a Florida summer. Basically, blowing hot outside air in and hot inside air back out.

To combat the suit, prison officials kept logs of the temperatures on all floors of UCINU. From those logs, the district court concluded that: (1) during eleven percent of July 1998, prisoners were subjected to temperatures higher than ninety degrees; (2) only fifteen percent of the temperatures for August 1998 were over ninety degrees; (3) only one percent of the temperatures for July 1999 were over ninety degrees; (4) on average, for the months of July and August 1998 and July 1999, prisoners only experienced temperatures over ninety degrees nine percent of the time; (5) temperatures over ninety-five degrees or higher were only recorded on seven occasions during the study period; and (6) no temperatures of 100 degrees or higher were recorded.

The Court said the temperatures and ventilation at UCINU "are almost always consistent with reasonable levels of comfort and slight discomfort which are to be expected in a residential setting in Florida in a building that is not air conditioned."

The Eleventh circuit then discussed a plethora of cases by federal courts that have considered Eighth Amendment claims regarding heat and ventilation. The court then reached several conclusions.

First, the Eighth Amendment applies to

prisoner's claims of inadequate cooling and ventilation. Cooling and ventilation are distinct prison conditions, and a prisoner may state a claim by alleging a deficiency as to either condition in isolation or both in combination. Second, the Eighth Amendment is concerned with both the "severity" and the "duration" of the prisoner's exposure to inadequate cooling and ventilation. Finally, a prisoner's mere discomfort, without more, is not a constitutional violation.

The Eleventh Circuit held the district courts conclusions of law and facts are correct in finding UCINU temperatures and ventilation constitutional. In affirming, the appellate court said it is sensitive to the prisoner's plight, but held that "constitutional rights don't come and go with the weather." Death row prisoners and those in Florida confinement units will have to continue sweating out summer as a result of this decision. See: *Chandler v. Crosby*, 379 F.3d 1278 (11<sup>th</sup> Cir. 2004) ■



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# Mere Pendency of Proceedings Deprives Court of Jurisdiction in Jail Collect Call Case; Attorney Fee Awarded Reversed, Injunction Upheld

The Sixth Circuit Court of Appeals has reversed an award of attorney's fees, holding the mere pendency of proceedings that threatens harm is insufficient to invoke a district court's jurisdiction to grant injunctive relief.

This civil rights action was originally filed by Jeff Lynch, a pretrial detainee at Ohio's Hamilton County Justice Center (HCJC). Lynch alleged that HCJC's policy of allowing prisoners to make only collect telephone calls, in combination with the Hamilton County Public Defender's policy of refusing collect calls operated to deny pretrial detainees at HCJC their Sixth Amendment right to counsel. The second amended complaint added Mike Powers as a plaintiff.

Hamilton County moved to dismiss, based on lack of standing to bring the suit. Lynch was dismissed from the suit on that basis in January 2002. The Ohio Federal District Court, however, held that Powers had standing because he had a *capias* that was "currently outstanding." That factual

finding was incorrect. Power's cause of action arose after he was arrested for failing to appear on charge of operating a motor vehicle without a license and improper display of a license plate. After failing to make bail, he was confined at HCJC for twenty days, where he was affected by the phone policies; after release on his own recognizance, he continued to have trouble resolving his case and a *capias*, a writ directing his arrest – was issued. That *capias* was recalled a month later with a *nolo contendere* plea.

The District Court subsequently entered injunctive relief against the phone policies. The unpublished injunction stated: "Defendant Leis is to permit pretrial detainees in the custody of the Hamilton County Sheriff's Office to make free phone calls pursuant to reasonable limits on time and duration to the main phone number and to all attorney direct-dial numbers at the Hamilton County Public Defender's Office." See: *Lynch v. Leis*, 2002 U.S. Dist. LEXIS 27604. While Hamilton County's

appeal of that injunction was pending, the parties litigated the award of attorney's fees. The county, once again, argued the District Court lacked jurisdiction. That argument was rejected by the court, and it entered an award of \$71,782.50 in attorney fees and \$2,201.08 in costs.

The Court held the "one adding Powers to the action" was operative. Therefore, Powers' standing to seek injunctive relief must rise or fall on his status on the filing date of the second amended complaint, which was May 25, 2000. [Editor's Note: Because a lawsuit filed by a former detainee does not implicate the Prison Litigation Reform Act, it makes sense to file cases when a plaintiff is not imprisoned. Which then runs up against the problem found in this case: lack of standing to challenge policies for injunctive relief.]

On that date, Powers was out on bail with two separate cases proceeding against him. The court said the question was whether the mere pendency of proceedings could create a sufficient risk that Powers would again be subject to the deprivation of his Sixth Amendment right by being placed in detention at HCJC. The court held that prior precedent holds that "a real and immediate" threat does not exist to confer standing where a threat is attenuated by both the unlikelihood a party will have another encounter with police and the unlikelihood the police would employ the same improper conduct. However, courts are "unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." Hence, the pending proceedings were insufficient to confer jurisdiction on the District Court.

In overturning the award of attorney's fees and costs, the Sixth Circuit noted that it was unfortunate that where a prevailing party whose attorneys won an important victory for all pretrial detainees in the HCJC is denied a fee award after a completed successful action, but "unless the statute under which a party seeks attorney's fees contains an independent grant of jurisdiction, an appellate court must vacate an award of attorney's fees if the District Court did not have subject matter jurisdiction over the litigation." The fees and costs award was reversed. The injunction, however, remains in place. See: *Lynch v. Leis*, 382 F.3d 642 (6<sup>th</sup> Cir. 2004).

## Florida Jury Awards \$3,000,000 for Medical Negligence Causing Prisoner's Death

After a seven-day trial, a Florida jury awarded \$3,006,200 to the plaintiffs in a lawsuit claiming medical negligence, causing the death of a Florida prisoner. This was brought by the estate of prisoner Clifford E. Jones, Jr., 35, against the Florida Department of Corrections and Dr. Galina Kats-Kagen; Frank McHugh, A.R.N.P.; Joan Nabors, R.N.; and Alexander Porter, L.P.N.

Jones was a prisoner at Jackson Correctional Institution when he presented himself to the infirmary. He had a history of tuberculosis, but exhibited symptoms consistent with pneumonia. On the fifth day after being admitted to the infirmary, Jones was so sick he passed out and went into shock. Five hours after being transferred to Jackson County Hospital, Jones died.

After his death, Jones' estate sued for funeral expenses and his 16-year-old daughter, Carmia Lee, sue for pain and suffering. The suit claimed individual doctors and nurses were word negligent by failing to: (1)

diagnose Jones' condition; (2) monitor the worsening of his condition; and (3) transfer Jones in a timely manner to a facility where he could be properly treated. This is also a civil rights claim of deliberate indifference to Jones' serious medical needs.

Prior to trial, the defendants offered to settle the suit per \$10,000. That offer was rejected, and the matter proceeded to a jury trial that lasted seven days. The Court issued a directed verdict for the defense on the deliberate indifference claim. The jury, however, on September 28, 2004, entered a verdict against the defendants on the medical negligence claim after only 90 minutes of deliberation.

The Estate was awarded \$6,200 in economic damages for the cost of Jones' funeral. For loss of parental guidance, Carmia was awarded \$500,000 past pain and suffering and \$2,500,000 for future pain and suffering.

Carmia and the estate were represented by the able counsel of Charles A. Barfield in Orlando and Scott Murphy in Maitland. See: *Rochelle v. Florida Department Of Corrections*, Florida Second Judicial Circuit Court, Leon County, Case No: 99-6177. ■

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# Florida's Law Libraries Provide Adequate Access to Courts Under State's Constitution

By David M. Reutter

Florida's First District Court of Appeal has held that Article I, § 21 of the Florida constitution requires the Florida Department of Corrections (FDOC) to provide more affirmative assistance to prisoners in the preparation and filing of litigation papers than does the federal constitution. The court, however, held the assistance FDOC provides does not significantly impede the prisoner's access to courts.

This class action suit, filed by five Florida prisoners, alleged that their right to court access under § 21 was violated by FDOC's actions of: (1) removing reference books and form pleadings from the state's prison law libraries; (2) limitation of access to legal materials through inter-library loans; (3) restriction on the hours and means of access to prison law libraries and restrictions on the use of those libraries and restrictions on the use of those libraries for drafting legal pleadings and legal mail; (4) elimination of access to computers, word processors, and typewriters for preparation of legal pleadings and legal mail; (5) reduction in the availability of prisoners' research aides to assist prisoners; (6) undue interference with prisoners attempting to assist other prisoners with their legal proceedings; (7) limitation on the storage of legal materials within a prison; and (8) improper review of prisoner legal mail and legal documents designated for copying.

After the Circuit Court held a hearing, it granted the FDOC declaratory judgment. The prisoners, represented by attorneys from Holland & Knight law firm, appealed. In support of the prisoners, numerous advocacy groups filed Amicus Curiae briefs.

On appeal, the prisoners argued the Circuit Court applied the narrower federal access to courts standard rather than the broader access to courts rights provided by the Florida Constitution. The First District agreed.

To determine if access to courts is vio-

lated under Article I, § 21, a court must apply a two prong test; (1) does the requirements of statutes or regulations create a "significantly difficult" impediment to access; and if so, (2) is the state's justification for the statute or regulation sufficient to pass constitutional muster.

The First District found that FDOC's law libraries and regulations do not significantly impede access to Florida courts. The court noted that access need only be for Florida courts and not federal or out-of-state courts. Hence, assistance is not required for federal legal matters including immigration, racial discrimination, disabilities, and veteran's benefits. The court held that FDOC law libraries provide adequate resources to litigate actions filed in Florida courts, including those based on federal law.

The court further held that only 25 hours of weekly law library operation is

not a significant impediment to court access. Moreover, while requiring prisoners to hand write pleadings takes more time and "may make the court's work more difficult" (to the extent that handwritten papers are sometimes more difficult to read), removal of mechanical equipment to do research and prepare documents does not impede court access.

Finally, the court held that a FDOC rule that only allows five typed pages in one envelope to be received by prisoners is constitutionally firm. Since prisoners have no right to typed legal papers, they have no right to confidentiality when receiving them from non-lawyers. Thus, such mail need not be treated as legal mail.

The Circuit Court's grant of declaratory judgment to FDOC was affirmed in all respects on the merits. See: *Henderson v. Crosby*, 883 So.2d 847 (Fla. 1<sup>st</sup> DCA 2004). ■



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# Second Circuit Holds Confidential Informant's Reliability Alone Insufficient to Support Hearsay or Conclusionary Statements

By David M. Reutter

The Second Circuit Court of Appeals has held that prison officials, in assessing the reliability of evidence at a prisoner's disciplinary hearing, must reference the totality of the circumstances and that an informant's record for reliability cannot, by itself, establish the reliability of bald conclusions or third-party hearsay. The court, however, held this issue was not clearly established and prison officials were entitled to qualified immunity.

This 42 U.S.C. § 1983 action was filed by New York prisoner Rubin Sira, alleging events that transpired at Green Haven Correctional Facility (GHCF) in 2000. That complaint alleged prison officials violated Sira's due process rights by finding him guilty (1) based upon insufficient evidence, (2) without providing him adequate notice of the charges, (3) without affording access to confidential evidence relevant to his defense, (4) without assessing the reliability of various confidential sources of incriminating information, and (5) without disclosing the confidential documentary evidence against him. Prison officials denied the allegations, moving for judgment on the pleadings based on qualified immunity. The Southern District of New York denied the motion after converting it to a summary judgment motion. The defendants appealed.

While at (GHCF) on January 19, 2000, Sira was served with a misbehavior report written that day. The report charged Sira with violating prison rules that prohibit making "any threat, spoken, in writing, or by gesture" and that prohibit prisoners from leading, organizing, participating, as urging

other prisoners to participate in work stoppages, sit-ins, lock-ins, or other action that may be detrimental to the order of the prison. To support the charges, the report stated that during an investigation into a planned prison demonstration that prisoners were to conduct on January 1, 2000, Sira was identified by confidential sources as urging prisoners to conduct a work/program stoppage. Sira was alleged to have been an organizer and threatened prisoners to participate. To avert the "Y2K strike," prison officials locked down GHCF from December 24, 1999, to January 6, 2000. Once the lock down ended, a strike did in fact occur.

At his disciplinary hearing on January 26, Sira pled not guilty, requesting dismissal because the report failed to (1) identify any person whom he had threatened or organized; (2) indicate where in (GHCF) the alleged misconduct had occurred; and (3) provide clear notice of the date of his alleged conduct, since the incident date on the report was marked January 19, while the body of facts suggested the strike possibly occurred before January 1. The hearing officer, Captain Robert Morton, denied Sira's dismissal request, and he continued on with the hearing, which spanned over several different days.

Lieutenant G. Schneider testified, in Sira's presence, that Sira, according to confidential informants, was the "captain" of "C Block" and he would enforce the Y2K strike in that capacity. Based on Schneider's testimony, Morton found Sira's misconduct report provided adequate notice of the date and time of misconduct. Morton then

moved to confidential proceedings outside Sira's presence. Three guards then testified about information they had received from five informants who implicated Sira in the Y2K strike. Once the confidential proceedings concluded, Sira requested to know the substance of the information the informants provided without identifying them. Morton refused to provide the information. Morton, based on the guards' testimony and the confidential information, found Sira guilty of participating in the charged demonstration, but found him not guilty of making threats. Sira was sentenced to six months in a Special Housing Unit. Sira's initial administrative appeal was denied, but with the assistance of counsel he obtained a reconsideration that concluded the "confidential evidence failed to support [the] charge." By that time, Sira's SHU sentence had expired.

In analyzing Sira's inadequate notice of charger claim, the Second Circuit found the misconduct report fails to (1) identify prisoners Sira's misconduct was directed at (2) describe words, actions, or the means Sira employed to further the strike, (3) mention sites within (GHCF) where Sira engaged in the charged conduct, and (4) the incident date of January 19, is misleading. The court held that when a prisoner is provided with no specific facts relating to conclusionary charges that he violated prison rules prohibiting prisoners from urging or threatening others to cause prison disruptions, he has no more ability to identify the conduct at issue and to muster a defense than if he had been given no notice at all.

The court further held that prison

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officials are not entitled to qualified immunity on the notice claim, for it has long been established that due process requires a modicum of factual specificity. Accordingly, the District Court properly denied prison officials qualified immunity on this claim. The Second Circuit then turned to Sira's claim related to the failure to disclose the evidence relied on to support the disciplinary ruling. A prisoner has a right to know the evidence upon which a disciplinary ruling is based. That right, however, is not absolute. When the disclosure of such evidence creates a risk of "violence or intimidation directed at either inmates or staff," a hearing officer may properly decline to inform a prisoner of the adverse evidence. The court found that there is no evidence in the record to suggest the disclosure of the *substance* of the informant's statements to Sira would have presented safety risks. While subsequent proceedings may change this, qualified immunity was also properly denied on this claim. To determine if the evidence was sufficient to meet the "some evidence" standard to uphold the disciplinary ruling, it must be determined if the confidential informant's information was reliable. The court said there was some ambiguity in its case law as to whether a hearing officer must make an independent assessment of informant credibility to ensure that disclosures qualify as some reliable evidence, or whether they can simply rely on the opinions of prison officials who have dealt with the informants. The court resolved that ambiguity in this case.

The court held that when credible informants provide hearsay disclosures, the hearing officer must consider the totality of the circumstances to determine if that information is reliable. When an informant makes conclusionary assertions, without any factual basis as to what the informant saw or heard, those assertions cannot qualify as reliable evidence. The court concluded that Sira suffered a due process violation because prison officials ordered him disciplined without some reliable evidence of misconduct when Morton failed to assess the informant's information in totality of the facts and failed to require support for conclusionary statements. The court, however, held the defendants were entitled to qualified immunity on this issue because the law was not clearly established.

The District Court's denial of the guard's summary judgment motion was affirmed in part, reversed in part. See: *Sira v. Morton*, 380 F.3d 57 (2<sup>nd</sup> Cir. 2004). 📰



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## News in Brief:

**Alabama:** On February 2, 2005, Jimmy Toliver, 40, was arrested on criminal trespassing charges after attempting to break into the Bullock County jail in Union Springs. Toliver had crawled under the jail's security fence and was found hiding behind an air conditioning unit at 3 AM. Toliver told police he was trying to borrow \$5 from a jail prisoner. A search of the area discovered a bag of marijuana stuffed into a ventilation shaft. He was later transported to the same jail he had sought entry to. Toliver was sentenced to time served and ordered by the judge to "stay away from the jail."

**Arizona:** On January 17, 2005, three guards at the Arizona State Prison Complex-Tucson were injured when a fight broke out in the prison's dining hall. Thirty prisoners barricaded themselves in the dining hall but surrendered when guards pepper sprayed them.

**California:** On August 2, 2005, Tyreese Reed, 29, was charged with 18 counts of rape and robbery. Known as the "Koreatown rapist," the electrical technician is accused of raping and robbing 13 women, all of them Asian, ranging in age from 17 to 55. Reed committed the attacks while posing as a California Department of Corrections parole officer. When arrested he had a CDC badge and a Beretta pistol with a laser sight.

**California:** On August 3, 2005, a 43 year old prisoner was run over by a prison bus. While attempting to escape, the prisoner was holding on to the undercarriage of the bus when he lost his grip and fell. The bus then ran over him, killing him in the process. The man was being held on parole violation charges.

**California:** On February 25, 2005, 480 black and Hispanic prisoners at the state prison in Tehachapi fought for 40 minutes before submitting to pepper spray, tear gas and baton rounds fired by guards. Three prisoners were injured during the melee and three staff members suffered minor injuries.

**California:** On January 15, 2005, Daniel Jones Jr., a guard at the Centinela State Prison, was arrested with his girlfriend, Leslie Saldana, on charges of conspiring to smuggle marijuana, cocaine and cell phones into the prison.

**Colombia:** On January 26, 2005, at least 20 prisoners escaped and six were killed when revolutionaries with the Revolutionary Armed Forces of Colombia (FARC) attacked the Picalena Prison 80 miles west of Bogotá. Guerrillas directed explosions and gunfire at the prison while prisoners

inside the facility went to the prison's outer perimeter and used dynamite to blast their way to freedom. Six prisoners were shot and killed by guards and three were recaptured. At least 20 escaped. The government is investigating how the prisoners obtained the explosives.

**Colorado:** In February, 2005, jailers in Stark County, Ohio, mistakenly released prisoner Ricky Claycomb, 37, after he was acquitted on rape charges he had been extradited from a Colorado prison to stand trial on. After the acquittal Claycomb told Ohio jail officials he was to be returned to Colorado to finish serving two more years. Ohio officials told him it was up to him to get back to prison. His mother sent him money for a bus ticket and after a two day bus ride to Colorado, breakfast and lunch with his mother, his brother drive him to the Fremont Correctional Facility in Canon City, after he called ahead to inform prison officials he was returning. Asked about Claycomb's release, Stark county sheriff Tim Swanson said, "We don't know exactly what happened."

**Colorado:** On August 3, 2005, prisoners at the Colorado Springs jail went on hunger strike to protest being fed turkey five meals in a row. The sheriff's office agreed and fed them spaghetti, with turkey meat sauce.

**Florida:** In May, 2005, the state Judicial Qualifications Commission filed a complaint against Panama City circuit judge Richard Albritton for telling female defendants to close their legs and stop having babies, ordering a defendant to attend church as a probation condition, telling an 18 year old woman how attractive she was before imposing a sentence lighter than he normally would, telling women in his court, including attorneys, that women should be at home with their children and telling a black, female attorney with the Department of Children and Families "Your people helped me get elected." Albritton's attorney, Harry Harper, denied Albritton has any gender or racial bias. "It's mystifying that accusations of those type could even be suggested," he said.

**Florida:** On December 16, 2004, Brenda Bobbitt, a sergeant in the Collier County jail in Immokalee, resigned after the county sheriff rejected her appeal from discipline imposed after an investigation confirmed her treatment of jail guard Carter Landas. Bobbitt threatened Landas with a taser gun to his buttocks, slashed at him with a knife, punched him in the stomach and made degrading remarks about his weight, using racist

and defamatory names. Most of the incidents were witnessed by other jail employees and included Bobbitt placing a taser gun on stun mode, holding it against Landas' buttocks and saying "Don't think I won't light your ass up." Bobbitt appealed the guilty findings against her by internal affairs investigators claiming there was a "family atmosphere" at the jail and she did not realize her conduct was unprofessional. Her resignation, after 23 years at the jail, meant she never served any of the recommended discipline.

**Georgia:** In May, 2005, Six Flags announced that all of its tickets would state that it reserved the right to refuse entry to anyone convicted of a sex offense to any of its 30 amusement parks. The company stated it would not conduct background checks of customers but added the language at the urging of its attorneys.

**Georgia:** On June 3, 2005, Curtis Hall, 43, a prisoner at the Thomas County Prison was charged with possessing marijuana after he returned from a work detail and guards discovered 3 grams of the demon weed concealed inside a peanut butter and jelly sandwich.

**Georgia:** On May 10, 2005, Kanoshia Bradley, 21, a guard at the Calhoun State Prison, was inside the prison during a sweep by drug detection dogs and found to be in possession of marijuana and both powdered and crack cocaine. She was charged with possession of all three substances. She was later fired from her job as a prison guard and released on \$10,000 bail.

**Illinois:** On February 20, 2005, Arlin McClendon, 36, a guard at the Cook County jail in Chicago was shot and killed by his friend and co-worker, who was not identified in media reports by name, when McClendon played a prank and pretended to attempt to carjack his friend's SUV which was being driven by the co-worker's wife. McClendon was shot multiple times at the scene.

**Illinois:** On May 6, 2005, Brian Leden, 33, a Lake County probation officer, pleaded guilty to accepting \$25,000 in bribes from Robert Terry, 38, a probationer he was supposed to supervise. In exchange for the bribe Leden took no action when Terry violated his probation by contacting his ex wife, drinking alcohol and being charged with new offenses. Leden claimed the money was not a bribe but Terry trying to help him out financially because he was addicted to gambling. Leden agreed to testify against Terry if Terry contests the bribery charge. Leden was sentenced to 30 months probation



and nine months of work release.

**Louisiana:** On February 28, 2005, Blaine Valdetero, 37, a prisoner at the Louisiana State Penitentiary in Angola, took his wife hostage during a visit and barricaded her and himself in the visiting room bathroom. Five minutes later guards broke down the door with a battering ram and found Valdetero slumped over, bleeding from a slashed throat. He later died in the prison hospital from the self-inflicted wound. His wife, unnamed by prison officials, was unharmed. Valdetero had been serving a life sentence for a 1991 Baton Rouge murder.

**Nepal:** On June 19, 2005, Maoist insurgents attacked a district prison in the city of Diktel and liberated 66 prisoners. Other government facilities were attacked before the guerrillas withdrew.

**New York:** In 2004 more than 300 visitors to prisoners at the Rikers Island jail in New York City were arrested and charged with attempting to smuggle contraband to the prisoners. That includes 187 visitors with illegal drugs, 19 with weapons and 109 others with contraband that includes cigarettes. Jail director Martin Horn also announced that 2004 slashings and stabbings at the jail were at a record low of 34 as opposed to 49 the year before.

**New York:** On May 29, 2005, Edwin Williams, a Bureau of Prisons guard in the Manhattan Metropolitan Correctional Center, was arrested for taking thousands of dollars in bribes to smuggle marijuana, cigarettes, food and cologne to prisoners in the jail. FBI agents video taped Williams as he received items at the house of a cooperating witness.

**North Carolina:** On May 27, 2005, Junior Allen, 65, was released from prison after spending 35 years imprisoned for entering a home and stealing a black and white television set in 1970. At the time, burglary carried a life sentence. It now carries a three year sentence. Parole officials claim Allen was denied parole 26 times because of a poor disciplinary record in prison. Enoch Hasberry, director of the Carteret Correctional Center in Newport where Allen finished his sentence before being released on five years of parole, said: "We've got an in-house joke here: How much time would he have gotten if he had stolen a color TV?"

**Ohio:** On June 29, 2005, a prisoner at the state prison in Chillicothe was struck by lightning and killed during a softball game when lightning struck the ball field inside the prison. Five other prisoners and two guards were injured by the lightning strike.

**Ohio:** On May 7, 2005, Martin Koliser,

32, a prisoner on death row in Mansfield for killing a police man, committed suicide by slashing himself.

**Oregon:** On April 25, 2005, Leighton Bates, a convicted rapist and kidnapper being held in the Intensive Management Unit (IMU) of the Oregon State Penitentiary in Salem, took prison guard Rebecca McLaughlin hostage for three hours using a shank. McLaughlin was released unharmed.

**Pennsylvania:** On January 25, 2005, Darren Miller, 27, was sentenced to an additional 15 years in prison for throwing urine and hot coffee on prison guards while imprisoned at the State Correctional Institution in Graterford in 2002.

**Russia:** On June 27, 2005, 260 prisoners in the prison in Lgov, a city near the Russian border with the Ukraine slashed their veins and throats with razor blades to protest abuse by prison officials.

**Scotland:** A 22 year old guard at the Kilmarnock Prison in Ayrshire, run by the for profit Premier Custodial Services, was fired after admitting he disguised himself as a prisoner to receive methadone from the prison's medical line. He was detected before actually receiving any of the drug and claimed it was a prank.

**Texas:** On April 20, 2005, Trinity county jail sergeant Scott Taylor, was indicted by a grand jury with official oppression for choking a hand cuffed prisoner and slamming him into a door. Taylor had spent a year on probation in Upton county ten years ago after being convicted of official oppression for abusing prisoners in his care there.

**Texas:** On February 14, 2005, Darrell Gilbert, 35, a prisoner at the Stiles Unit in Beaumont was stabbed to death during a fight with Reagan Caldwell, 47. Gilbert had been serving a 20 year sentence for manslaughter. Caldwell was sentenced to life for robbery in Houston in 1990.

**Texas:** On February 15, 2005, Lou Ford, 39, a guard employed by Geo Corporation at Central Texas Parole Violators Facility in San Antonio, was sentenced to 30 months in federal prison after pleading guilty to accepting an \$800 bribe from undercover police in order to deliver 4 ounces of cocaine to a jail prisoner.

**Texas:** On June 17, 2005, Darrell Horton, 29, was sentenced to 40 years in prison by a Rusk County jury for a 2002 attack on prison guard Don Gertz that left Gertz blind in his right eye. Horton was serving a drug sentence at the Bradshaw State Jail at the time of the attack.

**Washington:** On May 28, 2005, Robert Lemieux, 40, killed himself in the Pierce

County jail in Tacoma by overdosing on an undisclosed prescription medication two days after being convicted of first degree murder for killing his estranged wife's lover.

**Wisconsin:** In May, 2005, the state returned the last 53 prisoners from a private, out of state prison ending its decade long practice of sending prisoners to out of state, private prisons, which at its peak had over 4,000 prisoners in such facilities. The return of the out of state prisoners was made possible by Wisconsin opening three new prisons and contracting with jails to hold an additional 500 prisoners. ■

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## Ninth Circuit: Kicking Shackled Prisoner In Genitals Is Cruel And Unusual Punishment

When California Pelican Bay State Prison (PBSP) prisoner Christopher Watts filed a 42 U.S.C. § 1983 action against guards J. McKinney and S.J. Steinberg for kicking Watts in the genitals after an unsuccessful interrogation regarding PBSP guards bringing in drugs or knives, the U.S. District Court (N.D. Cal.) ruled that this physical abuse amounted to "cruel and unusual punishment." State defendants appealed, asserting that "no reasonable [guard] would have believed that his conduct was unlawful."

In a brief published opinion, the Ninth Circuit first reviewed Watts' sworn statement. On Oct. 10, 1995, Watts was escorted from his administration segregation cell for an "interrogation." There, Watts said he wanted his attorney present. Instead, the guards repeatedly threatened Watts and his family for not cooperating and told him repeatedly "he'd be sorry." Thereafter, guard McKinney took Watts to a holding cell, slammed Watts' face into a wall causing a nose bleed and swollen eye. Then, while Watts lay on the floor, McKinney kicked Watts several times in his

penis and in his back, while Watts' hands were cuffed behind his back.

From these facts the district court had found that a triable issue of fact was stated, i.e., whether McKinney had "maliciously and sadistically caused harm" in violation of the Eighth Amendment.

The Ninth Circuit scoffed at the California Attorney General's appeal of the question of a triable issue of fact. While an attorney's representation of his client should be zealous, it "needs to be tempered by commonsense." It held that "to suppose that any reasonable person, let alone a trained prison officer, would not know that kicking a helpless prisoner's genitals was cruel and unusual conduct is beyond belief." The court added that if the Supreme Court made a catalogue of acts by which cruel and sadistic purpose to harm another would be manifest, McKinney's acts "would be near the top of the list."

Accordingly, the Ninth Circuit affirmed the district court and ordered that "the case must go trial." See: *Watts v. McKinney*, 394 F.3d 710 (9th Cir. 2005). ■

## Other Resources

### ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

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### CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP, PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

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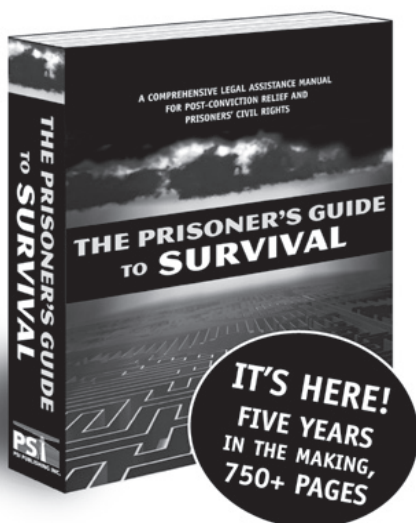
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# PRISON

## Legal News

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*Dedicated to Protecting Human Rights*

August 2005

### Prison Health Services: As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence

*by Paul Von Zielbauer; Joseph Plambeck contributed reporting for this article.*

Brian Tetrault was 44 when he was led into a dim county jail cell in upstate New York in 2001, charged with taking some skis and other items from his ex-wife's home. A former nuclear scientist who had struggled with Parkinson's disease, he began to die almost immediately, and state investigators would later discover why: The jail's medical director had cut off all but a few of the 32 pills he needed each day to quell his tremors.

Over the next 10 days, Mr. Tetrault slid into a stupor, soaked in his own sweat and urine. But he never saw the jail doctor again, and the nurses dismissed him as a

faker. After his heart finally stopped, investigators said, guards at the Schenectady jail doctored records to make it appear he had been released before he died.

Two months later, Victoria Williams Smith, the mother of a teenage boy, was booked into another upstate jail, in Dutchess County, charged with smuggling drugs to her husband in prison. She, too, had only 10 days to live after she began complaining of chest pains. She phoned friends in desperation: The medical director would not prescribe anything more potent than Bengay or the arthritis medicine she had brought with her, investigators said. A nurse scorned her pleas to be hospitalized as a ploy to get drugs. When at last an ambulance was called, Ms. Smith was on the floor of her cell, shaking from a heart attack that would kill her within the hour. She was 35.

In these two harrowing deaths, state investigators concluded, the culprit was a for-profit corporation, Prison Health Services, that had moved aggressively into New York State in the last decade, winning jail contracts worth hundreds of millions of dollars with an enticing sales pitch: Take the messy and expensive job of providing medical care from overmatched government officials, and give it to an experienced nationwide outfit that could recruit doctors, battle lawsuits and keep costs down.

A yearlong examination of Prison Health by *The New York Times* reveals repeated instances of medical care that has been flawed and sometimes lethal. The company's performance around the nation has provoked criticism from judges and sheriffs, lawsuits from prisoners' families

and whistle-blowers, and condemnations by federal, state and local authorities. The company has paid millions of dollars in fines and settlements.

In the two deaths, and eight others across upstate New York, state investigators say they kept discovering the same failings: medical staffs trimmed to the bone, doctors under-qualified or out of reach, nurses doing tasks beyond their training, prescription drugs withheld, patient records unread and employee misconduct unpunished.

Not surprisingly, Prison Health, which is based outside Nashville, is no longer working in most of those upstate jails. But it is hardly out of work. Despite a tarnished record, Prison Health has sold its promise of lower costs and better care, and become the biggest for-profit company providing medical care in jails and prisons. It has amassed 86 contracts in 28 states, and now cares for 237,000 prisoners, or about one in every 10 people behind bars.

Prison Health Services says that any lapses that have occurred are far outnumbered by its successes, and that many cities and states have been pleased with its work. Company executives dispute the state's findings in the upstate deaths, saying their policy is never to deny necessary medical care.

And they say that many complaints—from litigious prisoners, disgruntled employees and overzealous investigators—simply come with the hugely challenging work they have taken on.

"What we do," said Michael Catalano, the company chairman, "is provide a public health service that many others are unable or unwilling to do."

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**PUBLISHER**  
**Rollin Wright**

**EDITOR**  
**Paul Wright**

**ASSOCIATE EDITOR**  
**Alex Friedmann**

**EXECUTIVE DIRECTOR**  
**Donald W. Miniken Jr.**

**COLUMNISTS**  
**Mumia Abu Jamal, Denise Johnston, Daniel E. Manville, Kent Russell**

**CONTRIBUTING WRITERS**  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams & Mark Wilson**

**LAYOUT**  
**Lance Scott/Catalytic Communications**

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**Prison Legal News**  
**2400 NW 80th Street #148**  
**Seattle WA 98117**  
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**Fax (206) 505-9449**  
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## **Prison Health Services (cont.)**

The examination of Prison Health also reveals a company that is very much a creature of a growing phenomenon: the privatization of jail and prison health care. As governments try to shed the burden of soaring medical costs—driven by the exploding problems of AIDS and mental illness among prisoners—this field has become a \$2 billion-a-year industry.

It is an intensely competitive world populated by a handful of companies, each striving to find enough doctors and nurses for a demanding and sometimes dangerous job. The companies, overseen by local governments with limited choices and money, regularly move from jail to jail, and scandal to scandal—often disliked but always needed.

Perhaps the most striking example of Prison Health's ability to prosper amid its set of troubles unfolded in New York State. Despite disappointed customers and official investigations in Florida and Pennsylvania, the company still managed to win its largest contract ever in 2000, when New York City agreed to pay it \$254 million over three years to provide care at the correctional labyrinth on Rikers Island.

The city, in fact, just renewed that deal in January for another three years—despite the deaths upstate, and a chorus of criticism over Prison Health's work at Rikers, where employees and government monitors have complained of staff shortages and delays in drugs and treatments for H.I.V. and mental illnesses. A rash of suicides in 2003 prompted a scramble by officials to fill serious gaps in care and oversight.

Along the way, though, Prison Health has acquired at least one tenacious adversary. The State Commission of Correction, appointed by the governor to investigate every death in jail, has moved over the last several years from polite recommendations to bitter denunciations, frustrated by what it says is the company's refusal to admit and address deadly mistakes.

The commission has faulted company policies, or mistakes and misconduct by its employees, in 23 deaths of prisoners in the city and six upstate counties. Fifteen times in the last four years, it has recommended that the state discipline Prison Health doctors and nurses.

And since 2001, the commission, along with the State Education Department, which regulates the practice of medicine, has urged Attorney General Eliot Spitzer to halt the

company's operations in New York, saying that Prison Health lacks any legal authority to practice medicine because business executives are in charge. New York, like many other states, requires that for-profit corporations providing medical services be owned and controlled by doctors, to keep business calculations from driving medical decisions.

Prison Health says its work in New York is legal because it has set up two corporations headed by doctors to run medical care. But state investigators have called those corporations shams.

Elsewhere, Prison Health did not go that far, until questioned by *The Times*. Now it says it is creating doctor-run corporations in 11 other states with similar laws, including New Jersey and California.

"Had we realized this would be a question, we would have addressed it earlier," said Mr. Catalano, the company's chairman. "We have nothing to hide here."

But in one report after another, the state commission has exposed what it says is the dangerous way Prison Health has operated.

One investigation found that the doctor overseeing care in several upstate jails in 2001—continually overruling the doctors there, and refusing drugs and treatments—was not even licensed to practice in New York State. He did the job, the commission found, by telephone—from Washington.

The commission's gravest findings have involved deaths on the company's watch, mostly of people who had not been convicted of anything.

Candy Brown, a 46-year-old Rochester woman jailed in 2000 on a parole violation, died when her withdrawal from heroin went untreated for two days as she lay in her own vomit and excrement in the Monroe County Jail, moaning and crying for help. But nurses did not call a doctor or even clean her off, investigators said. Her fellow prisoners took pity and washed her face; some guards took it on themselves to ease her into a shower and a final change of clothes.

Scott Mayo Jr. was only a few minutes old in 2001 when guards fished him out of a toilet in the maternity unit of Albany County Jail. It was the guards, investigators said, who found a faint pulse in the premature baby and worked fiercely to keep his heart beating as a nurse stood by, offering little help.

"We're a jail," the nurse told state officials after the infant died. "There's no equipment for a fetus. Or a newborn."

In at least one death report, the commis-



## Prison Health Services (cont.)

sion took the opportunity to voice a broad indictment of the company. Frederick C. Lamy, chairman of the commission's medical review board, denounced Prison Health, or P.H.S. as it widely known, as "reckless and unprincipled in its corporate pursuits, irrespective of patient care."

"The lack of credentials, lack of training, shocking incompetence and outright misconduct" of the doctors and nurses in the case was "emblematic of P.H.S. Inc.'s conduct as a business corporation, holding itself out as a medical care provider while seemingly bereft of any quality control."

In its review of Prison Health's work, *The Times* interviewed government regulators, law enforcement officials and legal and medical specialists, including current and former company employees. The review included thousands of pages of public and internal company documents, state and city records, and every New York State report on deaths under the company's care.

The examination shows that in many parts of the country, including counties in New Jersey and Florida, Prison Health has become a mainstay, satisfying officials by paring expenses and marshaling medical staffs without the rules and union issues that constrain government efforts.

But elsewhere, it has hop-scotched from place to place, largely unscathed by accusations that in cutting costs, it has cut corners.

Georgia, which hired Prison Health in 1995, replaced the company two years later, complaining that it had understaffed prison clinics. Similar complaints led Maine to end its contract in 2003. In Alabama, one prison has only two doctors for more than 2,200 prisoners; one AIDS specialist, before she left in February, 2005, called staffing

"skeletal" and said she sometimes lacked even soap to wash her hands between treating patients.

In Philadelphia's jails, state and federal court monitors in the late 1990's told of potentially dangerous delays and gaps in treatment and medication for prisoners under Prison Health, which nonetheless went on in 2000 to win a contract not far away in the Baltimore City Detention Center. There, two years later, the federal Department of Justice reported that better care might have prevented four prisoner deaths. One guard, it said, complained that she had to fight nurses to get sick prisoners examined.

Such stories can be heard around the country. In Las Vegas, after an H.I.V. positive prisoner died in 2002, nurses and public defenders said the county jail's medical director had refused medications for AIDS and mental illness, calling prisoners junkies.

In Indiana, Barbara Logan, a former Prison Health administrator who filed a whistleblower suit last year, said in an interview that the pharmacy at her state prison was so poorly stocked that nurses often had to run out to CVS to refill routine prescriptions for diabetes and high blood pressure.

Before Prison Health even started in Georgia, there had been several prisoner deaths in neighboring Florida that cost the company three county contracts, millions of dollars in settlements—and an apology for its part in the 1994 death of 46-year-old Diane Nelson. Jailed in Pinellas County on charges that she had slapped her teenage daughter, Ms. Nelson suffered a heart attack after nurses failed for two days to order the heart medication her private doctor had prescribed. As she collapsed, a nurse told her, "Stop the theatrics."

The same nurse, in a deposition, also admitted that she had joked to the jail staff, "We save money because we skip the ambulance and bring them right to the morgue."

### A Tough Business: Taking On Headaches, And Creating Some, Too

Few jobs are harder to get right than tending to the health of prisoners, who are sicker and more dependent on alcohol and drugs than people outside. AIDS and hepatitis have torn through cellblocks, and mental illness is a mushrooming problem. In the last decade, state and local government spending for prisoner health care has tripled nationwide, to roughly \$5 billion a year.

Qualified doctors and nurses are difficult to find, as jails are hardly the most prestigious or best-paying places to work.

The potential costs of failure, though, are high—because most prisoners will eventually be let out, along with any disease or mental illness that went untreated.

For decades the task fell to state and local governments that typically lacked resources or expertise, acting in sometimes conflicting roles as punisher and medical protector. Often, the results were tragic.

Three skeletons dug up at an Arkansas penal farm in 1968 led to the uncovering of a monstrous system in which a prison hospital served as torture chamber and a doctor as chief tormentor. The 1971 uprising at Attica state prison in upstate New York, which was sparked in part by complaints about health care, left 43 prisoners and guards dead. The debacle unleashed a flood of prisoner lawsuits that culminated in a 1976 United States Supreme Court decision [*Estelle v. Gamble*] declaring that governments must provide adequate medical care in jails and prisons.

But where governments saw a burden, others spotted an opportunity. Two years after the ruling, a Delaware nurse named Doyle Moore founded Prison Health, pioneering a for-profit medical-care industry that offered local officials a grand solution: hand off the headache.

About 40 percent of all prisoner medical care in America is now contracted to for-profit companies, led by Prison Health, its closest rival, Correctional Medical Services, and four or five others. Though the remaining 60 percent of prisoner care is still supplied by governments, most often by their Health Departments, that number has been shrinking as medical expenses soar.

A few big-city hospitals and other nonprofit enterprises have stepped into the fray, and while not perfect themselves, have performed the best by many accounts, bringing a sense of mission to the work. But that care usually costs more than governments want to spend, and most hospitals are neither equipped nor motivated to enter a jail or prison, where profit margins linger in the single digits.

In this world, where governments are limited in their choices, a half-dozen for-profit companies jockey to underbid each other and promise the biggest savings.

"It's almost like a game of attrition, where the companies will take bids for amounts that you just can't do it," said Dr. Michael Puisis, a national expert and editor of *Clinical Practice in Correctional Medicine*, an anthology of articles by doctors. "They figure out how to make money after they get the contract."

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Businesses with the most dubious track records can survive, and thrive. When cost-trimming cuts into the quality of care, harming prisoners and prompting lawsuits and investigations, governments often see no alternatives but to keep the company, or hire another, then another when that one fails—a revolving-door process that sometimes ends with governments rehiring the company they fired years earlier.

Prison Health has mastered the game. When its mistakes have become public, the company has quietly settled lawsuits and nimbly brokered its exits by quickly resigning, thus preserving its marketable claim that it has never been let go for cause.

Even dissatisfied government clients can be reluctant to discuss their complaints openly, or share them with other counties or states. Some fear being exposed to lawsuits and criticism; others worry that the company dropped this year may return next year as the only bidder for the job. Or, as some former Prison Health customers discovered to their dismay, the new company they hire may be bought by the company they fired.

“You’ve got the professionals dealing with amateurs,” said Dr. Ronald Shansky, a former medical director for the Illinois prison system. He said most sheriffs and jailers were not sophisticated enough about medicine to know what to demand for their money until things go wrong. Local laws requiring that contracts be regularly put out for bid—and go to the lowest bidder—can force officials to switch providers constantly, disrupting care and demoralizing staffs.

Yet once they turn jail medicine over to an outside enterprise, governments rarely go back to providing it themselves. “It’s like an article of faith that private is better,” Dr. Shansky said, even though a 1997 study comparing government and for-profit prison care, commissioned by the Michigan Department of Corrections, found little difference in cost or quality.

On this playing field, Prison Health has prevailed by thinking big, buying up competitors and creating a nationwide pharmacy to supply its operations. Its revenues have risen in the last decade to an estimated \$690 million last year from \$110 million in 1994, and its stock has leapt to \$27.46 a share—its closing price in February, 2005—from a split-adjusted price of \$3.33.

But day by day, Prison Health—like all of its competitors—faces the most basic challenge: finding people to do the job. For openings in Philadelphia last year, it advertised on a Web page called the Job Resource. “Psychiatrists—Feel shackled to



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## Prison Health Services (cont.)

an unsatisfying job? Discover correctional medicine!” said one ad. A Las Vegas posting urged, “Come do some time with us!”

Those who Prison Health hires wind up responsible for the legion of people locked up every day. When the doors shut behind them, the care those prisoners get is shuttered from public view. Deaths behind bars provoke scant outcry.

But if the public has little information about prisoners, and not much inclination to care, it may have even less sympathy for the notion that they should die for want of medical attention.

### Cutting a Lifeline: For Parkinson's Patient, A Countdown to Death

Four days into his stay at the Schenectady County Jail, it all began to come apart for Brian Richard Tetrault. He could no longer walk the four steps from his bunk to the door of Cell 22, in A-block, where a nurse was waiting with his small ration of pills.

Since his arrest, the state commission said, he had been denied most of the medication he had used for a decade to control his Parkinson's disease and psychological problems. The medical staff knew about his ailments from the day he arrived, soft-spoken and clutching a plastic pill organizer; they even phoned his doctor for his charts.

But the jail's medical director took him off all but two of his seven medications, and nurses concluded that the new prisoner was more uncooperative than ill, state investigators said. Mr. Tetrault, a former nuclear scientist at the nearby Knolls Atomic Power Laboratory, had only seven days left before an agonizing death that investigators would label “physician induced.”

His mistreatment began the day he arrived at the jail, according to the state

commission. Without seeing Mr. Tetrault, the jail's medical director, Dr. W.J. Duke Dufresne, prescribed Sinemet and an anti-ulcer drug, but none of the other five medications for his Parkinson's, pain and psychiatric troubles.

On his second day in jail, Mr. Tetrault saw Dr. Dufresne, the only physician for the jail's 300 or so prisoners. In a brief visit, the commission said, the doctor reduced even the Sinemet. As for the mental health drugs, Dr. Dufresne later told investigators that only a psychiatrist should prescribe them.

But no one ever arranged for Mr. Tetrault to see the jail psychiatrist, the commission said. And never again did he see Dr. Dufresne, who told investigators he had believed that Mr. Tetrault was merely feeling the typical ups and downs of Parkinson's; he had planned to check on him in three months.

Mr. Tetrault had only days. On his fourth day in jail, medical records show, he grew increasingly “disky” and belligerent, as his body withdrew from the medications that had sustained him for years. On the sixth day, he lay in his bunk, steeped in his own urine and unable to move. “Continues to be manipulative,” a nurse wrote.

On the seventh day, the commission said, nurses continued to look in on him, chronicle his deterioration and do little about it. “Prisoner remains very stiff,” one wrote. “Head arched back, sweating profusely,” another noted. A third nurse forced him to walk to the jail clinic, though he could barely move.

On the eighth day, alerted by a nurse's phone call, Dr. Dufresne ordered Mr. Tetrault hospitalized. At Ellis Hospital in Schenectady, emergency-room doctors diagnosed the ravages of his untreated Parkinson's. “I suspect, in the prison setting, he was not getting his full dose of medication as needed,” wrote Dr. Richard B. Brooks.

There was not much the hospital could do. On the 10th day, Mr. Tetrault went into septic shock. On the 11th, he died.

The state commission ultimately referred Dr. Dufresne to the State Board for Professional Medical Conduct for what it alleged was “grossly inadequate” care, urged Prison Health to fire him and asked the county to fire Prison Health.

The commission found that Dr. Dufresne had never given Mr. Tetrault a physical examination; and nurses had transcribed the doctor's orders incorrectly, reducing even the Sinemet.

The medical conduct board has taken no

action against Dr. Dufresne. The company, in its lawyer's response to the commission, disputed virtually all of the commission's findings, saying that Mr. Tetrault sometimes resisted taking his medication, and that he was well able to move when he wanted. The company's internal one-page review of Mr. Tetrault's care passed no judgment on the doctor or the nurses. But it did recommend six minor changes, like keeping medical records in chronological order. Dr. Dufresne, who is now the company's regional medical director for upstate jails, did not return calls seeking comment.

Richard D. Wright, the president and chief executive of Prison Health, would not discuss details of the case, citing a lawsuit by Mr. Tetrault's son Zachary. He said that over all, Schenectady County “was extremely pleased with the work of the company.”

But the county moved to fire Prison Health the day after the commission's report was made public last June. “We were going to terminate them for cause,” said Chris Gardner, the county attorney. “But they approached us and we mutually agreed to terminate the relationship.”

The humiliation of Mr. Tetrault did not end with his passing, or with Prison Health, the commission said. On the day he died, Nov. 20, 2001, sheriff's officials altered records to change the time of his release from custody, in the early evening, to 2:45 p.m.—10 minutes before he was pronounced dead, the commission said. The Sheriff's Department denied the charge, and said it had done nothing untoward in trying to formally release Mr. Tetrault.

But the commission said the time change allowed the department to avoid an investigation, at least for a while. Commissioners learned of Mr. Tetrault's death by reading a newspaper article about Zachary's lawsuit, 20 months later.

### The Revolving Door: After Trouble in Florida, Moving On, and Up

If Schenectady County was learning hard lessons about Prison Health, it was old news in South Florida, where several counties had tangled, and re-tangled, with the company years earlier.

By the time Pinellas County hired Prison Health in 1992, the company was hitting its stride. Fourteen years after its founding, it had established a wide beachhead in the state, and had just begun a nationwide push that by the end of the decade would put it in the three biggest cities of the Northeast and the prison systems of entire states. A year earlier, the company began selling

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But for Pinellas, halfway down Florida's Gulf Coast, things were headed downhill.

Everett S. Rice, who was sheriff then, said that Prison Health understaffed the county jail in Clearwater. The company seemed reluctant, he said, to send seriously ill prisoners to hospitals, which could cost it thousands of dollars a day. Prisoners were regularly showing up in court incompetent to stand trial, said Bob Dillinger, the county public defender, because they were not getting their psychiatric medicines.

The sheriff's office learned that even the most basic care had to be spelled out in the contract. When one prisoner died after a delay in calling for help, Mr. Rice said, the agreement was rewritten to require that Prison Health call 911 at a specific time after the start of a medical emergency.

Then, in March 1994, came the death of Diane Nelson, who collapsed of a heart attack in front of the nurse whose words would echo in news reports: "We save money because we skip the ambulance."

Saving money was the reason the county had hired Prison Health. Pinellas was actually on its second round with the company, having first enlisted it in 1986 because of worries about the ballooning costs of the county's own jail health care. When the contract went back out for bid three years later, Pinellas switched to a cheaper competitor; three years after that, Prison Health bid the lowest and retook the job.

But Mr. Rice said the bidding process never turned up a whisper of criticism about Prison Health, or any of its competitors. "Every time we'd be up for renewal, we'd talk to the other counties and institutions, and surprisingly, most of them had glowing reports," he said.

In the end, the deal with Prison Health "probably saved a little money," Mr. Rice said, but the human and political costs were too high. "I thought if I'm going to get the blame for this, I'm going to bring it back inside," he said.

The county did that in April 1995, going back into the business of jail medical care. Three months later, an hour's drive to the east, rural Polk County—which had hired Prison Health the same year as Pinellas—broke off with the company after three prisoner deaths that cost Polk taxpayers thousands of dollars in settlements.

"There were instances where we would actually send somebody to the hospital by ambulance because P.H.S. wouldn't do so," said David Bergdoll, counsel to the Polk

County Sheriff's office.

Since 1992, at least 15 prisoners have died in 11 Florida jails in cases where Prison Health appears to have provided inadequate care, according to documents and interviews with state and county officials.

As it grew, Prison Health proved adept at ingratiating itself with local politicians, hiring lobbyists and contributing to campaigns for sheriff. Under a promise of immunity from prosecution, the nurse who founded the company, Mr. Moore, testified at a 1993 Florida corruption trial that he had paid the Broward County Republican chairman \$5,000 a month – "basically extortion," he said—to keep the contract there and in neighboring Palm Beach County.

Some counties say Prison Health has done good work and saved taxpayers money. In Tampa, the medical bill at the Hillsborough County Jail fell to \$1.2 million, from \$1.8 million in 1982, the year Prison Health replaced the county's medical operation, said Col. David M. Parrish, who runs the jail.

There have been other costs. Last year, the company dismissed a nurse and reprimanded two others after a prisoner's baby died; the mother, Kimberly Grey, said in a federal lawsuit that although she had been leaking amniotic fluid for five days, nurses refused to examine her until she gave birth over a cell toilet.

But Colonel Parrish said that mistakes, and second-guessing, were part of the job, no matter who does it. "Anybody who is in the health care business for prisoners is going to get blasted because prisoners have nothing better to do than complain and sue and find somebody who is going to make a big stink about nothing," he said.

Certainly, a litany of complaints followed as Prison Health expanded across the nation. In Philadelphia, a 1999 federal court monitor's report warned that the company's failure to segregate prisoners who were suffering from tuberculosis posed "a public health emergency." Pregnant

prisoners, it said, were not routinely tested or counseled for H.I.V., endangering their babies.

Dr. Robert Cohen, a state court monitor, said in an interview that Philadelphia doctors "actually encouraged women to refuse pelvic examinations."

Prison Health still works in Philadelphia, where officials have persistently prodded it to improve care. Like many governments, the city has moved from a fixed-cost contract in which the company's profit comes out of whatever it does not spend to one that covers most medical costs and pays Prison Health a management fee.

When other governments have shown less patience, Prison Health has survived, and even grown, by buying rivals like Correctional Health Services, of Verona, N.J. In 1999, its biggest purchase, EMSA Government Services, brought with it contracts with dozens of prisons and jails.

Back in Florida, the purchase brought some unwelcome *deja vu* to Polk County, which thought it was through with Prison Health when it hired EMSA. When Prison Health bought EMSA, Polk officials soon replaced it yet again.

"P.H.S. was the lowest bidder, but we didn't accept their bid," said Mr. Bergdoll, the sheriff's counsel. "That should tell you something." Since then, he said, the number of lawsuits has fallen so sharply that the

## U.S. Torture Information Needed

Because the United States has signed the United Nations Convention Against Torture, they are required to submit reports on the status of US compliance to the Treaty every five years. In May of this year, the US submitted their "Second Periodic Report of the United States of America to the Committee Against Torture". Several national prisoner advocacy groups are planning to issue what is called a "Shadow Report" to supply the Committee with credible evidence of US violations of the Convention which are ignored in the official report. The Convention not only prohibits torture but also "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" committed by a government official. We are seeking testimonies from prisoners on torture and abuse, including isolation and use of devices of torture (stun guns, stun belts, restraint beds, restraint chairs and other restraint devices, spit hoods, black boxes, etc.). Please send testimonies of your experiences and how the authorities dealt with any complaints you made to: Bonnie Kerness, AFSC Prison Watch Project, 89 Market Street, Newark, NJ 07102. We very much appreciate your help.

## Prison Health Services (cont.)

county's insurer lowered its premiums.

The EMSA purchase also brought Prison Health back to Broward County, Fla., which had dropped it years earlier because it had been unhappy with the medical care. Two years after its return, three state judges noticed the phenomenon that had played out in Pinellas—a parade of prisoners showing up in court incoherent—and ordered the company to stop withholding psychiatric drugs.

“My impression was that it was money,” Judge Susan Lebow said in an interview. “The doctors were under corporate direction to not continue the medications.”

Prison Health denies it gave any such order. The Broward sheriff would not comment on the company, which the county replaced again in 2001.

But the revolving door of for-profit health care spins on. Last December, Broward hired Armor Correctional Health Services, a company formed just a few weeks earlier by a familiar figure: Doyle Moore, the nurse who founded Prison Health.

### A Jailhouse Birth: Chaos on a Cell Floor As a Baby Is Discovered

It could not have been much worse. A newborn baby lay in a pool of blood on the floor of the Albany County Jail. At least four adults were there: the mother, a registered nurse and two guards who struggled to save the tiny boy. But the nurse looked on passively, tending to the dazed mother, convinced that little could be done, state records show.

The baby, who was named Scott Mayo Jr., died two days later.

The mistreatment and missed chances to help the young mother, Aja Venny, began soon after her arrival 11 days earlier, investigators said. A 22-year-old secretary and community-college student from the Bronx, she knew she had done something stupid: taken a ride with a drug dealer she knew from her neighborhood. When a state trooper pulled them over, she stuffed his small bags of drugs into her bra.

She was booked into jail on Aug. 30, 2001, nearly six months pregnant.

The medical staff made an appointment with an obstetrician it paid to visit every two weeks, but Ms. Venny never saw him, state investigators said; nurses ordered her files from a Bronx women's clinic, but never received them. The one concession to her

condition, it seems, was her assignment to the maternity unit, a six-bunk cell with a toilet cordoned off by a white curtain.

On Sept. 9, Ms. Venny awoke before dawn with excruciating cramps. Another prisoner told the guard that Ms. Venny was about to give birth. After two calls to the nursing supervisor, Donna Hunt, a jail sergeant sent a guard to fetch her immediately.

When she arrived at 7:15 a.m., Ms. Hunt found Ms. Venny sitting on the toilet crying and “blood everywhere,” she told investigators. She cleaned off and consoled the prisoner, and told the guards to call an ambulance. She said later that she assumed that Ms. Venny had miscarried and saw no reason to check the toilet.

But ambulance technicians, on the phone with the sergeant, asked if there was a baby. Guards looked in the toilet and discovered the infant, still in his placental sac. Guard Dave Verrelli scooped him out using a red biohazard waste bag and laid him on a towel on the cell floor as Nurse Hunt watched.

“I knew that there was probably nothing we could do for this fetus,” she told investigators.

Mr. Verrelli detected a slight pulse. “What should I do now?” he frantically asked the nurse, who told him to cut open the sac. Mr. Verrelli cut it, removed the baby and uncoiled the umbilical cord from its neck. Ms. Hunt confirmed that there was a faint heartbeat, investigators said, but did nothing to get the baby breathing in the quarter-hour before ambulance workers arrived and administered oxygen.

At the hospital, the boy was placed on a ventilator, his heart pumping but his temperature too low to be measured. On his third day of life, he died.

The State Board of Regents found that three Prison Health nurses, including Ms. Hunt, had failed to care properly for Ms. Venny or her baby. Each nurse was placed on a year's probation and fined \$500. The State Commission of Correction did not say whether anyone might have saved the child, but it emphasized that Ms. Hunt did not take basic steps to help. She did not return calls seeking comment.

The commission also found more deep-seated failures: a disorganized staff and prenatal training for nurses that consisted of e-mail messages with instructions copied from a university Web site.

Prison Health's lawyers defended Nurse Hunt—saying she found the child in the toilet, but was pushed aside by guards—and

accused the commission of ignoring “inconvenient facts.”

Ms. Venny, who completed a six-month boot-camp prison program after her son's death, now lives in the Bronx with her husband, Scott, and their 20-month-old daughter, Skye. The ashes of Scott Jr. are kept in a golden urn in the bedroom.

“I know what I was doing was wrong,” she said. But still, “I can't find a reason why a baby had to die.”

### Connecting the Deaths: A Pattern Emerges, And a Battle Begins

It was late 2000 when state investigators began to notice something strange. Reviewing deaths that had occurred in jails in upstate New York, they were not struck by the number or even the grim details of the cases, which they routinely examined as employees of the State Commission of Correction. Something else was wrong.

Working out of a cluttered office in Albany, the three commissioners and a six-member medical review board noticed that low-level employees were doing work normally done by better-credentialed people. Nurses without the proper qualifications, they said, were making medical decisions and pronouncing patients dead.

In Rochester, where Candy Brown had died that September, pleading for help as she withdrew from heroin, investigators found that one of the nurses responsible for her had been suspended by the state three times for negligent care.

In that case and others, commission members said, the people offering the most help and compassion were guards and prisoners. And the company, it turned out, was always the same: Prison Health.

“Our sense was that what we were dealing with was not clinical problems but business practices,” said James E. Lawrence, the commission's director of operations.

It was the start of a long fight to get the company to change its ways, and when that failed, to get other officials in Albany to step in. Four years later, the commission has been stymied on both fronts.

Mr. Lawrence said Prison Health seemed unfamiliar with New York's tradition of regulated health care, “and dismissive of it.” When the agency sought out those in charge, it would often be routed to lawyers or executives at the company's headquarters in Brentwood, Tenn., who bristled at the suggestion that they were answerable to New York State regulators. “The rules were not of any consequence,” Mr. Lawrence said.

Prison Health entered New York in

1985 as medical provider for the Dutchess County Jail. Orange and Broome Counties hired the company for a few years, but ended those contracts in the 1990's.

By late 2000, when the company began to attract the state commission's notice, it had signed contracts with Schenectady, Ulster, Monroe and Albany Counties. The Albany jail superintendent at the time called the company "a godsend."

The commission called it a disaster. "Grossly and flagrantly inadequate," for instance, was its verdict on the care given Candy Brown.

Prison Health, in turn, challenged the commission's authority, and even sued over its report on one prisoner's treatment, saying the panel had acted maliciously. The suit was dismissed on its merits.

Dr. Carl J. Keldie, the corporation's medical director, said the commission seemed to make up its mind before an investigation and then overstate its case in reports. "The tone, the timbre, the language is egregious," he said. Company executives said the commission has refused to meet and try to reconcile their differences.

The commission in 2001 moved beyond the specific criticisms in its reports to sound a general alarm. Asking state education officials to investigate, it said Prison Health was allowing "dangerously substandard medicine" by hiring doctors and nurses with questionable credentials.

A month later, spurred by the commission, the Department of Education alerted the state attorney general that the company was operating illegally in New York by not having doctors in charge of medical care. "Nobody really noticed that they weren't licensed," one commission doctor said of Prison Health's presence in New York.

In the three years since, nothing has come of either complaint. The only agency with the power to enforce the state law—the attorney general's office—finally replied last October, telling the commission to resolve the matter on its own. In a heated exchange of letters, an assistant attorney general, Ronda C. Lustman, scolded the commission for refusing to meet with executives.

The company says that it is acting legally because it has set up local corporations with doctors in charge. But there is abundant evidence, state investigators say, that those corporations are shams.

For example, Dr. Trevor Parks is listed as the sole shareholder of P.H.S. Medical Services P.C., which the company says provides all medical care at Rikers Island, free of any influence from Prison Health

executives. But investigators say that when they interviewed him, he had little idea of his role, or his corporation's.

Moreover, records show that Dr. Parks's corporation went out of business in July, for nonpayment of taxes and fees. After *The Times* pointed that out to company executives in December, Prison Health paid the money. Dr. Parks did not respond to phone calls and e-mail messages.

If frustration mounted at the commission,

a sense of impending trouble was growing at the jail in Albany County, where the commission said doctors' decisions on prisoner treatment were being overruled by a regional medical director in Washington who was not licensed to practice in New York.

The doctor, Akin Ayeni, said in an interview that he never overruled any doctor there. But a former medical director at the jail said she quit in April 2001 because she felt the company's policies, and Dr. Ayeni's

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## Prison Health Services (cont.)

decisions, were dangerous.

"I told my staff, 'I know it's only a matter of time before they kill someone,'" she said, asking that her name not be used because she feared retribution. "I knew there was going to be a death. I could feel it."

In the six months after she left, two people died and a third was seriously injured after poor treatment by Prison Health, the state commission found; the dead included Aja Venny's newborn son.

The county and the company parted ways six months later, said Thomas J. Wigger, the jail superintendent, because he was unsatisfied with the quality of care.

One by one, other counties have followed suit. Ulster County, for example, caught Prison Health overbilling it for thousands of dollars of nurse hours and switched to another company in 2001. The company, for its part, said it lost most of the upstate contracts to competitors who had underbid them. Strangely, it said it had no record of working in Orange County, even though the state commission faulted the company in two prisoner deaths, in 1989 and 1990.

Last October, Schenectady County dropped Prison Health after the death of Mr. Tetrault, the prisoner with Parkinson's disease. The jail director, Maj. Robert Elwell, said in an interview that the medical director, Dr. Dufresne, had discouraged treatment for anything but the most urgent problems. "When you're dealing with a for-profit corporation, those are the types of decisions that get made," Major Elwell said.

The company's only remaining outpost in upstate New York is Dutchess County. "I believe they are a good company," said David W. Rugar, the county jail administrator. "It's just an intense thing to do, when you provide medical services."

Indeed, just days before it renewed its deal with Prison Health in 2002, the jail had an intense experience that would cost the company's medical director there his job.

### Cries From the Heart: Despite Days of Agony, 'NoBody Will Help Me'

When they cleaned out Cell 6 in Unit 10 on Feb. 16, 2002, workers at the Dutchess County Jail found a letter that Victoria Williams Smith had written to her husband.

"My chest is tight & burns, my arms are numb," it said. "I been to the nurse about five times & no body will help me. I need to get out of this jail. It feels like I'm having a stroke, no bull."

Actually, it was a heart attack, and it had killed Ms. Smith a few hours earlier at the age of 35. The letter was just one in a skein of increasingly panicked pleas for help during her last 10 days in jail.

Ms. Smith was born in Brooklyn, but settled in North Carolina with her second husband, Justin Smith. They married in 1997, shortly after he was sent to a prison in Dutchess County for attempted robbery.

She shipped him canned food that he could sell for cash, and in January 2002 drove to the prison for what friends said was a visit allowed to married couples.

The reunion was called off by state troopers, who were waiting at the prison to search her. They found about seven ounces of heroin clearly intended for her husband to use or sell, state records show.

Thirteen days passed, state investigators said, before Ms. Smith was examined by a doctor: Vidyadhara A. Kagali, the part-time medical director at the jail in Poughkeepsie, who worked only on Wednesday and Friday evenings even though he was responsible for about 300 prisoners.

She could have hoped for better. Dr. Kagali, who was board certified only as a pathologist, had never treated patients in a hospital and had "limited knowledge of his responsibilities as jail medical director," according to commission records.

On Feb. 6, when she began to complain of chest pains and numbness, Dr. Kagali told her she was suffering from inflamed cartilage in her chest, and had her continue taking the Vioxx arthritis medication that friends in North Carolina mailed to her.

The next day, after Ms. Smith was found crying in pain in her cell, an electrocardiogram revealed abnormalities in her heart. But Dr. Kagali, notified by a nurse, did not see her, according to the state commission. On her third day in jail, records show, a second EKG showed the same heart problem,

but the doctor still did not see her.

On the seventh day, a nurse turned to the jail's part-time psychiatrist for help in easing Ms. Smith's chest pain and labored breathing. Without seeing her, he prescribed a drug for intestinal problems. On the eighth day, Dr. Kagali saw Ms. Smith; he ordered a spinal X-ray and recommended Bengay.

Two days later, in tears, she phoned her North Carolina friends, Chris and Marjorie Bowers, three times. "She said these people would not help her at all," Ms. Bowers said.

In the early morning of Feb. 16, Ms. Smith's untreated heart ailment became an emergency, according to jail records and sworn statements from nurses and guards. Around 4:30 a.m., a guard found her rocking on her bunk, clutching her chest, and called Barbara Light, the registered nurse on duty.

Ms. Light concluded that Ms. Smith was having an anxiety attack—even though, the commission said, the nurse had never seen the prisoner's medical record.

A half-hour later, Ms. Smith, weeping, told the guard she wanted to go to a hospital—a plea Nurse Light dismissed as an attempt to get drugs. Minutes after that, the guard placed a frantic third call to the nurse, who arrived to find the prisoner on the floor, shaking. An ambulance rushed Ms. Smith to Vassar Brothers Medical Center, where she died in less than an hour.

The state commission, in its report, seemed hardly to know where to begin to catalog the failures.

It urged that Dr. Kagali be fired for "gross incompetence," and referred Ms. Light to state regulators for discipline. State health authorities eventually suspended the doctor's license for six months, but have not taken action against Ms. Light. Neither she nor Dr. Kagali would comment.

The company's confidential review of Ms. Smith's death found no fault with her treatment, but recommended that its staff offer grief counseling to colleagues and prisoners after future jail deaths.

In a letter to the commission, Prison Health defended Ms. Light and Dr. Kagali. It said that over Ms. Smith's five weeks in jail the doctor had seen her numerous times and provided medications, knee braces and even an extra mattress for her arthritis. Ms. Smith had no known history of heart disease, the company said, and any suggestion that her death could have been prevented was "20-20 hindsight."

The letter was signed by Dr. Dufresne, whom the commission would later blame for Brian Tetrault's death. ■

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# Prison Health Services: Missed Signals in New York Jails Open Way to Season of Suicides

*by Paul Von Zielbauer; Joseph Plambeck contributed reporting for this article.*

The warnings were right there in her medical file: a childhood of sexual abuse, a diagnosis of manic depression, a suicide attempt at age 13—all noted when Carina Montes arrived at Rikers Island in September 2002.

But none of them, state investigators said, were ever seen by the mental health specialist caring for her. He could never track down the file, which by December included another troubling fact: Ms. Montes had been placed on suicide watch by a jail social worker. Not that the suicide watch was terribly reliable; it depended in part on prisoners paid 39 cents an hour to check on their suicidal peers.

In her five months at Rikers, investigators later discovered, Ms. Montes never saw a psychiatrist.

It did not, however, take a psychiatrist to pick up on the alarms she sounded near the end, when another prisoner saw her tearing bed sheets and threatening to kill herself. But the guard who was called had no idea she was on suicide watch, did not notice the sheets and never reported the incident. Six hours later Ms. Montes was dead, hanging from a sheet tied to a ventilation grate.

She was 29. Her offense: shoplifting 30 lipsticks.

The death of Carina Montes was one in a spate of suicides in New York City jails in 2003—six in just six months, more than in any similar stretch since 1985. None of these people had been convicted of the charges that put them in jail. But in Ms. Montes's death and four of the five others, government investigators reached a stinging judgment about one or both of the authorities responsible for their safety: Prison Health Services, the nation's largest for-profit provider of prisoner medical care, and the city correction system.

In their reports, investigators faulted a system in which patients' charts were missing, alerts about despondent prisoners were lost or unheeded, and neither medical personnel nor correction officers were properly trained in preventing suicide, the leading cause of deaths in American jails.

Prison Health came to Rikers in 2001 after signing a three-year, \$254 million contract and promising to deliver the health care that, compared with jails around the country, had helped make New York something of

a model. And it spoke confidently about tackling the jails' biggest problem: how to handle their vast and volatile population of the mentally ill.

The rash of suicides, and nine more during Prison Health's tenure, is one measure of the company's uneven and at times troubling record in meeting that challenge. But there are others.

Ten psychiatrists with foreign medical degrees were allowed to practice without state certification for more than a year after they were supposed to have been fired for failing to pass the necessary test. When it finally dismissed them on the city's orders in 2003, Prison Health was left with about one-third of its full-time psychiatrist positions empty, according to city health department figures.

The company has employed five doctors with criminal convictions, including one who had been jailed for selling human blood for phony tests to be billed to Medicaid. In all, at least 14 doctors who have worked for Prison Health have state or federal disciplinary records, among them a psychiatrist forbidden to practice in New Jersey after state officials blamed him for a patient's fatal drug overdose.

The city's Board of Correction, an oversight agency that sets minimum standards for jails, has complained that the company shuffles doctors from jail to jail—regardless of where they are needed—to avoid city fines and create the illusion that each building is properly staffed.

Many of the 30 current or former Prison Health employees interviewed for this article described an effort that, whatever its good intentions, frequently fails to adequately treat the mental illnesses that prisoners take into jail and that follow them back out.

Dr. Douglas Cooper, a psychiatrist who helped supervise mental health treatment at the nine Rikers jails until, he says, he quit in frustration in 2003, summed up the care as triage, buffeted by a sense of nonstop crisis. "The staff does the best they can," he said, "and what's left they sweep under the rug."

Prison Health Services, a Nashville-area corporation that bills itself as the gold standard of jail health care, says it has done a solid job at Rikers and a 10th jail, in Lower Manhattan, caring for more than 100,000

prisoners a year as part of its largest contract among scores across the nation.

The company says it has worked hard to find qualified mental health specialists, held increases in medical expenses below the national average, and saved the city hundreds of thousands of dollars.

There is little dispute that New York City has long insisted on more generous jail care than most other places; the suicide rate, even under Prison Health, is about half the national average for jails.

Then again, the rate was lower before Prison Health arrived. And in the four years since, the rate of suicides at Rikers has been higher than in the Los Angeles jail system, the largest and one of the most violent in the nation.

Suicides—"hang-ups" in the cold vernacular of the cellblock—have always been a jailhouse reality. Because prisoners can be resourceful when they set out to kill themselves, few people believe that hang-ups can be prevented entirely.

Yet they can be a critical barometer of how well medical and correction workers are performing an essential task: protecting the vulnerable people in their care. In 2003, something broke in the city's jail system, and prisoners slipped through a bewildering series of cracks.

The first, Jose Cruz, a 48-year-old with H.I.V. and hepatitis, hanged himself with a torn bed sheet in January. Even though he had been put on suicide watch, guards placed him at the end of a cellblock where they could not see him from their post, said the State Commission of Correction, a panel appointed by the governor to investigate

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## Prison Health Services (cont.)

every death in jail. The medical staff, the commission noted, had inadequate training in preventing suicides.

Thirteen days later, Joseph Hughes, a severely disturbed 24-year-old charged with murder, was found hanged four hours after a jail psychiatrist wrote that he was no danger to himself. The commission criticized the Prison Health staff, saying that Mr. Hughes's history of hallucinations and suicidal gestures required closer observation.

Ten days after that, guards cut down Ms. Montes—whose increasing desperation had gone unnoticed because her medical file was missing, a failing the state commission had already criticized in three other deaths during Prison Health's time at Rikers.

After two more suicides, a prisoner found James Davis, 43, in his cell in June with a bootlace tied around his neck. A doctor, two nurses and two guards spent 15 minutes vainly administering C.P.R., unaware that oxygen tanks and cardiac medication were nearby, the commission said.

No one thought to unknot the bootlace.

Sixteen days later in a jail-clinic waiting room, a 19-year-old who had just returned from a psychiatric evaluation unit managed to hang himself from a metal stud in the ceiling, according to the city's Board of Correction. Another prisoner rescued him while he was still semiconscious.

The city's health department, which now oversees Prison Health's work at Rikers, did not contest many of the commission's findings, though it defended the work of the psychiatrist who evaluated Mr. Hughes as "not inappropriate." Company executives did not respond to the commission's reports, saying that they had never read them because city officials did not give them copies.

### Promising Vigilance

The catalog of missteps and missed signals could not have come as a complete shock to city officials. Prison Health, after all, had attracted criticism around the country for faulty care. And by the time of the suicides, the state commission was busy investigating—and blaming—Prison Health for prisoner deaths in county jails upstate.

The city, though, has insisted that it has the tools to strictly monitor the company's performance. The state commission, too, concedes that city health officials are more vigilant than any county sheriff.

In fact, soon after the city hired Prison Health in 2001 to salvage jail medical services after three tumultuous years under the direction of St. Barnabas Hospital, New York City officials battled the company over its failure to meet many of the city's most basic clinical standards, and threatened to cancel the contract. Now, after a series of changes the city ordered—including suicide prevention and oversight measures prompted by the 2003 deaths—the health department says care has improved. On Jan. 1, it granted the company a \$300 million contract for another three years.

"They were the most qualified bidder and they were the most cost effective," said Dr. Thomas R. Frieden, the health commissioner, who described Prison Health as willing to make improvements when asked. "I don't think they're angels."

Others are more skeptical. The city comptroller's office, prompted by Prison Health's record and questions raised by *The New York Times*, asked the health department to delay signing the new contract until the department addressed concerns, including the Board of Correction's complaints of staff shortages at Rikers. Dr. Frieden replied that he saw no reason to wait.

But the new contract, according to two state officials, appears to violate a state law intended to keep business interests from influencing medical care. For example, it fails to ensure that doctors are the ultimate overseers of all medical treatment, policy and records. And the contract makes the doctors who are actually doing the work at Rikers subcontractors to Prison Health, the reverse of what the law requires.

The health department and the company say the contract is legal.

For those who work in the jails, though, the larger issue is the quality of the care. Figures provided by the city and St. Barnabas show that the clinical staff at Rikers has shrunk by 20 percent since the hospital was in charge, despite only a modest decline in the jail population. And several doctors and other employees said that mental health care is worse than before.

Forever unable to find enough psychiatrists, the company plugs the gap by hiring part-timers, as well as psychiatrists from temporary agencies, some of whom may never have treated prisoners. More than one-third of the mental health staff is part time.

Doctors rely on medical charts that have often been out of date or simply

unavailable because of a shortage of clerks, according to the Board of Correction. Psychiatric evaluations and medications have been delayed for days or weeks, while prisoners sometimes turn violent or suicidal, say the board and Prison Health employees.

Of course, the demands on Prison Health and the correction system are tremendous. The mentally ill have flooded New York's jails ever since the city cracked down a decade ago on lesser crimes like vagrancy. As many as one in four of the 14,000 prisoners in city jails on an average day have psychological ills, which need close supervision and expensive medicines. Often they fake symptoms or attempt suicide as a way of getting special treatment. In those ways, a mentally ill prisoner jailed on a minor charge usually requires closer attention than a career criminal.

"If you asked every jail administrator in the country what kind of criminal they want in their jails, everyone would say murderers," said Michael P. Jacobson, who was city correction commissioner from 1995 to 1997. "Give me a nice murderer."

Just what society owes these troubled prisoners is open to debate. But the guilt or innocence of most of them have not been settled. Many are in jail on minor charges or because they are unable to make bail. And though most leave within a week, many remain for months, and jail is the only place where they are likely to get any treatment or medication. The city, in fact, is required to create treatment plans for the most seriously disturbed upon their release.

Since *The Times* began last year to request information on the suicides, examining jail records and details of the Prison Health contract, city and company officials have made changes to prevent more deaths. The rate of suicides has slowed; in the 20 months since the spate of six suicides, there have been four.

Still, there are lapses. One of those four, David Pennington, 27, killed himself in July. Over three days in which he became increasingly irrational, guards went to the mental health staff for help three times, and a doctor even sent him to a psychiatrist, yet Mr. Pennington was never examined, state records say.

In a letter, a health department official disputed that finding and defended the care Mr. Pennington received. The official said the prisoner was seen by a psychiatrist the day he died and was not clearly suicidal. The psychiatrist was fired three months later, Prison Health said, for reasons unrelated to the death.



In the end, though, Prison Health is just the latest partner of a bureaucracy with its own blemished history: the correction system, which was unable to deal decisively with suicides for decades, as recommendations from state and local authorities were ignored, and fitful attempts at change failed.

### A Moment of Opportunity

The company's arrival at Rikers in January 2001 was a milestone for New York. The contract, negotiated with the administration of Mayor Rudolph W. Giuliani, was a linchpin in the city's effort to privatize government programs, and made New York's jail system the largest in the nation to entrust its health care to a commercial enterprise.

The deal was driven in great part by a determination to save money, and dovetailed with efforts to get the city out of the business of everything from job training to welfare enforcement. For years the city had used public hospitals to provide care in its jails, only to face skyrocketing costs and plenty of embarrassments. Prison Health, with its already shaky reputation, marked a calculated gamble.

The contract, though, was an even bigger deal for Prison Health. It raised the company's \$382 million yearly revenue by 21 percent, and pushed Prison Health to the forefront of a booming correctional health care industry. It also made the company responsible for treating more mentally ill people than anyone else in the nation except the Los Angeles County Jail.

Yet Prison Health had not told its new employer the whole nature of its operations, records and officials in the city comptroller's office suggest. In 1999, the company bought EMSA Correctional Care, which had been working for the city's Department of Juvenile Justice for three years. Prison Health, according to documents and interviews with city officials, subsequently became responsible for providing care to the 5,000 youngsters in the juvenile system every year.

That care, during 2000, would come under fire by a half-dozen Family Court judges in the city, who found that children were often receiving inadequate treatment.

But when negotiating the Rikers contract later that year, Prison Health filed papers with the city saying the company had "no N.Y.C. presence." The comptroller's office, which was not obligated to review the Rikers contract at the time, now says that Prison Health's filings were incomplete and misleading.

The company rejects that claim, and says the papers were accurate and honest, and had properly listed EMSA as an affiliate doing the work at juvenile justice. City health officials say they have no problems with Prison Health's representations.

Prison Health not only won the Rikers contract, but also benefited from an added bonus: an easy act to follow. St. Barnabas Hospital in the Bronx had just been fired after a striking number of jail deaths—34 in its final year, including 2 suicides—prompted a criminal investigation. Though no charges resulted, the Board of Correction, an eight-member watchdog panel, complained about the cost-cutting it saw as a root cause.

But under Prison Health, the rates of prisoner deaths and suicides have risen slightly. In a foreshadowing of the spurt of suicides to come, six prisoners killed themselves from May 2001 to January 2002.

In a string of memos to city health officials, the Board of Correction told of missing medical records, delayed psychiatric medications and minimal, inexperienced staffs. Jail guards, it said, sometimes had to pitch in, referring prisoners for mental evaluations.

It was not supposed to be that way. Stung by the St. Barnabas experience, city

health officials had set up elaborate ways of measuring Prison Health's performance, including a beefed-up quarterly report card with 35 standards. But during its first year, the company met those standards only 39 percent of the time. Its overseer at the time, the city's Health and Hospitals Corporation, threatened in July 2001 to scuttle the contract, and fined the company \$568,000.

Company executives say that the transition from St. Barnabas was rocky, but that their performance has improved, and they have managed some significant achievements: speeding distribution of medicine, creating a program to monitor prisoners with hypertension and installing a computer system for appointment scheduling.

Yet the company has not made good on several requirements in its contract. For example, it frequently sends prisoners to hospitals without performing tests or providing information on their medical history and treatment, according to reports by the State Commission of Correction. And Prison Health never came up with the rigorous suicide-prevention plan it promised the city in 2000.

"I had no training as to what we do when a patient becomes depressed and becomes suicidal," said Michele Garden,



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## Prison Health Services (cont.)

a psychologist who was treating Mr. Cruz, the first to kill himself in 2003. She quit later that year.

The correction system had its own problems, having failed to tackle the issue of suicides despite a series of detailed studies that began in the late 1960's.

The city hired a suicide-prevention coordinator in 1980, but gave him only a paltry budget. John Rakis, who got the job, recalls having doubts about the assignment while interviewing his first patient in the only spot available in the Bronx House of Detention: the barbershop.

"He was hallucinating, and at some point got up and started screaming and threw over the barber chair," said Mr. Rakis, who now advises the state and city on jail health care. "I went upstairs and thought, 'I don't think this is going to work.'"

He was right. When he quit in 1984, the Correction Department eliminated the job. A rash of suicides followed in 1985—11 for the year, with 3 in one week.

In the early 1980's, the city created a Prison Death Review Board, including members from the mayor's office and the Health and Hospitals Corporation, to investigate and prevent deaths. But fearing that the board's inquiries could fuel lawsuits, Health and Hospitals representatives began refusing to discuss the deaths, said Board of Correction officials. The review board has not met since 1997.

When Prison Health arrived in 2001, the entire machinery for monitoring suicidal prisoners remained lethally porous. The system depended, as it still does, on "suicide prevention aides," prisoners paid pennies an hour to make checks every 10 minutes. In an investigation last year, the state commission found that one of these aides was responsible for watching troubled or newly admitted prisoners in 34 separate cells.

Guards were supposed to help, too, looking in on suicidal prisoners every 15 minutes. But that often became a half-hour, said the correction commissioner, Martin F. Horn.

"You could pick and choose which rules you wanted to follow," said Mr. Horn, who arrived in January 2003.

Prisoners continued to kill themselves, and in its reports on the deaths, the state commission insisted repeatedly that those on suicide watch be observed at all times. In late 1999, it sent all jails and prisons a directive to make that the rule. City correc-

tion officials ignored it.

Not until four years later, after the spate of six suicides, did the city follow the directive. Two weeks after the sixth suicide, in July 2003, the health department replaced the Health and Hospitals Corporation as Prison Health's direct overseer, and took action to tighten suicide watches.

The Correction Department ordered a flurry of other changes to ensure closer monitoring, and hired Lindsay M. Hayes, a nationally known expert on jail suicides, to recommend improvements. But it gave *The Times* only an edited version of his report, stripped of his analysis and recommendations, and would not allow Mr. Hayes to discuss his findings publicly. The health department also refused to disclose its own investigations of the 2003 suicides.

Yet Mr. Horn, who became correction commissioner the month the six suicides began, said they were a jarring sign that something was dangerously wrong.

"I found it personally distressing," he said. "I was shellshocked."

### A Scramble for Help

On any given day, a psychiatrist walking the halls at Rikers could be a doctor from a temp agency who had never practiced there before. He could be a doctor who had never treated prisoners at all.

Or he could be someone like Dr. Edward M. Berkelhammer, whose work the New Jersey Board of Medical Examiners called "a danger to the public" in 1986. It suspended his medical license for two years, fined him and ordered him to see a psychiatrist himself after a patient died in his care.

Dr. Berkelhammer was putting a 26-year-old woman through drug detoxification when his mistake in administering drugs resulted in her overdose, the board ruled. He was working with an expired license, and he continued to compound his troubles. In 1989, New York suspended him for two months for lying about his record in applications for a license. And in 1990, New Jersey revoked his license for failing to obey its orders.

In an interview, Dr. Berkelhammer said that the girl's death was a single incident long ago, and that he was "very well thought of" at Kings County Hospital in Brooklyn, where he worked for several years afterward, treating psychotic prisoners. "Of all the people at Rikers, I'm the last person anyone has to worry about," he said.

Indeed, there are doctors at Rikers with checkered pasts, including criminal convictions.

Dr. Ammaji Manyam, for instance, was sentenced to a year in jail in 1990 on charges of conspiracy and attempted grand larceny, for selling blood in a scheme to charge the state for bogus tests. Her medical license was revoked in New York, New Jersey and California, but restored in New York in 1997, after she said she wanted to work in a jail clinic because she knew from experience how poor the medical services were. Dr. Manyam did not return calls seeking comment for this article.

Others have had their medical credentials called into question. New York officials revoked the license of a Prison Health psychiatrist, Joseph S. Kleinplatz, in 2003 after Illinois officials concluded that his diploma from a Mexican medical school had been forged. The company then fired him. His lawyer, Karen S. Burstein, said he was a good doctor with a real diploma; a state appellate court has ordered that his case be reconsidered.

The health department is now reviewing Prison Health's system for checking doctors' credentials.

Becky Pinney, the vice president in charge of Prison Health operations in New York City, said the company had done its best to weed out doctors with disciplinary records. Most of them, she said, had first been hired by St. Barnabas Hospital—though Prison Health rehired them, as it did most of the hospital's staff at Rikers. She said the company was thorough in investigating job candidates, running names through state and federal databanks, and rechecking credentials every two years.

Finding qualified doctors, particularly psychiatrists, is a fundamental challenge for any jail medical operation. While Prison Health says it pays competitive salaries, doctors who have left for other jobs said they made much more working fewer hours.

"You have so many people vying for psychiatrists in a city this size, it makes it even more difficult," Ms. Pinney said. The company has responded aggressively, she said, recruiting at Columbia University's medical school and mailing solicitations to every psychiatrist in the city and North Jersey.

The company, then, often takes what it can get—witness the 10 unlicensed psychiatrists who Prison Health was supposed to fire by the end of 2001 because they had failed to pass state medical tests. The city allowed the company to keep them on for another 16 months, but when the doctors failed even then to obtain certification, it had them dismissed.

Prison Health soon rehired three of the psychiatrists, at reduced salaries, as social workers and mental health specialists.

"There's a reason these people have failed to demonstrate to the board that they are qualified," said Dr. Robert L. Cohen, who was medical director at Rikers from 1982 to 1986, when Montefiore Medical Center ran health care.

But if hiring doctors is hard, keeping them is tougher, say many who have worked at Rikers. "They cannot get psychiatrists to stay there," said Roberta Posner, a psychologist who headed a mental health unit when she was fired in 2001 after 12 years at Rikers. The company would not say why it dismissed her; Ms. Posner said it was for complaining. "The staff is so stressed and so spread out that they can barely manage," she said.

There are only 10 full-time psychiatrists working with prisoners at Rikers, the company said. It employs 30 part-timers, and 8 others from two temporary agencies, including one in Atlanta called Psychiatrists Only.

Some current and former workers at Rikers said the reliance on such help disrupts treatment. A deputy health commissioner, James L. Capozziello, conceded, "It's not the optimal way of doing things."

When doctors cannot be found, the company has filled in with less skilled workers, say city officials and Prison Health employees. Since 2002, the city has allowed more than one-third of the psychiatrist positions to be filled by nurse practitioners or physician assistants, who are licensed to diagnose medical problems and prescribe medications. The health department says that the company is now using only seven of those workers to substitute for psychiatrists, and that it plans to end the practice.

Cathy Potler, deputy director of the Board of Correction, said that some of those nurses and physician assistants had little or no background in psychiatry.

"The result," she told city officials in a May 2003 letter, "is that the least experienced mental health staff are assigned to the facility with patients who are in need of the highest level of care."

### "Juggling Hand Grenades"

As soon as Dr. Douglas Cooper arrived at work in the summer of 2003, the phone would ring and, he said, his heart would sink. He was facing another day of too few employees, too many psychotic prisoners and a corporate boss that he says was more interested in paperwork than patients.

As the assistant supervising psychiatrist for all nine Rikers jails, he would have to figure out how to handle more than 300 patients at the island's largest mental health unit, in the largest jail at Rikers, where he worked. On the line was Prison Health's Rikers office, ordering him to send one or two of his four or five psychiatrists—each of whom might already have 30 patients to see—to jails that could not meet their city-mandated staffing quotas that day.

Rikers had a lyrical name for the practice: floating. But Dr. Cooper likened it to a bumpy ride on a unicycle with three punctures and only one patch. "They move the patch around to whichever hole is leaking air the fastest," he said.

Mental health care, he said, was merely damage control, and the prisoners treated first were the many who knew they could get attention by threatening violence to themselves or others. Meanwhile, the staff tried to keep tabs on the patients who were quieter but often in more peril.

"You were juggling hand grenades, and one of them was going to go off, hopefully not in your hands," said Dr. Cooper, 52, who quit that August after nine years at Rikers.

His experience goes to the heart of what many employees say is the reality of daily medicine at Rikers. In interviews, more than two dozen current and former Prison Health doctors, physician assistants, psychologists and social workers said they were spread so thin that most mental health care was minimal. Most spoke on the condition that their names not be printed, saying they feared losing their jobs.

The numbers do not lie, they say. In 2000, the last year under St. Barnabas, the jails had about 830 full-time clinical employees, according to the hospital. Today, Prison Health has a clinical staff of about 670, the health department said.

That figure, set by the city, is inadequate, Dr. Cooper said—"designed to ration health care to cut costs as close to the bone as possible, and to provide a semblance of health care when one doesn't really exist." Prison Health, or P.H.S. as it is commonly known, goes along, more concerned with pleasing the city than with serving patients, he said.

The company's approach, he said, is essentially this: "Put your best face forward, hide as many problems as you can and hang on to the contract for as long as you can."

As a case in point, he and others cited the way the company regards different kinds of paperwork. Medical records, on one hand, are often outdated or unavailable, they said.

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## Prison Health Services (cont.)

Senior clinicians said they commonly had to sign off on treatment without seeing a medical history, a practice they said could jeopardize their licenses, and prisoners' health.

But at the same time, employees said, Prison Health uses doctors and other highly trained specialists to produce and double-check another set of papers: the blizzard of documents that city bureaucrats use to gauge the company's performance. The paper chase actually appears to have grown out of an effort by the city to prevent a reprise of the St. Barnabas years. In its first contract with Prison Health, the city listed the numbers of doctors, nurses, clerks and other staff required at each jail. Failure to document compliance with that list, known as the staffing matrix, for a single day, or even a shift, could result in a \$5,000 fine.

But Prison Health has turned the matrix into a meaningless yardstick, several doctors and physician assistants said. Some mental health clinicians said that a number of their most experienced colleagues—the clinical supervisors helping run the medical programs in each jail—work full time reviewing reports for the city, making sure boxes are marked and evaluations signed. Even those working with prisoners said they were overwhelmed.

"It became impossible to have a therapeutic conversation with a patient—it was just checking off boxes," said Dr. Daniel Selling, a clinical psychologist who quit in March after about eight months at Rikers. "The P.H.S. administration could care less what I do with a patient."

In the practice known as floating, the company has often sent a doctor or nurse with a backlog of patients at one jail to another where there are fewer prisoners to treat, simply to avoid fines, the Board of Correction said. The city has repeatedly fined Prison Health for incomplete filings, but never for treatment that resulted in injury or death.

"The constant shuffling of mental health providers from one facility to the next keeps them from being able to see his/her patient caseload," Ms. Potler, the board's deputy director, complained to city officials in her May 2003 memo. The company says it has greatly reduced that problem.

Floating, in turn, led to fudging, said several current and former employees. To sidestep a fine, they said, Prison Health has had employees sign in at one jail but then

work at another. When there have been too few doctors to float, medical administrators have signed in—but without seeing any patients, said three senior clinicians. One added, "The practice is clearly fraudulent."

Health department officials said they were not aware of any deception by Prison Health. But they said the staffing matrix had been changed in the new contract to ensure that a core group of mental health workers at each jail cannot be floated. The fines have been eliminated, officials said, and the company will be graded more on treatment than on paperwork.

Company officials denied that any employees had been forced to sign in at jails falsely. Ms. Pinney said that she tried to avoid moving employees between jails, but that it was sometimes necessary to meet patients' needs. The complaints about short-staffing, she said, were untrue, if expected.

"We've set a very high standard of performance for our employees," she said. "Some people like that and some people don't like that."

Several doctors said that an overextended and discouraged medical staff would not pick up on suicidal behavior.

"People lose touch, because the pressure is on," one mental health supervisor said in exasperation. "And if patients are not the priority," he added, "the consequence is those six suicides."

### Alone at the End

From the first days she spent at Rikers Island, charged with shoplifting 30 tubes of Revlon lipstick from a Rite-Aid in the Bronx, it was obvious that Carina Montes was carrying around something a lot weightier than stolen merchandise.

A 29-year-old former gang member with a gunshot scar on her stomach and a teardrop tattooed under her right eye, Ms. Montes was sexually abused as a child. She was 8 when she began seeing a psychiatrist for depression, medical records show. She tried to kill herself three times, at ages 13, 18 and 25, and arrived at Rikers severely depressed.

She told some of this in her intake exam, to a physician who diagnosed manic depression and prescribed antipsychotic medication, state investigators said. But little of the information would follow Ms. Montes, they said, as Prison Health passed her from one staff member to another, losing track of her records and even seeming for months to lose track of the young woman herself.

Over the five months she had left, she

would never be seen by a doctor again, the State Commission of Correction found. At the end, she would have no one to help her but other prisoners and a rookie jail guard.

Isolation was nothing new for Ms. Montes. Born in Puerto Rico, she dropped out after the ninth grade into a different sort of education, selling crack on the Grand Concourse, then paying for it in city jails and upstate prisons. Paroled from a drug sentence in March 2002, she had no family to turn to—just Ana Torres, a lover who took her in from a women's shelter.

That Sept. 13, the day after Ms. Montes landed at Rikers, the doctor recommended an immediate mental health examination. But nearly three months passed before Prison Health performed the exam, which took place only because a guard had noticed Ms. Montes acting strangely, records show.

The social worker who finally examined her on Dec. 7 was a "floater" who rarely worked in the women's jail. Learning of Ms. Montes's three attempts to kill herself, he placed her on suicide watch.

It took another 23 days before Ms. Montes was seen by a mental health specialist, Brett Bergman. But he did not know his patient was on suicide watch, he later told investigators, because he could not find her medical file. "Patient appears to be doing well and was stable," Mr. Bergman wrote. Although he saw her twice more in the next month, he still could not locate the file.

No other clinician had a chance to help her; on Dec. 2, after she fought with another prisoner, the correction staff placed her in a protective-custody cellblock that had no regular mental health services.

On February 6, her isolation proved deadly. Although she was on suicide watch, Ms. Montes had not been seen by any mental health worker for nine days, records show. No one noticed that Ms. Montes, a diabetic, had refused her insulin injections for two days.

But another prisoner, Linda Vega, saw her weeping in her cell that morning, distraught over a quarrel with a new lover four cells away. "Everything I love don't love me," she lamented, according to Ms. Vega, and said she would hang herself. "I then noticed sheets torn apart between her legs," Ms. Vega told city investigators.

At 11 a.m., alerted by prisoners, a newly hired guard, Kje Demas, stood outside Ms. Montes's open cell door and asked if she was all right. "I'm O.K., I'm just going through something," she said, the guard told investigators. Mr. Demas said he had never been told she was on suicide watch. He did not see the bedsheets or any cause for alarm.

Shortly before 5 p.m., another guard heard prisoners screaming and found Ms. Montes hanging from an air vent.

The Correction Department fired Demas for failing to notify a superior. The health department said it "counseled" Mr.

Bergman and his supervisor for not reviewing the medical charts they could not find, and imposed a rule that prisoners on suicide watch be interviewed every two days.

There was no penalty for Prison Health.

Ms. Montes's body was shipped a few miles northeast of Rikers—to Hart Island, where the city buries its unclaimed dead. ■

[This article originally appeared in the *New York Times*. Reprinted with permission.]

## PHS Medical Care At Rikers Fails In Evaluation

by Paul Von Zielbauer

A recent evaluation of the company in charge of prisoner health care at Rikers Island, coming months after it was awarded a new \$300 million contract, has found that it has failed to meet a number of the most basic treatment goals. City records showed that the company, Prison Health Services Inc., did not meet standards on practices ranging from H.I.V. and diabetes therapy to the timely distribution of medication to adequately conducting mental health evaluations.

The city Department of Health and Mental Hygiene, which oversees the company's work at Rikers Island and at a jail in Lower Manhattan, found that during the first quarter of 2005, Prison Health failed to earn a passing grade on 12 of 39 performance standards the city sets for treating jail prisoners. Some of the problems, like incomplete medical records or slipshod evaluations of mentally ill prisoners, have been evident since 2004 but have not been corrected, according to health department reports.

Other problems identified in the department's review, involving things as serious as the oversight of prisoners who have been placed on suicide watch, are more recent or had not been evaluated by city health auditors in the past.

As a result, the city is withholding \$55,000 in payments to the company, the largest penalty for poor performance it has incurred since 2001, the first year of its work in New York City adult jails.

The evaluation came months after the health department gave Prison Health, the largest private provider of prison and jail health services in the nation, a new three-year contract to care for about 14,000 prisoners a day.

The company's work at Rikers had been criticized by independent city and state monitors, but the health department had defended its decision to renew the contract, and said it had devised a more effective and demanding way of evaluating the company's performance.

The company, in a statement, said it has provided sound care to prisoners at Rikers since taking over health care opera-

tions there. It described the shortcomings documented by the city as temporary, and said its poor evaluation was because of changes in the way the city had chosen to gauge its work.

"At all times during the first quarter, P.H.S. continued to deliver quality care to our patients," Benjamin S. Purser Jr., the company's vice president for ethics and compliance, said in the statement that was sent out via e-mail.

Robert Berding, the health department official in charge of overseeing Prison Health's work, said the city's medical standards are exacting—a company is required to meet the standards in every measured category at least 95 percent of the time over a three-month period. Each area that needed improvement, he said, would be closely monitored.

But some members of the city Board of Correction, a panel appointed by the mayor that sets jail standards, said the city's review was disturbing.

"It seems like the needle is moving in the wrong direction, not the right one," said Hildy J. Simmons, the chairwoman of the Board of Correction. Ms. Simmons made her remarks at the board's monthly meeting in Lower Manhattan yesterday.

Another board member, Paul A. Vallone, criticized the health department's decision to allow the company to come up with its own plan to correct the problems in care.

"It's like a judge allowing a criminal to determine his sentence," Mr. Vallone said, adding that the Board of Corrections should take a more active role in ensuring that the care would be improved.

Several board members seemed eager for a more comprehensive understanding about Prison Health's performance, and about how closely city health officials were monitoring the company at Rikers.

"I think it's time for us to be asking some questions and getting some clearer answers," Ms. Simmons said.

Mr. Vallone and a third board member, Gwen L. Zornberg, said several Prison

Health employees at Rikers believed the biggest obstacle to improving prisoner medical care were missing records that often forced doctors to examine patients without knowing their full medical histories, or what medications they took.

"Medical records seem to be getting lost over and over," Dr. Zornberg said.

Colleen Roche, a Prison Health spokeswoman, said the company was planning to begin using computerized medical history forms in July, allowing doctors to more easily summon patient records. The company, she said, was also building a new computer server to track specialized medical care in jail, a chronic problem during Prison Health's four-and-a-half-year tenure at Rikers. ■

[This article originally appeared in the *New York Times*. Reprinted with permission.]

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# From the Editor

by Paul Wright

The many duties I have as editor of *PLN* include doing a lot of the research for the news and legal stories that appear in *PLN* as well as coordinating *PLN*'s litigation efforts around the country, doing advocacy on behalf of prisoners' rights and administrative tasks related to the well being of *PLN* itself. All of which is fairly time consuming and exhausting. We are pleased to announce that effective September 19, 2005, we have hired Alex Friedmann as *PLN*'s associate editor to assist in both research and advocacy.

Alex is a former Tennessee state prisoner, skilled jailhouse lawyer and a long time prisoner rights advocate. While incarcerated Alex wrote regularly for *PLN* and since his release from prison has worked as a volunteer researcher for *PLN*. Alex is also one of the leading experts on the private prison industry in the US and has a wealth of knowledge and experience on that topic. As associate editor Alex will now be doing a lot of the research for the news and legal

stories that appear in *PLN* that I have been doing. We expect *PLN*'s already high quality to improve further. We are pleased and proud to have Alex on board.

Another change we have undertaken is the hiring of a desktop publishing specialist to handle the layout of each issue of *PLN*. Since we started publishing in 1990 we have done the layout of each issue of *PLN*, all 182 of them, in house. The last fifteen years have, however, seen a growing complexity to desktop publishing programs as they have gotten to the point that they require longer learning curves to use. Lance Scott is a professional graphic designer and he did the layout for the July issue of *PLN* as well as this issue and will be doing future issues as well. We see this as yet another important step in the ongoing professionalization of *PLN*. We are very pleased with Lance's work and look forward to further improving the quality of each issue of *PLN*.

We have received a number of letters from concerned readers inquiring about the

delay in receipt of their issues of *PLN*. As I mentioned in the last issue of *PLN*, our production schedule was delayed due a *PLN* trial in Florida and switching to a new desk top publishing program. We are publishing on a two week schedule and will be caught up on our regular schedule by the December issue. This does not affect the length of readers' subscriptions as those are calculated based on the number of issues sent, not the dates. We apologize for the delays this has caused.

*PLN*'s website continues to grow in size and subscribers on a daily basis. Every issue of *PLN* is posted online now both in a PDF format of the original magazine as it appeared in print as well as the full text of every article in a searchable database and the full text of all court cases we have published over the years. This has been a huge undertaking but it is finally available. All materials on the website can be easily printed for mailing to prisoners.

Enjoy this issue of *PLN* and encourage others to subscribe. 📧

## Court Orders Washington DOC to Stop Dragging Its Feet on Sex Offender Release Plans

by Hank Balson

The Washington Court of Appeals ruled in May that the state's Department of Corrections (DOC) has been illegally delaying decisions on early release plans for sex offenders, depriving certain prisoners of their earned early release credits without due process. The court held that DOC "must act on proposed release plans in a timely manner, so as to ensure the inmate has a genuine opportunity to benefit from the earned early release credits."

Washington prisoners incarcerated for sex offenses are eligible to earn early release credits that may enable them to transfer to community custody prior to the completion of their maximum sentence. As such prisoners approach their earned early release date, they are required to submit a plan for transferring to community custody. DOC used to prohibit certain prisoners from submitting community custody plans if the state was considering referring them for possible civil commitment proceedings.

In 2002 the Washington Court of Ap-

peals ruled that DOC could not deprive a prisoner of his earned early release credits solely because DOC was considering referring that prisoner for civil commitment under Washington's sex offender civil commitment statute. See: *In re the Personal Restraint Petition of Dutcher*, 114 Wn. App. 755, 60 P.3d 635 (2002). Regardless of DOC's civil commitment considerations, the court held, the Department must allow prisoners to submit a community release plan, and must make decisions about prisoners' eligibility for community custody based on the merits of the release plan.

In response to that ruling DOC adopted a new practice, requiring all prisoners being considered for civil commitment to wait until DOC obtained a forensic psychological evaluation before their release plans could be approved or denied. The purpose of the evaluation was to help DOC decide whether to refer prisoners to prosecutors for possible civil commitment. However, DOC failed to ensure that forensic psychological evaluations were obtained prior to prisoners'

earned early release dates. In some cases, DOC wasn't even scheduling the evaluations until many months after a prisoner's earned early release date had passed. Consequently, some prisoners were being held long past their earned release dates, in violation of state statutes and the requirements of due process.

Although the Department of Corrections is free to obtain a forensic psychological evaluation of a prisoner if it so chooses, the Court ruled that DOC is not authorized to postpone consideration of a prisoner's community custody plan while it awaits the results of such an evaluation.

The ruling applies to prisoners with determinate sentences as well as prisoners under the jurisdiction of Washington's Indeterminate Sentence Review Board.

The petitioners in this case were represented by Seattle attorneys Hank Balson of the Public Interest Law Group, PLLC, and Suzanne Elliott. The state did not seek review in the state supreme court. See: *In re Liptrap*, 111 P.3d 1227 (Wa. App. Div. I, 2005). 📧



# Over 96% of CCA Donations Go to GOP

by Matthew T. Clarke

It is well known that large corporations—especially those that are prone to feast at the government trough—make donations to political parties and candidates. Most companies like to hedge their bets, donating to both major political parties. Nationwide, Fortune 500 companies gave between 62 and 75 percent of the donations from their political action committees (PACs) to Republicans. Most of the rest went to Democrats. However Corrections Corporation of America's (CCA's) PAC gave over 96 percent of its \$149,500 in political donations to Republicans according to Federal Elections Commission filings through August 2004.

The less than 4% Democratic donations included a total of \$5,000 given to Tennessee Representatives Jim Cooper, Lincoln Davis, John Tanner and Harold Ford, Jr. Tennessee is CCA's home state. Most of the donations were made in states, such as Tennessee, Colorado, Georgia and Florida, where CCA runs private prisons.

Another nationally-known Tennessee-based company, FedEx, says that it gives about sixty percent of its donations to whichever party is in power. The other 40 percent is given to the opposition.

One exception to CCA's "fund the Republicans" rule came in the closely-contested Washington state gubernatorial election. There CCA gave \$1,350 each to Republican candidate Dino Rossi and successful Democratic candidate Christine Gregoire.

Some think corporate contributions are down in respect to political parties and candidates. However, the not-so-secret sump of political cash contributions is so-called 527 committees. Named for section 527 of the federal tax code, the committees are allowed to raise funds without limitations so long as they spend the money on political activities not directly related to the election of a candidate. Thus, 527 committees are allowed to do just about any political activity that doesn't mention the name of the candidate they champion. Examples of this include MoveOn.org and Swift Boat Veterans for Truth, both of which had a clearly partisan agenda favoring one of the presidential candidates and both of which were allowed to accept unlimited donations. Even more clearly biased groups such as RGA (Republican Governors Association) and DGA (Democratic Governors Association) count

as 527 committees.

CCA was not absent from the 527 donation frenzy. It gave \$212,055 to RGA and \$115,500 to DGA. Its total outlay to 527 committees was \$370,055. CCA is proud of its record of political donations according to CCA spokesperson Louise Chickering.

"We support organizations that want to further public-private partnerships and efficient government use of taxpayer money," said Chickering.

Melanie Sloan, executive director for the Washington-based Citizens for Responsibility and Ethics, a nonpartisan ethics organization, has another take on 527 committees. She believes that the corporate donors to are using their donations to 527 committees to influence state-level political decisions and therefore such donations should be regulated. Her organization has sued the Federal Election Commission to bring about such regulation.

"Corporations are not political," according to Ms. Sloan. "Most of them don't have a social agenda. They know that governors have the power to set regulations. In some ways they have more power than the president."

The McCain-Feingold campaign reform act ended the practice of allowing unlimited contributions to political parties in 2002. This was done to prevent rich and powerful corporations from purchasing access to and persuasion of government officials. However, 527 committees allow the continuation of such practices through a legal loophole that needs closing. Another legal loophole in the campaign finance reform laws is the donation by large corporations to politician's charities. For instance, CCA gave \$100,000 to House Majority Leader Tom Delay's personal charity, the DeLay Foundation for Kids [PLN, April, 2005].

Yet another loophole is the legal defense fund contributions to politicians like DeLay who are being investigated for and charged with alleged wrongdoings. All of these loopholes blur the line between political and

non-political donations and allow corporations to buy face time, legislation, contracts and influence with politicians. They are all problems that need solving, preferably by amendment of the campaign finance reform laws. ■

Sources: *Jackson Sun*, *The Olympian*, *Chattanooga Times Free Press*, *Associated Press*.

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# New York Senator Returned To Jail After Illegal Release

by Michael Rigby

Most people will accept that certain perks are available to a state's top lawmakers. What is unacceptable, however, is that these perks often continue even after the public trust has been violated. The case of former New York Senator Guy Velella, a once powerful Republican convicted of accepting bribes from state contractors, is a prime example. From being given a sweetheart deal, to gaining early and improper release from jail, to remaining free for Christmas after he lost his appeal, the disgraced senator's case is rife with favoritism.

Evidence of preferential treatment was apparent from the start. In May 2002 Velella, 60, his father Vincent, 90, and two co-defendants were indicted in a scheme to accept bribes from state contractors. But prosecutors bargained with Velella. In exchange for pleading guilty to a felony charge of accepting at least \$137,000 in kickbacks, his father was given immunity to prosecution and Velella was sentenced to just one year in jail. Velella's co-defendants—Hector Del Toro, 52, and Manuel Gonzalez, 67—were sentenced to jail terms of 9 months and 8 months, respectively.

The actual sentences, though, turned out to be much less. After spending just three months behind bars, Velella was released from Rikers Island on September 28, 2004, by a virtually unknown city entity—the Local Conditional Release Commission (LCRC). His partners in crime were also sprung. Unforeseen at the time was the firestorm of controversy the releases would ignite.

As it turns out, the decision to release Velella was plagued with improprieties. First of all, Velella's release was not based on any particular merit, but rather his tearful calls to commission members and letters of support from friends in high places.

In several calls and one letter to the panel, Velella said he had trouble breathing, couldn't sleep, and feared he would have a heart attack. Velella also allegedly told Raul Russi, the panel's then-chairman, that he "was going to kill himself" if he wasn't let out. In August, Russi called a rare meeting to consider Velella's case. Russi said he called the meeting because the case was so prominent.

Velella's treatment is in sharp contrast to that of typical prisoners. While his cries prompted city officials into action, no one

seemed to notice the despair of less prominent prisoners like David Pennington and Milton Diaz. Pennington, a prisoner serving time at Rikers for burglary, hung himself with a bed sheet in July 2004. That same month, Diaz committed suicide in a Bronx jail—hung himself with a pair of shoelaces. But did any public official take special notice of their emotional state? Apparently not.

When New York legislators created LCRCs in 1989, they were seen as a way to ease overcrowding and save money. But they were never cost-effective because they were rarely used for ordinary prisoners who tend to be poor and politically unconnected. In the early 1990s, for instance, when the city's jail population peaked at 20,000, the LCRC was approving only about 200 prisoners a year for early release. "[E]ven when they were releasing a lot, it was still a little," said Michael Jacobson, former head of New York City's criminal justice programs.

Recent years have seen the numbers decline even further. Between 1999 and 2004 the city's LCRC—which has an annual budget of \$386,000—granted early release to just 15 people. And in 2004, only 4 won early release: Velella, his collaborators, and one other.

For many New Yorkers, Velella's case confirmed "their most cynical suspicions about government," said Councilman David Yassky, a Brooklyn Democrat. "It seems to me unlikely that the three people most worthy of compassion in Rikers Island were these three people who happened to be co-conspirators in this bribery case," said Yassky. "I think there is very, very good reason to suspect that something else went on here."

Ironically, while still a senator in February 2004, Velella had voted with his senate cohorts, mostly Republicans, to abolish the very panel that freed him. The move came after an LCRC in upstate New York released Mary Beth Anslow, a woman convicted of operating an illegal daycare where a 3-month old died. Like Velella to follow, Anslow was released just 3-months into her one year sentence. The bill died due to opposition in the State Assembly.

Several months later, in a classic case of the double standard, the bill's main sponsor, Republican Senator Michael F. Nozolio, along with 31 other prominent Velella cheerleaders, wrote letters petitioning the LCRC for Velella's release. Other letter

writers included former mayor Ed Koch, the Archdiocese of New York, and a host of civic leaders, lawmakers, and retired judges.

Responding to the outcry over Velella's apparent preferential treatment, Mayor Michael Bloomberg quickly ordered the city's Department of Investigation (DOI) to examine his release. The results were not good. The DOI found that the LCRC kept slipshod records, was largely ignorant of the rules under which it operated, and failed to follow procedure when considering early releases. In Velella's case, for instance, the LCRC had not waited the mandatory 60 days after rejecting his initial application before conducting a second review. Moreover, only two panel members were present when the vote to release Velella was taken, rather than the required quorum of three. The investigation also revealed that Velella had hired the husband of panel member Jeanne Hammock to advise him on the board's procedures. Ms. Hammock, who voted against releasing Velella the first time, was conspicuously absent during the second vote.

Embarrassed by the imbroglio, Bloomberg in October forced the resignation of all 4 board members—Russi, Hammock, Amy Ianora, and Irene Prager—and appointed 5 new ones. On November 19, 2004, the reconstituted panel ordered Velella, his fall partners, and two others back to jail. In revoking the five paroles, the commission cited irregularities uncovered by the DOI.

But Velella, unwilling to accept the board's decision, immediately challenged the reversal in court. Ten days later, at 10:00 a.m., a state supreme court upheld the panel's decision and gave Velella until 5:00 p.m. to surrender. Just 3 hours later, however, Velella's lawyers obtained a lightning-fast ruling from the Appellate Division of the State Supreme Court, First Department, allowing him to remain free until December 16, when the court's 5 judges would hear his appeal.

Ultimately, the panel of Appellate Division judges affirmed the lower court's ruling [see sidebar], but allowed Velella to remain free until December 27. The Christmas reprieve was especially charitable since every day Velella remained free was subtracted from his jail term. Velella was freed from jail on March 18, 2005, after serving 182 days of his one-year sentence in jail.

Critics of Velella's release are glad the new board's decision was upheld. David

M. Kapner, an attorney for the Legal Aid Society, said Velella's controversial release reinforced the worst perceptions of the criminal justice system. "The public perception is if you're rich and well-connected, the system works for you," Kapner said. "He pled guilty, he got his deal. You live with it." Civil-rights attorney Ron Kuby complained that the poor and unconnected defendants he represents never get the kind of breaks Velella has. "In terms of both the whining and the corruption, it's hard to compare him to anybody else," said Kuby. "Who would have thought Martha Stewart would be a more stand-up convict than Guy Velella?"

Velella will continue to draw his \$80,000

a year state pension. In August, 2005, it was revealed that Velella's campaign finance group, Friends of Guy Velella, had donated \$50,000.00 to the state Republican Party. When media outlets asked the Republican Party if they had a problem accepting money from a convicted felon, convicted of crimes related to his public office no less, Senate Republican leader Joseph Bruno's office said the GOP had no problem taking campaign funds from Velella. "The senator was a valued member of the [Republican] majority, and we value his continuing support," said Bruno spokesman Mark Hansen. ■

Sources: *New York Times*, *New York Post*

## New York Appeals Court Upholds Former Senator's Return To Rikers

The Appellate Division of the New York Supreme Court, First Department, has ordered former state senator Guy J. Velella and four others (the petitioners) back to jail. In reaching this decision the court found that the petitioners had been illegally released by New York City's Local Conditional Release Commission (LCRC).

All 5 petitioners—including Velella and his co-conspirators, Manuel Gonzalez and Hector Del Toro—had been granted early release by the LCRC. Following a flurry of public criticism over Velella's scandalous release, Mayor Michael Bloomberg fired the original board members and appointed new ones. On November 19, 2004, the newly reconstituted LCRC reversed the prior board and ordered all five petitioners back to jail.

Velella and the others challenged the decision. The LCRC's ruling was upheld by a state supreme (trial level) court, and appeal was taken.

On December 20, 2004, a panel of five Appellate Division judges unanimously affirmed. Petitioners Kamala Stephens, Carlos Caba, and Gonzalez, the court held, had not served the required 30 days in jail prior to being considered for release (Correction Law § 273[1]). As to Velella and Del Toro, the board had not waited the required 60 days after rejecting their first application for release before considering their subsequent applications (Correction Law § 273[6]).

The court went on to note that although government agencies are normally barred from changing a valid final order under New York law, "an agency has the power to set aside a determination on the ground of a significant irregularity." Moreover, because

the releases were illegal, the petitioners had no vested substantive due process right to the protection of the release orders. The court further held that the petitioners' right to substantive due process had not been violated because, "under the circumstances of these cases, each of the petitioners had an adequate post-deprivation opportunity to be heard in these article 78 proceedings."

The court concluded that the release orders were invalid and that the current LCRC had acted properly. Accordingly, the petitioners were ordered to surrender themselves, but not until December 27. The court offered no explanation for the Christmas reprieve. Velella's attorney's immediately appealed to the state's highest court, the Court of Appeals, which declined to hear his case. See: *Matter of Velella v. New York City Local Conditional Release Commission*, 13 A.D.3d 201, 788 N.Y.S.2d 8 (NY 2004). ■

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# Prisoners' Experience In Tsunami Marked By Courage, Callousness

by Michael Rigby

Residents of Martara, Sri Lanka, no longer fear the prisoners who live among them. That's because they've seen a different side. Though frantic to check on family and friends after a huge wave slammed into the prison's exterior—knocking down a perimeter wall and setting them free—the newly liberated prisoners stopped to aid the overwhelmed local inhabitants. “The way the water came in, the people in jail were affected first,” said A.G. Karunadasa, 77, who lives near the jail. “Even as they ran away, however, they stopped to help us.” Another witness, Manori Kulasooriya, a 37-year-old teacher who lives a few doors down, said the prisoners assisted the whole neighborhood, carrying babies through the flood and boosting people onto roofs. “The prisoners all helped us, so we're not afraid,” she said.

On the morning of December 26, 2004, an earthquake-generated tsunami devastated the coasts of Southeast Asia and Africa leaving millions homeless and at least 157,000 dead. Like other accounts emerging from the stricken region, those involving prisoners evoke a wide range of emotions. Some

inspire, some depress, and some demonstrate a chilling lack of compassion.

The 413 prisoners at the Martara prison began their day on December 26 like any other. At 6 a.m. many of the lower security prisoners were in the prison's common area exercising and milling about, while those convicted of more serious crimes remained in their cells. Then something amazing happened—at least from the prisoners' perspective. At around 9:20 a.m. a massive wave swamped the prison, demolishing a 15-foot-high perimeter wall and allowing the prisoners to flee. “It was as though nature made bail for everyone,” said guard Indika Lasath Kumara, 20.

Along with helping the locals as they left, several prisoners rescued three female jailers from the raging waters, saving their lives. All three of the women nearly drowned, said guards. Regrettably, not everyone survived. Eight prisoners were crushed to death by the water as they swept the street outside the prison.

For most of the prisoners, their freedom was, by choice, short-lived. By January 3, 2005, 83 of the escapees had returned to the prison. However, because the prison was not yet secure and both of its buses were damaged by the water, officials asked those returning to take the public bus to another jail down the road, and most did. Guards said that most of the prisoners who returned did so after checking on their families and making funeral arrangements.

The government hoped the remaining prisoners would also return and offered a short amnesty period, which ended January 7. Officials were still unsure how many prisoners actually died in the disaster and how many were just on the lam.

The monstrous waves were even more deadly at the main jail in Indonesia's Banda Aceh province. As the tsunami approached, the wardens released prisoners into the main courtyard. But no one expected what happened next. A giant wave engulfed the compound in a Niagara of dirty water and debris, decimating the jail. All 280 prisoners and 6 guards were missing and feared dead.

Teuke Darwin, head of the provincial justice ministry, said he was told about the final minutes inside the prison by a warden who fled just after the earthquake but before the tsunami. A tour of the prison several days later revealed that cells had indeed been unlocked but that the prison's main door

and inside gate were bolted shut, meaning the prisoners were trapped inside when the waves hit.

The tsunami also wiped out the region's main women's prison in Longha, west of Banda Aceh. All 101 prisoners and guards were killed, said Darwin. However, because the town's buildings were all leveled by the raging water, it's now hard to determine where the women's jail once stood. More than 100 prisoners also perished in a jail in the northern town of Sigli, he said.

Perhaps one of the most disturbing stories to emerge is the shooting death of two prisoners at the Galle jail in Sri Lanka. When the first waves struck at around 9:10 a.m., the situation quickly became chaotic. The female section was inundated with over three feet of water. Prisoners in the jail—around 800 of them—were also hearing radio reports of tsunami waves lashing coastal regions and killing hundreds. Concerned about their families and afraid of more waves, the prisoners, most of whom were from Galle, demanded to be released. “Our wives and children could be affected. We want to go home. We want to protect them,” some cried out.

When officials didn't respond, the prisoners acted in desperation. Some began pelting guards with rocks. Others tried to escape. Determined that no one was leaving, disaster or not, officials requested assistance from the army. Fifteen soldiers responded. The frantic prisoners, still looking for a way out, tried to break open the gates with iron bars. Guards immediately opened fire with shotguns and automatic rifles. Others began beating prisoners with batons. Two prisoners were killed by weapons fire. Eight others suffered gunshot wounds and were taken to the prison infirmary and a local hospital.

After the melee more than 550 prisoners were evacuated to another prison in Boosa, about 6 miles away. According to subsequent reports, waves seriously damaged the jail property. A magistrate later commended the guards' actions. It's sadly ironic that prisoners freed by circumstance in one part of Sri Lanka saved countless lives, including their keepers', while those in another were callously gunned down. Residents may no longer live in fear, but the prisoners certainly do. ■

Sources: *Los Angeles Times*, *Seattle Post-Intelligencer*, *AP*, *Dallas Morning News*, *World Socialist Web Site*

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# Federal Immigration Detainee Taken Off Life Support Without Family's Consent

by John E. Dannenberg

A 69 year-old Mexican national, who suffered a heart attack at the federal Metropolitan Detention Center (MDC) in Los Angeles and was put on life support at White Memorial Medical Center, was taken off life support three days later without notification to or consent of his nearby family.

Prison officials were aware of Moises A. Murillo's preexisting heart condition, having placed him on daily medication for a clot near his heart in July. He fell off his bunk in August and broke three ribs. On Friday, October 22, 2004, guards found Murillo on the floor. When he was taken to the hospital, doctors declared him brain dead and put him on life support. MDC didn't notify Murillo's family "because it was late Friday by then, and over the weekend they didn't have time to get the family notified," according to U.S. Marshals spokesman Jimmel Griffin. "We only deal with emergencies as far as after-hours stuff," he added. Griffin further stated that MDC didn't have Catalina Hernandez' (Murillo's wife) phone number, but later found it in the visiting log. Hernandez had visited Murillo dozens of times since his

incarceration in July, and had been looking for him at MDC since that Sunday. "She was told he wasn't there," said Murillo's 31 year-old daughter, Ruby. "The guard gave her a phone number to call ... and it just rang and rang." On Monday morning, Ruby called her father's federal public defender, but he knew nothing.

Officials at White Memorial said hospital policy permits doctors to unilaterally remove life support for patients with no hope of recovery if family cannot be located. Doctors at White Memorial had consulted with U.S. Marshals on Monday before removing Murillo from life support. Unlike the case of Terry Schiavo, where the congress and president George Bush declared the sanctity of human life, Murillo was promptly disconnected from life support three days after lapsing into a coma. Murillo's case has not become a cause celebre among those who purport to support a "right to life."

Murillo had lived in the United States since 1958, working as a farm worker until his deportation in 1986. Following his il-

legal reentry, he had worked for 20 years at car washes. The incident was particularly disturbing since he was only facing an immigration violation. Murillo's family was outraged. Hernandez was not called and told of her husband's condition until a few hours after he was declared dead. ■

Source: *Los Angeles Times*.

## California Prison Employee Paid \$500,000 To Settle Whistleblower Retaliation Suit

The California Department of Corrections (CDC) settled an employee whistleblower retaliation suit for \$500,000 in October, 2004. CDC admitted it had additionally spent \$300,000 in legal fees fighting the claim.

Richard Krupp, formerly the chief of CDC's Personnel Automation Section, after being rebuffed by his supervisors on his plan to cut down on overtime and sick leave cost abuses he observed, took his complaint to the state Bureau of Audits. In January, 2000, the audit bureau reported that CDC's mismanagement of sick and overtime leave was costing taxpayers \$17 million per year. Krupp, directed to respond to the audit bureau's report, found that the true costs were instead a much higher \$105 million for fiscal year 1999-2000.

Krupp's reward for his exposé was a transfer to another job where all he did was read college students' proposals to interview prisoners. The state Inspector General and the state Personnel Board characterized the

transfer as retaliatory; Krupp sued CDC in 2002. In June, 2004, his wife, a CDC Correctional Captain, added her related complaint when she mysteriously became the subject of an internal affairs charge on June 18, 2004 regarding one of her employee's having taken a state vehicle home.

In reaching the \$500,000 settlement, CDC admitted no wrongdoing. The investigation against Krupp's wife was dropped. Krupp, who had been a star witness testifying before the California Senate in March 2004 about problems within CDC, still works for CDC in the Office of Substance Abuse Programs. He lamented, "Unfortunately, it took a lot of time and effort, and the taxpayers have been paying for all this stuff." But it appears they have been paying 200 times as much annually for the alleged overtime and sick leave abuses he uncovered. ■

Sources: *Sacramento Bee*; *Contra Costa Times*.

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# Supreme Court Finds Ohio Supermax Placement Policy Constitutional

by Bob Williams

The United States Supreme Court has found prisoners possess a liberty interest in avoiding supermax placement but ruled Ohio's new classification policy for placing and retaining prisoners in the state's supermax is constitutional as written. Relief for due process violations under the former written and unwritten policies was to be determined on remand.

In 2001, Charles Austin and 28 other Ohio state prisoners filed a class action 42 U.S.C. § 1983 suit challenging conditions of confinement at the state's supermax, Ohio State Penitentiary (OSP). Eighth Amendment claims for medical and psychiatric care, inadequate recreation and harsh restraints were settled before trial which was held in 2002. The settlement included a two-year injunction with \$150,000 in attorney fees and \$10,000 per year in monitoring fees. Shortly before trial, a new policy 111-07 was issued which became the focus of trial and was found unconstitutional. The United States District Court for the Northern District of Ohio entered an injunction prohibiting further OSP placement until an approved 111-07 policy was issued complying with both the procedural and substantive due process changes ordered by the court. See: *Austin v. Wilkinson*, 189 F.Supp.2d 719 (N.D. Ohio 2002) [PLN, Feb. 2003, p. 6-7].

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the district court's three substantive due process changes as beyond the power of the court but upheld 12 procedural due process changes as complying with the Supreme Court's three-prong due process test announced in *Mathews v. Eldridge*, 96 S.Ct. 893 (1976). The Court also found supermax placement in Ohio is an "atypical and significant hardship" under *Sandin* and thus a state created liberty interest exists in avoiding placement at OSP. (Under *Sandin v. Conner*, 115 S.Ct. 2293 (1995), it is the nature of the deprivation which must impose an "atypical and significant hardship in relation to the ordinary incidents of prison life" and not the language of the regulation which gives rise to a liberty interest.) See: *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004) [PLN, May 2005, p. 26].

On certiorari, the Supreme Court

addressed both liberty interest and due process issues, specifically agreeing with the lower courts in their findings that prisoners possess a "constitutionally protected liberty interest in avoiding assignment at OSP." While Ohio conceded this point in briefing, the United States, as *amicus curiae*, staunchly argued prisoners have no such liberty interest.

The threshold question of liberty interest, a prerequisite to reaching the merits of a due process claim, was quickly dispatched by the Court. Unfortunately, the Court established no baseline for comparison with OSP conditions. Instead, they noted that the circuits have inconsistent baselines then simply stated that "OSP imposes such an atypical and significant hardship under any plausible baseline" from which to measure the Ohio prison system. The Court considered conditions such as prohibiting all human contact including cell-to-cell conversations, 24-hour lighting, and one hour per day indoor exercise to apply to most solitary confinement facilities. Two components, however, cause OSP to reach *Sandin*'s "atypical and significant hardship" threshold: (1) duration, which is indefinite with an initial 30-day review followed by annual reviews; and (2) parole ineligibility, for those otherwise eligible while at OSP. These harsh conditions the Court found "necessary and appropriate," relative to the danger "high-risk" prisoners pose to other prisoners and guards, but necessity does not diminish the liberty interest.

Turning to the due process analysis, the Court relied on its three-prong *Mathews* test. (1) Private interest affected by official action; (2) risk of erroneous deprivation and probable value of any additional safeguards; and (3) governmental interest, including function, fiscal, and administrative burdens.

**Private interest.** The Court rejected the lower courts' "assumption that *Sandin* altered the first *Mathews* factor" by requiring greater due process protection once an "atypical and significant hardship" is found. Finding this a *non sequitur*, the Court said "*Sandin* concerned only whether a state-created liberty interest existed so as to trigger *Mathews* balancing at all." Prisoners have limited procedural protections

by nature of their confinement's curtailed liberty. Any private interest must be evaluated within the context of the prison system. The fact that the new policy 111-07 provides any procedures was apparently good enough.

**Risk of erroneous deprivation.** This risk was found minimized by the new policy's requirement of notice of the factual basis for placement and opportunity for rebuttal, three-level review process providing power to overturn placement at any level, a prisoner's ability to object even at the highest level of review, and a placement review after 30 days. If a reviewer declines placement, the process ends and cannot be overturned at a higher level with placement reinstated.

**Government interest (function).** "Prison security, imperiled by the brutal reality of prison gangs, provides a backdrop of the State's interest," which is a dominant concern because Ohio is obligated to ensure the safety of its 44,000 prisoners plus the guards and the public. "Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and extend their power outside prison walls." The Court found this claim a compelling state interest.

**Government interest (fiscal).** According to the district court's 2002 fact-finding, it costs \$34,167 per annum to incarcerate a maximum security Ohio prisoner but \$40,007 for a year's stay at OSP. The district court based its findings on the Ohio Department of Rehabilitation and Corrections' web site which in 2005 claimed an OSP per annum rate of \$57,550. With the allocation of scarce resources stretched thin, there's no more money to fund "more effective education and vocational assistance programs to improve the lives of prisoners." It follows from this, so the Court reasoned, that the courts must continue their hands-off policy of giving "substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards."

**Governmental interest (administration).** The Court found that allowing a prisoner to call witnesses or providing the other attributes of an adversarial hearing



prior to OSP placement would defeat “both the state’s immediate objective of controlling the prisoner and its greater objective of controlling the prison.”

Recognizing that the new policy has yet to be implemented, the Court noted that if it does not in practice operate as described in its opinion, a new challenge may be brought. Jules Lobel, a Center for Constitutional Rights attorney in New York, said this ruling might prevent the state from transferring en masse its death row inmates from the Mansfield Correctional Institute to OSP. (See accompanying article *Ohio Death Row Moving to Supermax*.) A motion for contempt was recently denied by the trial court. This ruling pretty much leaves unfettered discretion to prison officials to place prisoners in control units. It does reverse Fourth and Fifth circuit precedents that had held prisoners would never have a due process claim pertaining to their control unit placement. See: *Wilkinson v. Austin*, 125 S. Ct. 2384 (2005). ■

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## Ohio Death Row Moving to Supermax

by Bob Williams

In March 2005, the Ohio Department of Rehabilitation and Correction (DORC) announced that Ohio’s 193 death row prisoners would be moved from the Mansfield Correctional Institute (MCI) to the state’s Supermax facility, the Ohio State Penitentiary (OSP), to save millions of dollars.

OSP warden Marc Houk claims the new environment will be less restrictive than normal OSP conditions and comparable to the current death row MCI conditions (where death row was moved to after the 1993 riots at the Southern Ohio Correctional Facility in Lucasville). The proposed differences at OSP include dayroom access, interactions with other death row prisoners, outdoor exercise, more time outside OSP’s smaller cells, access to programs and religious services, and up to 15 visitors per month—all of which are denied other OSP prisoners.

ACLU attorney Staughton Lynd, counsel in the Supermax conditions case in the United States Supreme Court (see accompanying article “Supreme Court Finds Ohio Supermax Placement Policy Constitutional”), is not convinced the conditions will

be similar. Lynd says the real reason for the move is to fill OSP which, as of June 7, 2005, held 269 prisoners with 235 vacant cells.

Lynd also states that the new supreme court ruling does not provide for the “wholesale transfer to OSP of an entire category of prisoners without assessing the security risk presented by a particular individual prisoner” and complying with the other due process requirements of the new placement policy 111-07.

The state delayed the move pending the outcome of an ACLU action filed against the move. In October 2005, the trial court denied the prisoners’ motion. *PLN* will report the decision in detail in an upcoming issue. ■

Source: *Associated Press*

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# Report: Federal Prison Guards Sexually Abuse Prisoners With Near Impunity

by Michael Rigby

Federal prison guards and other employees who have sex with prisoners are rarely prosecuted, and when convictions do result the punishment is often trivial, according to a report by the Justice Department's Office of Inspector General (OIG). The April 2005 report, *Detering Staff Sexual Abuse of Federal Inmates*, blames the problem on light penalties and loopholes in federal law.

Between fiscal years (FY) 2000 and 2004, 351 federal prison employees were investigated for alleged sexual abuse of prisoners. Of those, OIG investigators found enough evidence in 163 of the cases to refer them for prosecution. However, fewer than half (45%) were accepted by prosecutors. Even worse, the 65 that were eventually convicted received lenient sentences. The majority (73%) received probation, 15% were sentenced to less than 1 year in jail, and one received only a fine. Just 8% were sentenced to more than 1 year imprisonment.

Consequently, investigators reported that these predators are emboldened by a

culture of impunity, believing they either won't be caught or that there will be no repercussions if they are. They're generally right. The report cited one case in which prosecutors refused to pursue action against a teacher who confessed to having sex with a prisoner, referring to it as a "stupid sex case" and a "waste of time." "Why do you people keep bothering us with these cases?" the prosecutor asked OIG agents. "It's only a misdemeanor!"

Under federal law, punishment ranges for sexual assaults not involving force or the threat of force are absurdly small. For instance, sexual abuse of a prisoner, 18 U.S.C. § 2243 (occurring when a sex act is committed), is a misdemeanor with a maximum penalty of 1 year imprisonment. Sexual contact, 18 U.S.C. § 2244(a)(4), which involves touching a prisoner in sexual areas for lewd purposes, is also a misdemeanor, carrying a maximum sentence of 6 months. By contrast, 43 states impose penalties of more than 1 year imprisonment for unforced sex acts with prisoners.

The report further noted that due to the inherent inequality of their positions, the potential for security problems arising from compromised guards, and the fact that these predators often target prisoners who have been sexually abused in the past, sex between staff and prisoners is never viewed as consensual—it is always illegal. Many times, guards and other staff prey on prisoners who are psychologically weak, disabled or otherwise vulnerable.


In one case cited by the report, a Bureau of Prisons (BOP) psychiatrist at a Metropolitan Detention Center was charged with seven counts of sexual abuse of a ward for having sexual relations with his female mental health patients. He was sentenced to 1 year in jail. In another case, a BOP guard was sentenced to 12 years in prison and 3 years supervised release after being convicted on 11 counts of sexual abuse and sexual contact with prisoners. The guard, who worked at a Federal Transfer Center, had targeted former prostitutes and those facing deportation.

Guards and staff who monitor the 27,000 federal prisoners in contract facilities typically escape prosecution altogether. Courts have generally found that private facilities under contract with the BOP are

not encompassed by the statutory language of 18 U.S.C. §§ 2241-2244, which govern sexual abuse of prisoners by prison staff. [However, prisoners who assault staff at such facilities are being convicted of assaulting a federal officer!] Consequently, when the OIG refers sexual abuse cases for prosecution that occur in these private prisons or halfway houses, they must rely on state prosecutors who tend to "focus their limited resources on prosecuting sexual abuse involving state, rather than federal, inmates." The report notes that many states specifically include contract facilities in statutes governing the sexual abuse of prisoners by staff.

This pervasive sexual abuse—which investigators recognized is significantly underreported because prisoners generally fear retaliation and/or assume they won't be believed—exposes the BOP to civil and criminal liability. Without providing specifics, the report notes that the BOP paid \$600,000 (presumably during the investigation period, FY 2000-2004) to settle two separate lawsuits brought by prisoners who were abused by staff.

The sexual abuse also causes significant harm to the prisoners. According to one BOP psychiatrist cited in the report, prisoners "may experience deep psychological and emotional trauma by being sexually abused in prison ... [and] may suffer disciplinary actions for engaging in sexual relations with staff such as solitary confinement or undesirable transfers to another institution far from their families."

The report made three specific recommendations, which investigators believe will help curtail instances of sexual abuse in federal prisons and contract facilities: 1) increase the maximum penalty for sexual abuse of a ward to 5 years imprisonment; 2) increase the maximum penalty for abusive sexual contact to 2 years imprisonment; and, 3) extend federal criminal jurisdiction to persons who have sex with federal prisoners in detention facilities under contract with the BOP. *PLN* reports extensively on prison rape issues. See indexes for more. The report is available on *PLN's* website at [www.prisonlegalnews.org](http://www.prisonlegalnews.org). 

Additional Sources: *Tacoma News-Tribune*, *New York Times*, *Associated Press*

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# \$15,000 Settlement In Hawaii Voting Rights Suit

by John E. Dannenberg

Dwayne Yoshina, Chief Election Officer of the Hawaii Office of Elections and Genevieve Wong, Honolulu City Clerk agreed to pay \$15,000 in damages for disenfranchising 44 prisoners at the Oahu Community Correctional Center (OCCC) by their failure to provide the prisoners with absentee ballots and to monitor election rights in the November, 2000 general election. After \$10,000 was deducted for the prisoners' attorneys, an award of \$833 was approved for each of the six prisoners who submitted valid claims. The prisoners' claims for injunctive relief against Hawaii correctional officials were dismissed as moot because the prisoners had since been released from custody.

William Remmers, Jr., was a pretrial detainee at OCCC in the months prior to the November 2000 general election. He was a registered voter, and followed OCCC instructions to sign up for an absentee ballot. He was not told that ballots could be

requested from the City Clerk. Because election officials thus failed to service OCCC, he was denied his right to vote. Remmers' administrative appeals alleging deficient voting policies were denied. He sued election officials and OCCC in U.S. District Court under 42 U.S.C. § 1983 for disenfranchisement.

The court certified Remmers' complaint as a class action because there were purportedly 44 similarly situated potential claimants. Remmers also sought injunctive relief to require OCCC to implement a plan to prevent future such disenfranchisement, claiming that although he had by then been released from custody, the issue was not moot because it was "capable of repetition, yet evading review." The court disagreed, relying upon precedent that held that when "repetition" would require the plaintiff to commit a new crime, something he could prevent, the likelihood of recurrence was too remote to avoid mootness.

In assessing constitutional liability, the court distinguished OCCC actors from election officials. For OCCC, a "heightened pleading standard" was invoked requiring Remmers to show that OCCC personnel acted to disenfranchise him. But OCCC reasonably did its part by providing Remmers with a sign-up sheet. It was the failure of election officials to monitor OCCC and provide the absentee ballots that actually injured Remmers. Accordingly, the court dismissed OCCC defendants and permitted damage claims to proceed against the election officials.

On November 4, 2004, the parties settled for \$15,000 in damages, \$10,000 of which went to the attorneys. After proper advertising, six responding claimants were approved to divide the remaining \$5,000. The class was represented by the ACLU, by and through attorneys John Edmunds and Ronald Verga of Honolulu. See: *Remmers v. Yoshina*, U.S.D.C. (D. Hawaii), Civil No. 02-00451 DAE/KSC. ■

## Wackenhut Settles Suit Over Premature Birth for \$98,000

On August 12, 2004, Wackenhut Corrections Corporation, now known as GEO Group, Inc., settled a suit alleging that inadequate medical care at a 640-bed Wackenhut-run jail caused a prisoner to give birth prematurely.

Melissa Villarreal, 32, a former prisoner at the Wackenhut-run jail in downtown San Antonio, was arrested for drunken driving and incarcerated at the jail in 2001. She alleged that inadequate medical care at the jail caused her to give birth to her son, Logan Daniel Flores, prematurely. The boy was born on November 7, 2001, at University Hospital, weighing 1 pound, 6 ounces. He continues to have medical complications due to the premature birth. Villarreal also alleged that she was not allowed to see the boy or provide milk for him.

Wackenhut agreed to pay Villarreal \$94,369, to settle medical claims for the boy (whose treatment was largely paid by Medicare) for \$750 and to pay \$3,500 to a court-appointed attorney who represented the interests of the baby.

Ironically, the settlement announcement came after U.S. Magistrate Judge Pamela Mathy, unaware of the settlement agreement, recommended granting Wackenhut summary judgment, noting that the company had documented that it gave Villarreal adequate medical care.

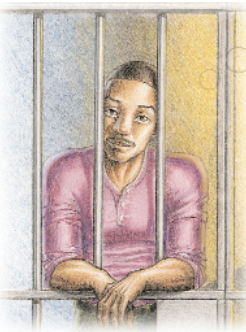
"This was plan B just in case the summary judgments did get granted against us, and that is exactly what happened," said Villarreal's attorney Frank Menchaca of San Antonio.

As a part of the settlement, Wackenhut denied any wrongdoing. See: *Villarreal v. Wackenhut Corrections Corp.*, U.S.D.C. W.D. Tex.-San Antonio Div., Civil Action Case No. 5:02-cv-625. ■

Additional Sources: *San Antonio Express-News*

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# 42 Alabama AIDS Prison Deaths In Five Years Spurs Major Medical Suit Settlement

by John E. Dannenberg

The Alabama Department of Corrections (ADOC) settled a class action federal civil rights lawsuit brought by Limestone Correctional Facility AIDS-afflicted prisoners who had complained of unconstitutional conditions of medical treatment and confinement that resulted in excessive suffering and a high mortality rate. The settlement implicated performance failure of Limestone's former contract medical provider, NaphCare, Inc. The instant settlement is in addition to earlier hepatitis-C and working-conditions settlements previously reported in *PLN* (Oct. 2003, pp.3, 5; Jan. 2003, p.12).

Antonio Leatherwood and four other Limestone prisoners sued Donald Campbell, Commissioner of ADOC, Ronald Cavanaugh, Director of Treatment of ADOC, Billy Mitchem, Limestone's Warden and David Wise, Deputy Warden in a 42 U.S.C. § 1983 class action suit for injunctive relief for all AIDS-afflicted Limestone prisoners. The impetus of the suit was to end the years of pain and suffering and ensure that medical care would improve. U.S. District Magistrate Judge John Ott (U.S.D.C., N.D. Ala. (Western Div.) had found, "It is evident that lives were lost due to preventable lapses in the medical treatment. HIV prisoners died without necessary intervention by the Limestone medical staff or ADOC."

Indeed, court-appointed mortality

expert Dr. Stephen Tabet found that 42 prisoners had died of AIDS since 1999, a figure he found "remarkably high" compared to other prison systems. Dr. Tabet concluded that "the most egregious failure at Limestone is the number of preventable deaths. ... In almost all instances, the death was preceded by a failure to provide proper medical care or treatment. Consistently, patients died of preventable illness. ... At least one patient had such severe pneumonia that he suffocated in front of the medical staff despite the patient's request for treatment and hospitalization. Another, critically ill Terrell Grey, was taken in a van for two hours to a Birmingham hospital, instead of to a local facility; he died enroute, "tended" only by two guards. The plaintiffs had testified that many HIV-positive prisoners "housed in dormitory 16, [the] warehouse HIV infirmary, died a horrible death, literally standing on their feet."

Accordingly, the parties entered into a comprehensive 18-page Settlement Agreement which became the court's order on June 24, 2004. Although medical care issues were fully settled, an unresolved issue was the desegregation of HIV-positive prisoners from general population prisoners in their "institutional programs" (e.g., education, training, supervised release). The court felt that it was more important to get medical care resolved via a prompt settlement than to delay the entire case for a lengthy trial (and possible appeal) at the peril of continuing constitutional-magnitude healthcare violations. ADOC agreed to look into the desegregation issue. Nonetheless, although the Agreement automatically terminates after two years, the parties agreed that the court shall retain continuing jurisdiction to entertain claims of ongoing constitutional violations, if any, thereafter. Magistrate John E. Ou was appointed Special Master to monitor progress during the two-year remedial phase.

The Settlement Agreement is as profound as it is disturbing, in that its very terms indicate the deprived state of affairs that gave rise

to the suit. At the same time, it is comprehensive and serves as a model for other under-served prisons' HIV medical needs, and is therefore reported in detail here. Renowned HIV consultant Dr. Joseph Bick was hired to evaluate compliance and to suggest any improvements.

The standard of care is to be consistent with that adopted by the National Commission on Correctional Healthcare and the Centers for Disease Control and Prevention. The provisions apply to antiretroviral treatment of HIV infection as well as to the treatment and prevention of opportunistic infections and other illnesses [especially tuberculosis, where the entire 200 HIV-positive population plus staff were exposed when an active TB case went untreated in the HIV dorm]. "Medically necessary" care shall be provided, including alleviation of pain, prevention of diseases, prevention of organ deterioration and reduction of mortality.

Limestone shall employ an HIV specialist/medical doctor for AIDS and HIV prisoners. He shall have more than three years experience in inpatient and outpatient HIV care, and shall devote at least thirty hours per week to HIV prisoner treatment. An additional full-time registered nurse shall be hired at Limestone, who shall serve as the HIV Coordinator and triage person. A registered nurse (RN) - shall be on duty daily 24 hours/day at Limestone. In addition, a licensed practical nurse (LPN) shall be on duty 16 hours per day, every day, in the HIV dorms.

Guards shall not make medical decisions or judgments. RN's and LPN's shall not make decisions outside the scope of their licenses. All medical and custody staff shall receive CPR training. If Limestone cannot adequately care for an HIV prisoner, the prisoner must be sent to an outside specialist in a timely manner.

The HIV Specialist shall see every HIV-positive prisoner at least quarterly, to include a history, physical exam and evaluation of current CD4+ levels and viral load. All prisoners with AIDS will be seen at least every 60 days. Liver enzymes shall be monitored for those taking liver-threatening medications.

Protocols shall be adopted to minimize spread of the skin disease MRSA (Methicillin Resistant Staphylococcus Aureus) [see:

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PLN, Dec. 2003, p.10], including prevention, intake examinations, diagnosis and outbreak/control plans.

All medications shall be provided within 48 hours of being prescribed by the HIV Specialist, in appropriate doses and times. Medications shall be hand delivered to acutely ill HIV prisoners, and when medically appropriate, a snack shall accompany them. All HIV prisoners shall have fresh water available to them 24 - 7. The pharmacy shall stock all medications typically used in HIV and related infection treatment.

Limestone shall establish a chronic care program for HIV -positive prisoners. It shall dovetail with established treatment criteria for diabetics, per the agreement reached in *Gaddis v. Campbell* in October 2004 and those co-infected with Hepatitis C, per the agreement reached in *Baker v. Campbell* in 2004 (see: PLN, Feb. 2005, p.18). HIV patients showing signs of liver dysfunction shall have an HCV PCR test administered.

All HIV-positive prisoners shall have three meals per day, six days per week. On Sundays and holidays, they shall receive two meals plus a medication snack consisting of one sandwich and eight ounces of milk. Meals shall be served after 5 :00 a.m. Those patients prescribed medical diets shall have their individual needs met for calories, carbohydrates and fat. Patients with wasting shall have dietary supplements as medically necessary.

To cover emergencies, a wireless intercom shall be installed in five cells per dorm housing HIV prisoners. It shall be linked to the dormitory guard station, and shall be available for acutely ill HIV patients.

Any HIV -positive prisoner arriving

at Limestone shall be examined by a nurse within 24 hours of intake, and within 48 hours, he shall be seen by the HIV Specialist. Any previously prescribed medication shall be immediately provided again at Limestone, without disruption in the treatment.

Appropriate end-of-life care shall be provided, including choice of end-of-life options regarding life-prolonging treatment.

Physically disabled HIV-positive prisoners shall be provided facilities with adequate hand-railing, including in each HIV dorm shower. Any required prostheses shall be fitted within 90 days. HIV-positive prisoners shall have timely dental care, including treatment and fitting of dentures (within 60 days of impressions).

All sick call slips shall be triaged daily. Informal medical grievance forms shall be answered within 72 hours; formal grievance forms shall be handled within five days. Translators shall be made available for non-English speaking HIV-positive prisoners. Co-payments shall not be assessed for chronic care. Emergency care treatment of communicable diseases or upon any follow-up appointment. Housing shall be cleaned daily and disinfected between prisoner placements. All cleaning shall be documented, and dorms inspected weekly. There shall be no open bay housing or triple celling of HIV-positive prisoners. HIV counselors shall be provided for every HIV-positive prisoner, including use of outside agencies, at least once per week. HIV education material shall be provided, including updated medical periodicals. Prior to release, each such prisoner shall be given release counseling and Social Security Administration and planning services,. Upon release from

Limestone, all HIV-positive prisoners shall have access to their prison medical records as well as be given a 30-day medication supply. Any mental health evaluations and treatment of HIV-positive prisoners shall conform with the settlement agreement in *Bradley v. Haley*. ADOC presently employs Tennessee-based Prison Health Services, Inc. as its medical provider.

Plaintiffs were represented by Gretchen Rohr (Atlanta, GA) and Stephen Hanlon (Washington DC) of Holland and Knight, and David Lipman and Francis Amania (Miami, FL), all appearing for the Southern Center for Human Rights, who filed the original lawsuit in November, 2002. See: *Leatherwood v. Campbell*, U.S.D.C. (N.D. Ala., Western Div.) No. CV-02-BE-2812-W. ❏

Other sources: *Huntsville Times, Birmingham News.*

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# Louisiana Prison Writer Free After 44 Years

by Michael Rigby

Award-winning prison journalist and civil rights figure Wilbert Rideau, once described as “the most rehabilitated prisoner in America,” is free after spending more than four decades behind bars. Ironically, Rideau’s freedom came not from being exonerated, but from being found guilty a fourth time.

Rideau was a 19-year-old, virtually illiterate, eighth-grade dropout when he robbed a Lake Charles bank on February 16, 1961. After collecting \$14,079 in cash, Rideau, who is black, kidnapped three white employees and drove them to a bayou on the edge of town. There he shot teller Julia Ferguson, then stabbed her through the heart with a hunting knife. Rideau also shot the other hostages and left them for dead, but they survived. Caught just 80 minutes later, Rideau would spend the next 44 years in some of Louisiana’s most brutal prisons.

Rideau was sentenced to die for Ferguson’s murder in April 1961. It was the first of three death sentences to be imposed by juries comprised entirely of white men—the second came in 1964, the third in 1970. The U.S. Supreme Court overturned Rideau’s first conviction in 1963 because his confession had been broadcast repeatedly on local television before his trial. His second conviction was thrown out in 1969 because of a Supreme Court ruling in another case. Rideau was again sentenced to death in

1970, but that sentence was commuted to life in prison after the U.S. Supreme Court declared the current death penalty laws unconstitutional.

## Doing Time

Though conditions on Louisiana’s death row in the 1960s and ‘70s were unbelievably harsh, Rideau began to educate himself. “They didn’t allow exercise in those days. You went in and were locked down and you stayed locked down,” says Rideau. “They didn’t believe in books neither. On death row you could read the Bible. It was bread and water if they caught you with anything else.” Even so, some of the white guards smuggled books to Rideau, so he spent his time reading and learning to write. “I had to do something to hang on to my sanity, so I read. ... The only other thing to do was write,” he said in 1980.

After his death sentence was commuted in 1973, Rideau was moved to the Louisiana State Penitentiary at Angola—then one of the nation’s most savage prisons. At Angola rapes and stabbings occurred daily, guards routinely beat prisoners, cockroaches infested the food, and medical care was practically nonexistent.

Yet despite the barbarous conditions, Rideau continued to write. In 1976, he was appointed editor of *The Angolite*, which made history in 1977 as the first prison publication to be nominated for the National Magazine Awards. Under Rideau and co-editor Billy Wayne Sinclair (who remains imprisoned), *The Angolite* continued to excel, winning the Polk Award, the American Bar Association’s Silver Gavel Award and the Robert F. Kennedy Journalism Award. Rideau later narrated an acclaimed National Public Radio documentary and directed the Oscar-nominated film *The Farm*.

## Road To Freedom

In 2000, the U.S. Fifth Circuit Court of Appeals again overturned Rideau’s conviction, this time because blacks had been excluded from the grand jury in 1961. He was reindicted in 2001 and the case proceeded to trial in January 2005. But this time things were different.

First, the defense team unleashed an army of paralegals and law students to investigate potential jurors, checking everything from their political affiliations to the type of residence they inhabited. The selection,

which took place in Monroe 150 miles away, resulted in a racially mixed jury of 7 white women, 2 black women, a woman of mixed race, and a black man.

Second, the defense contended that racism played a role in demonizing Rideau after the crime. As one example, they pointed to a pervasive myth—which surfaced during every retrial—that Rideau’s attack had been so ferocious that he nearly severed Ms. Ferguson’s head. However, a forensic technician who testified for the defense stated that the victim’s neck wound appeared to have resulted from a tracheotomy performed at the hospital.

Finally, the defense argued that Rideau had only killed out of panic and should therefore be convicted of manslaughter, not murder. In a risky but necessary maneuver, the defense put Rideau himself on the witness stand. (Rideau had not testified in previous trials.) “The state’s narrative was a very simple, understandable narrative,” said George H. Kendall, one of Rideau’s attorneys. “We had to have an alternative narrative, and the only way we could get that out was through our client.”

As he had from the beginning, Rideau admitted killing Ms. Ferguson, but said that he had only done so after the hostages bolted from the car. “If I had intended to kill those people, eliminate witnesses, I would have done it right there in the bank,” Rideau testified. “It never entered my mind that I was going to hurt anybody.”

On Saturday evening, January 15, 2005, the jury agreed and found Rideau guilty of manslaughter. Because the maximum sentence for manslaughter in 1961 was 21 years, Rideau was given credit for time served, making him eligible for immediate release. In one of his first acts as a free man, Rideau apologized to the victims. “I’d like to give my heartfelt apologies to the victims in the offense and to all the lives that my actions have caused suffering,” he said.

Rideau’s future remains uncertain at this point, though he is certain of one thing. He wants to continue writing. “I always felt like if I could do what I was doing through the barrier of imprisonment, how much more could I do without the bars?”

In a final vindictive blow, the trial judge ordered Rideau to pay more than \$60,000.00 to the county for the cost of transporting and housing the jury. This is the largest cost bill ever levied on a defen-

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dant in Louisiana and comes despite the fact that Rideau had offered to plead guilty to manslaughter and avoid the expense of a trial and the fact that the court had refused to appoint Rideau's long time lawyers to represent him at trial and insisted, instead, on appointing a new attorney who told the trial court he was overburdened and lacked the time to properly defend Rideau. Rideau also served one of the longest sentences in Louisiana history, 44 years, which is more than double the 21 years allowed for the manslaughter charge for which he was convicted. The court has been asked to withdraw the order.

Rideau's defense team included Ted Shaw, president of the NAACP Legal Defense and Educational Fund, public defender Ron Ware, New York civil rights lawyer George Kendall, Baton Rouge legal researcher Linda LaBranche, and long-time New Orleans defense attorney Julian Murray.

Everyone at *PLN* wishes Wilbert success and good luck after his long overdue release from prison. We have long had an exchange subscription with *The Angolite*. 📧

Sources: *The New York Times*, *AP*, *Nola.com*, *Washington Post*, *Los Angeles Times*, *Houston Chronicle*

## New York City Settles False Imprisonment Suit For \$1.25 Million

On September 23, 2004, New York City agreed to pay \$1.25 million to a man who was falsely arrested and imprisoned for 15 months.

Bernie Pollard, a 28-year-old construction worker, was arrested at his Brooklyn home on July 22, 1989, in connection with a woman's stabbing death.

In a subsequent lineup at the 75th Precinct jail, Pollard was identified as the assailant by 4 out of 5 eyewitnesses. He was then transferred to Rikers Island where he remained for 15 months.

At the ensuing criminal trial, a bombshell was dropped—two of the eyewitnesses recanted their testimony. Detective David Carbone, they claimed, had coerced their identifications of Pollard. The jury exonerated him.

Following his acquittal, Pollard sued the city of New York and Carbone under 42 U.S.C. § 1983 for false arrest and imprisonment in violation of his civil rights. Pollard specifically claimed that the investigation and indictment was improper; that Carbone coerced the witnesses into identifying him;

and that Carbone failed to investigate any other suspects—including the woman's husband, who had a restraining order against him. In addition, Pollard contended that the grand jury was not given the opportunity to hear testimony from an eyewitness who later recanted.

During the civil trial, Pollard presented expert testimony from Maurice Knight, a New York City psychiatrist. Knight testified that as a result of his false arrest and imprisonment, Pollard suffered from Post-Traumatic Stress Disorder and depression and that he would require ongoing psychiatric care. Pollard also retained an expert on police practices and procedures, Captain Edward Mamet, also of New York City.

At the conclusion of opening arguments the defendants reevaluated their position and decided to settle for \$1.25 million. Pollard was represented by Richard Gross of the Brooklyn, New York firm Rubert & Gross. See: *Pollard v. City of New York*, Supreme Court, King County, Case No. 30562/01. 📧

Source: *VerdictSearch New York Reporter*.

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# Suit Over Rape of Prisoner By TDCJ Employee Settled for \$118,318.56 and Beach Property

by Matthew T. Clarke

On November 19, 2004, a Texas prisoner who was raped by a Texas Department of Criminal Justice (TDCJ) guard settled his suit against the guard and TDCJ for a total of \$118,318.56 and the guard's beach property.

Nathan Essary, 22, a Texas state prisoner of slight build, little prison experience and a history of mental illness, filed suit under 42 U.S.C. § 1983 alleging Michael Chaney, 25, a former TDCJ employee, sexually assaulted him and Luther Unit assistant warden Jerry Barrett failed to prevent the sexual assaults even though he knew of Chaney having previously sexually abused other prisoners and Essary.

Essary arrived at the minimum-security Luther Unit from the Montfort mental health unit in May 2001 after treatment for suicidal depression caused by his having been gang-raped at the Sanchez Unit in El Paso. He was assigned to the laundry where Chaney, a Laundry Manager, was well-known for improperly touching and

sexually harassing prisoners. Chaney turned his unwanted attention upon Essary. Essary avoided this situation by getting himself transferred to another shift. Later, Chaney was assigned periodically to that shift. He ignored Essary's pleas to stop the verbal harassment and unwanted touching.

Chaney threatened to give Essary bogus disciplinary write ups if he reported the harassment. Fearful that this would prevent his making parole, Essary kept silent. Chaney's behavior grew increasingly aggressive. He began kissing Essary and grabbing his genitals. Using threats, Chaney forced Essary to masturbate him. Essary managed to preserve some of Chaney's semen on his handkerchief which he mailed to the U.S. Attorney in Houston.

About a week later, Chaney ordered Essary to submit to sex. Essary refused. Chaney then threatened to have gang members kill Essary. Using that threat, he forced Essary to perform oral sex on him. Essary again managed to preserve some of the semen on his handkerchief.

Within a few days, Chaney was taunting Essary about wanting to "do it again soon." Essary put in a request to see a counselor. He met with two psychologists and told them of the sexual assaults. One of them told Essary that he had received several complaints from other prisoners regarding Chaney's sexually predatory behavior. Barrett was summoned.

Essary told Barrett of the threats and sexual assaults and asked for protection. Barrett told Essary that he would change his job. Essary told Barrett that he needed immediate help as he was scheduled to work with Chaney that evening, but Barrett just said, "Don't worry, you'll get a job change."

That afternoon, Chaney came to Essary's cell and ordered him to work. Later that afternoon, Chaney told Essary that he knew Essary was getting a job change and ordered him to stay late so they could "do it one more time." Using threats, Chaney again forced Essary to masturbate him. Later that night, Essary received a job change.

On May 30, 2002, based upon DNA test results on the preserved semen, Chaney was indicted in the 278th Judicial District Court in Huntsville on one count of aggravated sexual assault and improper sexual activity. He was released on bond.

Essary sought the assistance of the ACLU. ACLU attorneys Margaret Winter and Amy Fettig of Washington D.C. and Meredith Martin Rountree of Austin, Texas represented him. TDCJ settled its part of the lawsuit by agreeing to pay Essary \$64,000 in damages and the ACLU \$46,000 in attorney fees and costs. TDCJ also agreed not to seek costs of incarceration from Essary. Chaney settled his part of the suit by agreeing to pay Essary a lump sum of \$12,318.56 and monthly payments of \$50 for ten years as well as deeding two lots located in Crystal Beach, Texas, and valued at \$30,000 to Essary. Neither TDCJ, Barrett nor Chaney admitted wrongdoing.

The criminal case, which was filed in 2002, has languished in district court. Gina DeBois, chief of the Special Prosecution Unit for prison crimes, said that she would like to see something happen soon; however, "the case is filed in a district court where the judge does not place a high priority on cases that happen in TDCJ." Judge Kenneth H. Keeling of the 278th Judicial District Court tells a different story. He says no one from the Special Prosecution Unit or Grimes County District Attorney's Office has asked for a trial date. Chaney's criminal defense attorney, Frank Blazek, expressed another sentiment.

"I assume that, with the settlement of the civil case, the criminal case will go away," stated Blazek.

On March 11, 2005, Chaney was sentenced to probation, community service, and a fine. See following article for details.

Blazek is right. Perhaps justice is for sale in the law-and-order State of Texas. It could be that the tough-on-crime policy behind the motto: "Don't Mess With Texas" has exceptions when the criminal is part of the system. Could it be that an aggravated sexual assault prosecution, a charge that would send the average convicted defendant to prison for thirty or more years, can be bought off for a mere \$12,318.56, fifty bucks a month and \$30,000 in beach property? There are many men in TDCJ that would have loved to have had that sweetheart deal. Of course, they aren't in TDCJ as employees. See: *Essary v. Chaney*, U.S.D.C. S.D.Tex-Houston Div., Civil Action, Case No. H-02-3822. ■

Additional Sources: *Houston Chronicle*

## **Are You a Non-Violent Drug Offender Who Has Been Raped or Sexually Abused While in Custody?**

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# Texas: "Prison-Rape Capital Of The Country"

by Michael Rigby

Despite reputed efforts by officials in the Texas Department of Criminal Justice (TDCJ) to curb prison rapes, the number of reported sexual assaults has increased 160% in the past 4 years, from 234 in 2000 to 609 in 2004.

Some prisoner advocates say the problem is even more pervasive than statistics show. "I really have become convinced over the last three years or so that Texas is the prison-rape capital of the country," said Margaret Winter, an attorney who represents two prisoners who sued TDCJ. "When prisoners report it, they are ignored, laughed at, and often punished."

Many of the sexual assaults are perpetrated by guards. According to state records, since 2000 at least 129 Texas prisoners have reported being raped by guards or having sex with them.

One victim, Garrett Cunningham, 33, claimed that he was raped by former prison guard Michael Chaney, 53, near the showers at the Luther Unit in Navasota. Cunningham kept quiet about the 2000 assault because he feared retaliation. "He [the guard] told me he'd have me sent to another prison, where this would happen to me all the time from gang members," Cunningham said. "That he could have me killed in there."

Like Cunningham, many sexually victimized prisoners are reluctant to report the assaults. "Recurrence is the great fear," said Cindy Struckman-Johnson, a psychology professor at the University of South Dakota

who has studied incidents of prisoner rape in Midwestern prisons. "They fear harm by perpetrators, poor treatment by staff, and shame and embarrassment."

What's more, most allegations of prison sexual assaults never result in convictions. In the vast majority of cases charges are either not pursued or the perpetrators face lackluster prosecution—especially when a prison guard is involved.

Chaney is a typical example. Though at least three other prisoners also accused Chaney of raping them at the Luther Unit, only one resulted in charges. The prisoner in that 2001 case managed to save semen on a handkerchief, which DNA testing matched to Chaney. In January 2005, the prisoner settled a civil suit against Chaney and TDCJ for \$54,000.

But Chaney still skated on the criminal charges. On March 11, 2005, he pleaded no contest to having sex with a prisoner—reduced from aggravated sexual assault—and was sentenced to three years' probation, fined \$1,000, and ordered to perform 300 hours of community service. Under the plea agreement, the criminal charges will be expunged from Chaney's record if he successfully completes the probation.

Some of the rapes could have been avoided had prison officials taken the complaints of Cunningham and other prisoners seriously, said Ms. Winters, associate director of the American Civil Liberties Union's National Prison Project. "One prisoner was

lucky enough to smuggle DNA evidence out of the prison," she said. "But this man has had countless victims."

Slowly, the issue of prison rape in Texas is gaining attention. The case of former state prisoner Roderick Johnson is responsible for much of it. Johnson is suing seven prison administrators and staff members claiming they did nothing while gangs bought and sold him as a sex slave. Johnson also alleges that prison administrators at the Allred Unit in Iowa Park refused to protect him because he's gay. The case went to trial in September, 2005.

Cunningham said he too would like to be compensated for his ordeal, but that's not likely to happen. When he filed a written complaint in 2003, investigators declined to pursue the matter because he had failed to exhaust his administrative remedies through the prison grievance process. Still, Cunningham believes that not addressing the issue at the time was the right decision. "Had I done it differently, I might not be sitting here right now," he said. "I might have been shipped to another unit and mysteriously died.... Or an officer could find me dead in my cell."

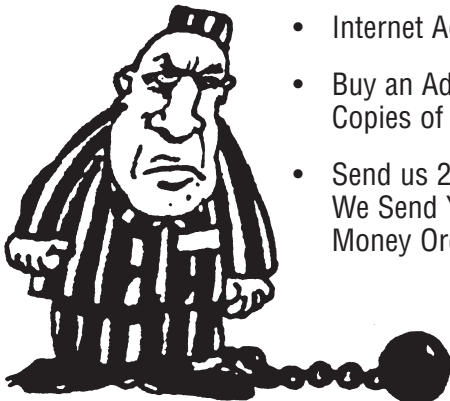
Cunningham, who has since been released, operates Pen Friends and Services in his spare time. The business provides prisoners with contacts and resources for legal information and free books. ■

Source: *The Dallas Morning News*

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# Michigan's Restrictive Placement Of HIV+ Prisoners Enjoined; \$2 Million Damages and Fees Awarded

by John E. Dannenberg

Winning a fifteen year state court battle, Michigan prisoners who tested positive for HIV (AIDS virus), and who were otherwise eligible to serve their time in community residential programs, camps or farms, gained the right to not be restricted from such advantageous placement solely because of their HIV infection status. The Michigan Department of Corrections (MDOC) settled with the prisoners in December, 2004 for injunctive relief and for \$2,000,000 in damages, attorney fees, costs and interest.

In 1990, a class of Michigan prisoners challenged the discriminatory practices of the MDOC under the state's Handicappers Civil Rights Act, MCL 37.110 et seq. [since recodified as Persons with Disabilities Civil Rights Act, MCL 37.1101 et seq.] and under the Michigan Constitution's Equal Protection Clause, because MDOC refused to permit custody-eligible prisoners who tested positive for HIV to be placed in preferential minimum security facilities solely due to

their medical handicap. Although the trial court granted class certification, it shortly dismissed the class claims based upon jurisdictional grounds and mootness. On June 15, 1994, the Michigan Court of Appeals reversed the trial court, affirmed the class certification and remanded.

On remand, the trial court dismissed the claims under the Handicappers Act and denied the request to add claims under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 and the Rehabilitation Act (RA) of 1973, 29 U.S.C. § 794(2). However, the trial court did permit a bench trial on the equal protection claim, but ruled against the prisoner class on June 7, 1997.

The Court of Appeals reversed on June 25, 1999, holding that the trial court abused its discretion in denying the plaintiffs' motion to amend their complaint as to the ADA and RA claims, erred in dismissing claims under MCL 37.1101 and made; clearly erroneous findings of fact and applied the wrong standard of law in denying the equal protection claim. It reaffirmed the class certification. (*Doe v. Department of Corrections*, 236 Mich.App. 801 (1999).) Moreover, a special panel of the appellate court was convened solely to affirm that the prisoners had a right to bring the complaint under MCL 37.1101. (*Doe v. Department of Corrections*, 240 Mich.App. 199 (2000).) The defendants then unsuccessfully tried to have the court retrospectively impose ameliorative tenets of Michigan's later-enacted Persons With Disabilities Civil Rights Act. (*Doe v. Department of Corrections*, 249 Mich.App. 49 (2002).) After all this litigation, the prisoner class was finally permitted to file their amended complaint, with causes of action under the ADA and RA, as well as MCL 37.1101; they then moved for partial summary judgment.

Senior officials of MDOC were sued in their individual and official capacities in state court under the court's pendant jurisdiction to hear the federal law complaints. At issue was the prejudice attaching to MDOC's discriminatory policy that treated HIV+ prisoners as pariahs by banning their participation in community-based corrections programs, including camp and farm placements where prisoners may participate in rehabilitative work-release and educational activities.

Feeling the heat in February, 1991, MDOC modified its blanket denials with a new directive, although the effect was the same. HIV+ prisoners now had the burden of demonstrating that they could be medically managed in the community-based programs at no added cost to MDOC. Notably, no prisoners suffering from any other medical condition were required to meet such a test. Over time, MDOC tried to tie the ban to a diagnosis of cancer or opportunistic infections. A June, 1993 amendment attempt proved no better, when a specific minimum white blood cell count was announced as a bar to such placement. But even a prisoner's ability to meet the demands of the community-based programs was never permitted to override his HIV+ stigma.

Because the class was plainly treated unequally with prisoners who suffered from other medical problems, and because the discrimination was based solely upon a medical handicap, MDOC's policies and practices flunked constitutional muster. Damages were claimed for emotional distress, psychological injury, loss of liberty, loss of wages, benefits and privileges, loss of educational benefits, and for increased time in secure custody.

The settlement agreement, which became final with the Order of Dismissal on February 23, 2005, terminated MDOC's use of HIV+ status as a litmus for custody placement. Only an actual inability to participate in community programs (but not from an accommodatable disability) might be cause for exclusion. All persons previously rejected were to be reevaluated within seven days, with Director's review completed within ten more days. The \$2 million was designated to be apportioned among class members and their attorneys, to cover all damages, fees, costs and interest, in accordance with a court-approved Plan of Allocation. Importantly, the agreement expressly held that such payments to prisoners may not be subject to Michigan's State Correctional Facility Reimbursement Act to offset any costs of prior, ongoing or future confinement.

The prisoners were represented by attorneys Michael Barnhart of Detroit and Deborah LaBelle of Ann Arbor. See: *Doe v. Michigan Department of Corrections*, Case #90-66580 CZ, Michigan Circuit Court, County of Ingham. ■

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# Colorado Teenagers Raped By Guards Settle For \$165,000 Each

by Michael Rigby

In August 2004, two teenage girls raped by guards at a Colorado juvenile prison settled their lawsuits for \$165,000 apiece. Both girls had been imprisoned at the Youthful Offender System (YOS), which is operated by the Colorado Department of Corrections. Their lawsuits were identical and involved the same defendants. The facts presented here were taken from one of those lawsuits.

Seventeen-year-old Angel arrived at the male-dominated YOS in July 2001 after spending three long months at boot camp, a rigorous military-style program that all incoming prisoners must complete. At the time YOS housed approximately 200 males and 6 teenage girls.

Soon after arriving, Angel was subjected to constant sexual harassment from both the guards and the young male prisoners. The atmosphere at YOS was sexually charged with the youths regularly engaging in sex. Teenage boys were having sex with guards and female prisoners; guards were initiating sex through force or with bribes of candy and favors.

Everyone at YOS, prisoners and staff alike, knew of the ongoing sexual assaults and rapes. The rampant sexual misconduct had previously resulted in multiple pregnancies of female prisoners (as a result Angel and other girls were forced to take birth control pills), and guards openly discussed which guards were molesting which girls.

The girls lived together in a dormitory that had no locks on the doors. Nighttime security consisted of two guards, usually males. Their only apparent supervision was a single supervisor who patrolled the grounds on a bicycle. There are no security cameras at YOS.

The girls were easy prey for the wolves guarding them. In July 2001 guard Gary Neal raped Angel in an office while his partner, Steve Sanchez, hid out of sight. A week later another guard, Duane Coleman, skulked into Angel's room and raped her roommate while Angel lay crying in her bed. Coleman had been Angel's drill instructor at boot camp; he was a man she trusted.

Although Angel didn't immediately report the rape for fear of retaliation—guards had the authority at any time to return prisoners to boot camp or have them sent to adult prison—Neal eventually confessed to sexual contact and was sentenced to 18 months in prison. The resulting investigation found that at least three other girls had also been raped by guards, making it a nearly universal experience among the six girls. It's unknown if any of the other guards were criminally charged.

After Neal was fired, the prison's director, Brian Gomez, and other guards retaliated against Angel, just as she had feared. As one example, when Angel appeared in court for her reconsideration hearing a few months after reporting Neal, Gomez tried to

have her "revoked" and sent to adult prison. The judge refused stating that Gomez was running a private brothel for the benefit of his staff.

Furthermore, once the criminal investigation began against Neal, prison officials "threatened violence against witnesses and their families in order to prevent discovery of the sexual assaults," and attempted to cover up the abuses by lying to investigators.

Angel ultimately sued multiple guards and prison staff under 42 U.S.C. § 1983 in federal district court seeking compensatory, punitive, and special damages. She specifically alleged violation of her constitutional rights and failure to properly screen, hire, supervise and discipline prison employees.

Rather than proceed to trial, the defendants settled for \$165,000 with each plaintiff. Both plaintiffs were represented by Julia Yoo and Eugene G. Iredale of San Diego, California. See: *Castro v. Neal*, US DC D CO, Case No. 03-WM-1247 (MJW).

## Texas Prisoner Kills Prison Employee and Himself

On October 21, 2004, a prisoner at the Texas Department of Criminal Justice's 2,800-bed, maximum-security Connely Unit in Kenedy, Texas, killed a prison employee, then committed suicide.

Gary Laskowski, 38, a Texas state prisoner, had been serving a life sentence in TDCJ since 1988 for two counts of aggravated sexual assault from Nueces County. He worked as a janitor assisting the prison's administrative staff and would have been eligible for parole in 2007. Laskowski had a "clean disciplinary record," according to TDCJ spokesman Mike Viesca.

Rhonda Osborne, 33, had been a clerk at the prison for five years. She was attacked

in a storage closet and died of asphyxiation according to preliminary autopsy results from the Bexar County medical examiner's office.

Laskowski killed himself by cutting his neck and wrists.

Texas recently enacted new rules making it much more difficult for a prisoners serving time for sex offenses and capital murder to make parole and is applying them retroactively to all prisoners, regardless of when the offense occurred. Perhaps removing prisoners' hope of making parole was not such a good idea after all.

Sources: *Dallas Morning News*, *Associated Press*.

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# Concentration Of Paroled Illinois Sex Offenders Stirs Controversy

by Michael Rigby

Following news that a disproportionate number of paroled sex offenders were concentrated on Chicago's South Side, Illinois officials instituted more rigid oversight of transitional group homes and returned 55 parolees to prison.

The *Chicago Tribune* reported on January 31, 2005, that 10.5% (158) of the state's 1,503 currently paroled sex offenders were placed in transitional group homes in poor African-American communities on Chicago's South Side. In fact, five transitional homes are located in the area's 60628 zip code, which includes the communities

of Roseland, Pullman, West Pullman, and Washington Park. Community leaders and residents were outraged upon learning of the high concentration of paroled sex offenders in their neighborhoods. "They dump every damn thing here," said Alderman Carrie Austin. "It's a disrespect to our community." No increase in crime has been reported and it is unclear if the sex offenders are from those neighborhoods before being convicted.

According to the *Tribune*, paroled sex offenders are placed in the group homes only as a last resort after prison officials have tried

to locate family or other private housing. When released to one of these homes an offender must wear an electronic monitor at all times; may leave the premises only for job interviews; must sign out and inform his parole officer of his plans; and is required to present proof upon his return that he indeed went where he said he was going.

Still, fear that sex offenders will re-offend has prompted opposition to the homes in many communities. As a result, the potential pool of transitional facilities outside of Chicago has dwindled over the years, said Deanne Benos, a DOC parole official. "An unacceptable situation has evolved over the past several years with the decline of the number of ... providers working with parolees," she said. "There is no question that this is a serious concern."

On February 1, 2005, Governor Rod Blagojevich responded to the criticism by ordering prison officials to limit the number of sex offenders placed in a particular area. However, no specific number as to how many could live in a single ZIP code was given. Blagojevich also told the DOC to devise standards for transitional group homes for sex offenders, including limiting the number of offenders in each home, requiring 24-hour supervision, and mandating regular contact between the home and the local police. Finally, Blagojevich directed prison officials to implement a pilot project to track 200 of the sex offenders deemed most dangerous through 24-hour global positioning system (GPS) monitoring.

Immediately after the Governor's guidelines were issued, the DOC began moving some parolees from Cook County to other areas of the state. Fifty-five were returned to prison due to a lack of suitable housing.

The *Tribune* report also caused city and state officials to target the transitional homes themselves. Chicago authorities ticketed several of the homes for building code violations and took them to Housing Court. State Representative Kevin Joyce (D-Chicago) joined the fray and introduced legislation that would prohibit more than one registered sex offender from living at particular address. The bill passed on February 3, 2005. Joyce is considering an amendment to the bill to provide an exemption for transitional group homes. ■

Source: *Chicago Tribune*

## Arizona Boot Camp Director Convicted In Teen's Death

On January 3, 2005, the founder of a tough-love boot camp in Arizona was convicted of reckless manslaughter in the 2001 death of a 14-year-old camper who collapsed under the relentless desert sun. On May 24, 2005, Long was sentenced to six in prison for his role in the homicide.

Charles Long, 59, was originally charged with second-degree murder in the death of camp participant Anthony Haynes, but jurors convicted him of the lesser charge of reckless manslaughter. "There was never any doubt as to the guilt on Count I (the homicide charge), it was the level of guilt," said juror Myrna Lee after the trial.

Long was also found guilty of aggravated assault for holding a knife to the chest of another teenager and threatening to "gut him like a fish." The jury deadlocked on eight counts of child abuse related to other camp participants. Youths at the camp

ranged from 7 to 18 years of age.

Because the aggravated assault conviction carries a mandatory 5-15 year prison sentence, Long was taken into custody immediately following the verdicts.

Haynes, a troubled, overweight teenager, had been sent to Long's Buffalo Soldiers Re-Enactors Association boot camp after he slashed the tires on his mother's car and was caught shoplifting.

In July 2001, while sitting in a disciplinary line in the triple-digit desert heat, Haynes started behaving erratically, eating dirt and possibly hallucinating. A counselor and four other boys took Haynes to a nearby hotel room and placed him, unconscious, in a shower where he inhaled water. When the counselor called to report Haynes' condition, Long told him to bring the boy back to camp instead of seeking medical help.

Haynes died at the boot camp despite attempts to resuscitate him. A medical examiner determined that Haynes died of complications from near drowning and from dehydration. The counselor was charged with negligent homicide, but prosecutors promised him probation in exchange for his testimony.

Long and his wife, Carmelina Long, maintain that he did nothing wrong. "They've put an innocent man in jail," said Ms. Long. "All he ever did was dedicate his life to working with kids. He will be vindicated. He's a good man, a soldier for the Lord." The camp was shut down after Haynes' death. ■

Sources: *The Arizona Republic*, *Associated Press*

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# Staph Infections Kill Women Prisoners In Pennsylvania; Coroner's Office Raided

by Michael Rigby

Three female prisoners have died after contracting a deadly strain of Staph infection while confined in Pennsylvania jails. All of the deaths occurred in March 2005. Two of the women, originally said to have inhaled toxic fumes while cleaning one of the jails, died within hours of each other.

Angel L. Powell, 33, became seriously ill while imprisoned in the Burlington County Minimum Security Facility. She was rushed to a local hospital on March 2, 2005, but it was too late. She died the next day. An autopsy revealed that Powell died from pneumonia caused by MethicillinResistant Staphylococcus Aureus, or MRSA. Powell was the sixth Burlington County prisoner in a year to become infected. Prisoners in other Burlington County jail facilities have also contracted MRSA, health officials said.

MRSA is a particularly virulent strain of Staphylococcus Aureus, a bacteria that most commonly causes skin lesions but can also lead to skin and bone infections and pneumonia. Originally found most often in hospitals, MRSA is now "clearly an epidemic" in community settings, the *New England Journal of Medicine* reported in April 2005. The *Journal* noted that MRSA infections are fatal in 20 to 25 percent of patients.

Because MRSA is passed through contact with contaminated surfaces or skin, jails and prisons nationwide have battled outbreaks over the past few years.

The MRSA epidemic is especially evident at the Allegheny County Jail in Pennsylvania, where two female prisoners contracted the infection and died within hours of each other.

On Friday, March 18, 2005, Amy Sartori, 21, and Valeriya Whetsell, 50, had been assigned to a cleaning detail at the Allegheny County Jail. Sartori took ill on Saturday and went to the jail infirmary. She was later transported to Mercy Hospital, where she died Sunday at 7:31 p.m. Whetsell became ill on Sunday. Like Santori, Whetsell was treated at the jail infirmary before being taken to the same hospital, where she died shortly after 4:00 a.m. Monday.

At a news conference held on March 21, the day of Whetsell's death, Allegheny County Coroner Dr. Cyril H. Wecht quickly proclaimed the women had died from asphyxiation caused by inhaling toxic fumes

produced from mixing cleaning products. On April 8, however, Dr. Wecht admitted the deaths had been caused by something entirely different—MRSA. Additional tests revealed that the women had the flu, then contracted MRSA, which led to their deaths.

The Coroner's new findings prompted the jail to enact measures to improve cleanliness, according to Chuck Mandarino, president of the Allegheny County Independent Prison Employees Union. Mandarino said the jail will replace damaged mattresses and other items that are difficult to sanitize, add an extra shift of laundry workers to wash prisoner clothing more often, and issue all prisoners an extra set of clothing to reduce the number of days they must wear the same outer clothes.

Many of the guards inquired about the infections and asked why it took two weeks to determine the cause of the women's deaths, Mandarino said. He further noted that the union is concerned about the poor communication with medical personnel at the jail. "The problem is the medical department hasn't been totally forthcoming," he said. "They're uncooperative at best and way too secretive."

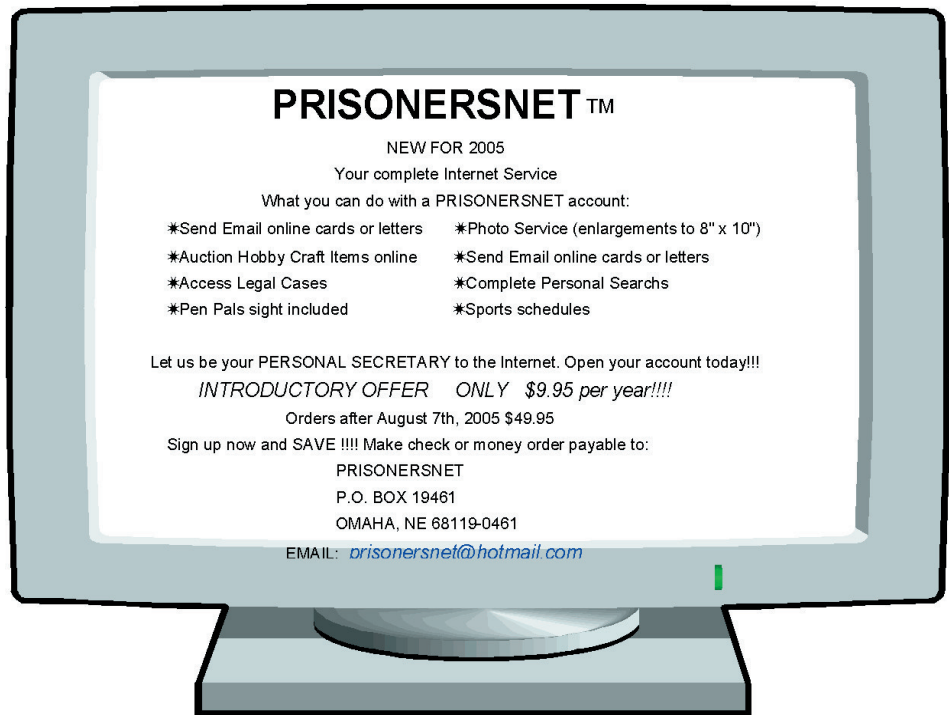
Four guards who came in contact with

the women may also have contracted the infection. "I have four officers that say they were working in the vicinity and developed some symptoms, flu-like symptoms," said Warden Ramon Bustin. "I think they're concerned that it could be related" to the deaths of Whetsell and Sartori.

In a strange twist, roughly a dozen FBI agents stormed the Allegheny County Coroner's Office on April 9, 2005, seizing computers and log books and questioning at least six employees. Around the same time, another team of federal agents swept into Dr. Wecht's private law firm and seized autopsy files. The raid, which began at around 9 a.m., was apparently part of an investigation into whether Dr. Wecht illegally commingled his public and private business. David Armstrong, who is representing the coroner's office, said the agents executed two search warrants, both of which had been sealed by a judge. Armstrong declined to release documents detailing the seized items.

PLN reports extensively on MRSA and other health issues in prisons and jails. See indexes for more. ■

Source: *Pittsburgh Post-Gazette*, *Burlington County Times*, *Associated Press*



# Kentucky State Auditor Blasts Prison Industries After \$377K in Undeposited Payments Found in Manager's Desk

by Matthew T. Clarke

It is hard to imagine the surprise of Kentucky Correctional Industries (KCI) employees when they discovered \$377,751.86 in undeposited payments in a KCI manager's desk in April, 2004. As a result of the discovery, Kentucky Department of Corrections (DOC) Commissioner John Rees asked the State Auditor to conduct an audit of KCI to "scrutinize the financial integrity of" KCI and "examine existing internal control mechanisms." The audit revealed "flawed business practices, lack of financial controls, and gross mismanagement by the former branch manager and previous administrators that led to the inability to conclusively account for all KCI receipts." Meanwhile, state officials expressed shock and anger at the discovery. Kentucky Lt. Governor Pence described the payment hoarding as a "deplorable neglect of duty."

"This was an extreme example of lack of oversight," said Rees. "I can certainly understand the surprise and outrage experienced by Lt. Governor Pence and Commissioner Rees when this situation first came to their attention. The fact that an employee would put over \$377,000 in payments in a drawer and not deposit them for years is simply unbelievable."

Of equal concern is that financial controls were not in place to ensure that the employee's managers would prevent or detect these actions. In short, there appears to have been a complete lack of oversight of cash management at KCI, said State Auditor Crit Luallen.

On May 4, 2004, Rees asked Luallen to see if the accounting of payments received

was reliable, determine the amount of loss caused by the manager's failure to deposit the payments, evaluate the financial controls in place and report weaknesses in the system. The period audited was July 2000 through May 2004. Without waiting for the auditor's report, KCI fired the manager and the supervisor of his department, reassigned the manager's direct supervisor, hired a new fiscal branch employee and put new fiscal and receipt controls in place.

One problem the auditors encountered was an incompatibility between the KCI accounting software and the state's accounting software that made it impossible to determine whether payments marked paid in the KCI software were also listed as paid by the state. After overcoming this problem, they determined that there was a \$177,000 variance between the two systems. An additional \$202,000 in transaction discrepancies between the two software systems that was apparently caused by data entry error was also discovered. Additionally, many transactions marked as paid in the KCI system showed unpaid in the state system. Upon further investigation, 35 transactions totaling \$63,835.59 appeared improper and were referred to the Kentucky State Police for investigation of possible criminal activities.

The \$377,751.86 in undeposited payments were examined and reduced to \$342,843.19 in actual undeposited payments because some were duplicate payments while others should have been paid to other state agencies. Of that sum, KCI was able to deposit \$338,241.34. It is seeking payment for the remaining \$4,618.15 it was unable to deposit because of the time elapsed since payment.

This mess of the undeposited payments was made possible primarily due to three glaring flaws in KCI's accounting system. The first was that the same person received the payment, receipted the payment, secured the payment and made the data entries showing payment received. These functions should be isolated if possible. The second was that no invoice was generated until goods were shipped to the receiver. This meant that if a payment was received before goods were shipped; the manager had no way to match the payment with the order. In those cases, payments

had to be held, often for months, until the ordered goods were shipped. The final glaring error was that KCI sales invoices contained no remittance advice—a portion of the sales invoice that identifies the order and customer and is to be returned with the payment. The only way for managers to identify which payment when with which order was to scour through all of the sales invoices by hand. However, customers often had multiple names (e.g. DOC, Dept. of Corr., Corrections Department) causing confusion even in that process.

The auditor's report, released on November 15, 2004, made suggestions for improving fiscal controls at KCI, many of which had already been put in place following the discovery of the hoarded payments. The report advised KCI to segregate the authorization, custody, recordkeeping and reconciliation of transactions and operations; restrictively endorse payment checks immediately upon receipt; forward cash receipts to the State Treasury on a daily basis; include a remittance advice on the sales invoice; produce accounts receivable aging reports for management; attempt to reconcile the KCI and state accounting software entries; add a field or sub-field to the KCI and state accounting databases to allow cross-referencing; use a master list of existing customers to avoid duplication of customer listings under different names; update its policies and procedures manual for internal operations and make the manual readily accessible to each employee; pursue payment from customers whose checks have expired; and continue its efforts to deposit payments as quickly as possible.

In short, the hoarding of payments was a big boondoggle that exposed a bigger boondoggle—lack of fiscal controls. Whether KCI can learn from its mistakes remains to be seen. The auditor's report is available on PLN's website at [www.prison-legalnews.org](http://www.prison-legalnews.org). ■

Sources: *Kentucky Auditor of Public Accounts, Press Release*; *Kentucky State Auditors Report* (both available online at [www.auditor.ky.gov](http://www.auditor.ky.gov)); *New York Times*.

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# Besmirched California Prison Doctors Sue To Block Higher Qualification Standards

by John E. Dannenberg

California Department of Corrections (CDC) doctors, who have been much maligned in recent scathing federal court reports depicting "horrible" medical care conditions in California's prisons, made a defensive move on April 29, 2005 by having their union, the Union of American Physicians and Dentists, file a suit in Sacramento County Superior Court alleging that the tighter doctor certification standards recently announced by CDC violate state law.

At the heart of the disagreement is that CDC is levying medical qualification standards upon its doctors in the form of Medical Board certification for either internal or family medicine or by way of a CDC-administered competency test. The union alleges that CDC's evaluation programs are flawed and that in any event, any new job qualifications must be approved by the State Personnel Board. They claim that CDC "is arbitrarily, capriciously, and unilaterally imposing new minimum qualifications for prison doctors to divert attention from its own execrable management spanning two decades. In a desperate last ditch effort to divert attention from its own colossal mismanagement, CDC is doing its best to blame prison doctors for its own failure."

CDC spokesman Todd Slosek countered that it was bound by a court order stemming from the *Plata v. Schwarzenegger* class action prisoner lawsuit (U.S.D.C. (N.D. Cal.), No. C-01-1351 TEH) to make sure that its doctors provide adequate medical care. Nonetheless, Youth and Adult Correctional Agency Undersecretary Kevin Carruth acknowledged in late April that prison officials are unable to manage CDC's medical system, and want to employ consultants from the University of California (UC) to design a new plan within 18 months. The union was critical of the plan, which anticipated spending \$14.7 million at UC San Diego and UC San Francisco. The California Senate was skeptical, too, red-lining this budget item from the May, 2005 revised Governor's budget. Carruth was resigned to the expected outcome that the *Plata* court would appoint an interim receiver in July, 2005 to take over CDC's entire health care delivery program. The court issued an order to show cause to this effect on May 10, 2005. The court appointed a federal receiver to take control of the CDC's medical system in July, 2005. *PLN* will report the details once the receiver is announced and a written opinion issued.

But an example of just such inexcusable prison doctor misbehavior resulted

in one doctor's surrendering his medical license on March 18, 2005. Dr. James Pendleton, 55, was a physician at Corcoran State Prison in 1998, where he met an HIV+ prisoner whom he coerced into having homosexual relations. The allegations are that Pendleton forced the prisoner to comply by telling him that if he did not, the doctor would not include the prisoner in a study on a new vaccine that could cure his HIV.

After the prisoner paroled in June, 1998, Pendleton arranged to meet with him for sex in hotels in Corcoran, Sherman Oaks and Los Angeles. Pendleton also gave the prisoner rent money, introducing himself as the prisoner's father. The unnamed prisoner ended the relationship in 2000, but was forced back into it when he was returned to Corcoran for a parole violation. Only then did he report the problem to Corcoran's internal affairs staff for investigation. They set up a meeting with camera and recorder in a room where Pendleton was examining the prisoner. During the exam, Pendleton made "numerous responses substantiating the sexual relationship."

After leaving Corcoran, Pendleton, a graduate of Dartmouth College, practiced in Morgan Hill and Dublin, California. He had been Tulare County's health director from 1983 to 1989. Pendleton reportedly is married and has three children. ■

Sources: *Sacramento Bee*; *Visalia Times*.

## California's Sex-Offender Internet Site Gets 14 Million Hits In First Four Days

California's new public internet data-base listing 63,000 of 85,000 convicted sex-offenders was put on line December 15, 2004. By that evening, it was too crowded to navigate, receiving 14 million hits in the first four days. This data was previously only available at police stations.

In 2003, the U.S. Supreme Court approved such public lists ("Megan's Law"). The California site was authorized by legislation passed in September, 2004, which gave the state attorney general until July, 2005 to comply. Attorney General spokesperson Mariam Bedrosian said, "We hope that families will use this as a tool to protect themselves, to educate their children and to be aware of the risks that surround them." Offenders are listed by ZIP code, city, county, name, address

and proximity to elementary schools and parks. The most serious offenders can be identified by clicking on blue dots on maps, which give street addresses. [Exact addresses are only given for "top 33,500."] Other data includes photographs, gender, age, race and physical identifiers.

A criticism of the list is that an estimated 20% have not advised authorities of changes in address. And by law, those 22,000 with the most minor offenses are not listed at all. ■

Source: *New York Times*; see: [Meganlaw.ca.gov](http://Meganlaw.ca.gov).

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## News in Brief:

**Alabama:** On April 28, 2005, Mario Centobie, 39, was executed after waiving his appeals. In 1998, Centobie, a former Mississippi firefighter who was serving a 40 year sentence at Parchman Prison in Mississippi for kidnapping his estranged wife and 6 year old son, escaped from the prison while being taken to a court appearance. Over the course of that escape Centobie shot one police officer and killed another in separate incidents. Captured by police when he did not resist an arrest lest the people who had given him a ride be harmed, Centobie later escaped from the Etowah county jail after charmed jail guard Donna Hawkins into helping him escape. He remained free for two weeks before being caught after police traced the love letters he sent Hawkins. Hawkins was convicted of her role in the escape and served 18 months in prison.

**Alabama:** On May 25, 2005, Frankie Pruitt, 35, Alfred Tanner, 34, Christopher Robinson, 29; Jeremiah Davis, 17; Terry Kelly, 39 and Carlos McGlathery, 34, were charged with murdering fellow Madison county jail prisoner Ronald Pinchon, 19, by beating him to death three days earlier. Pinchon was in jail for violating work release rules, where he had been placed after violating his probation sentence for unauthorized use of a vehicle. Davis, Robinson and Kelly were in jail awaiting trial on capital murder charges before this incident. No motive is given for the attack.

**Argentina:** On April 19, 2005, Adolfo Scilingo, 58, a former Argentine navy officer was convicted by a human rights court in Spain after he admitted participating in two "death flights" where 30 drugged, naked political prisoners were thrown from airplanes into the ocean during the US backed military dictatorship in Argentina between 1976-83. Scilingo was convicted of crimes against humanity and sentenced to 640 years in prison, 21 years for each murdered prisoner and five years for torture and five for illegal detention. Under Spanish law prisoners can only serve 40 years in prison. Like most civilized countries, Spain has neither the death penalty nor life imprisonment.

**California:** On May 27, 2005, a 16 year old prisoner awaiting sentencing after pleading guilty to second degree murder for beating a homeless man to death was charged with raping his 13 year old cellmate in the San Leandro jail. Prosecutors are requesting that he be tried as an adult and allege the rapes occurred over a two day period in the jail.

**England:** On March 3, 2005, Neil Brennan, 21, a prisoner serving a six year sentence for armed robbery, was freed by two armed men while he was being transported to a hospital by prison guards in a taxi. Brennan was being taken to the hospital for treatment of a self inflicted hand wound.

**Florida:** On May 13, 2005, Willie

Yawn, 21, and Paul Unkle, 28, escaped from the Columbia County jail by breaking into a vent in their cell, breaking open a utility door, dropping 20 feet into the jail yard and throwing a blanket over razor wire on the perimeter fence. They were recaptured a day later outside of a convenience store in the area.

**Indiana:** On February 25, 2005, Terry Conover, 43, a guard at the Shelby county jail, was sentenced to four years in prison, with all but 60 days of the sentence suspended, after pleading guilty to trafficking with a prisoner and possession of a controlled substance. Conover had been bringing tobacco, which is banned at the jail, to a prisoner who was a male relative. The prisoner told jail officials he had given Conover Xanax pills in exchange for the tobacco. Conover was also sentenced to 46 months probation and nine months of house arrest.

**Indiana:** On November 24, 2005, Durand Huggins, 27, a guard employed by Corrections Corporation of America at the Marion County Jail II in Indianapolis, was arrested on charges of smuggling marijuana and tobacco into the jail for prisoners.

**Louisiana:** On May 18, 2005, Frank Bernath, 61, a disabled prisoner at the Louisiana State Penitentiary in Angola hanged himself in his cell. Bernath had been serving a life sentence after being convicted of killing a sheriff's deputy in 2001. Prior to his death Bernath had complained repeatedly of being mistreated by prison employees, including having his wheelchair taken away from him. Warden Burl Cain told media that Bernath killed himself because he was angry about having his wheelchair taken away from him.

**Louisiana:** While awaiting the results of his appeal stemming from the 2003 murder of a fan in a nightclub, rap singer Corey Miller, AKA C-Murder, recorded a 17 track CD titled *The Truest S\*\*\* I Ever Said* and filmed a music video from the confines of the Jefferson Parish jail in Gretna. The footage used in the music video *Y'all Heard of Me* shows Miller dressed in an orange prison jumpsuit, gesturing with his hands while rapping. The footage was obtained from video shot by *Court TV* and Cox Communications, a cable TV company that produces a rap program called *Phat Phat 'N All That*. Jefferson Parish sheriff Harry Lee says he never authorized the video or the CD, which was recorded by Miller's attorney Ronald Rakosky, during visits to the jail. Rakosky

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said Miller had done nothing wrong and said the CD and video are a case of a wrongly accused man doing something positive with his time. "I know of no law or regulation that prohibited anything that we were doing," he said. Miller's conviction in the murder of Steve Thomas, 16, was reversed by a trial judge when it was discovered that prosecutors withheld evidence of a witness's criminal history. Prosecutors have appealed. Rokosky is now allowed to enter the jail with only a pad and pen. Lee, for his part, wants to seize any profits from the CD. "They used my jail. I think I'm entitled to some money," said Lee.

**Louisiana:** On May 25, 2005, Derrick Kilton, 23, and Samuel Carter, 18, were arrested and charged with introducing contraband into prison, possession with intent to distribute cocaine, heroin and marijuana and resisting arrest by flight. Kilton and Carter allegedly threw a package of drugs over the fence into the recreation yard of the Orleans Parish Prison and when sheriff's deputies gave chase, ran their car into a metro bus, injuring four bus passengers.

**Mexico:** On May 13, 2005, Otto Herrera Garcia, 40, the alleged leader of a Guatemala based drug trafficking group who was awaiting extradition to the US,

escaped from a Mexico City jail. Garcia was appealing the US extradition request within the Mexican court system when he escaped. Mexican police then arrested 45 jail employees, including the warden, for complicity in the escape.

**Michigan:** On March 1, 2005, the Department of Corrections announced it was no longer going to provide coffee for prisoners on its meal menus; instead, prisoners would only be able to purchase instant coffee from prison commissaries. Prison officials claim this will save \$250,000 from its \$1.79 billion dollar budget. This was the DOC's contribution to resolving a \$375 million deficit in the state's general fund.

**Myanmar:** On December 12, 2004, the military junta announced it would summarily release 5,070 prisoners whose detentions were now deemed "irrelevant or improper."

**New Jersey:** On February 23, 2005, eight guards at the New Jersey State Prison in Trenton reported being overcome by fumes that leaked into a control booth at the prison. The source of the fumes was unknown.

**New York:** On May 12, 2005, Brooklyn judge Michael Garson was charged with stealing \$163,000 from his 92 year old aunt.

His cousin, former Brooklyn judge Gerald Garson is awaiting trial on unrelated bribery charges and is named in the indictment of participating in the looting of the elderly aunt's estate.

**North Carolina:** In January, 2005, Jeffrey Manchester, 33, was caught living in an abandoned Circuit City store. On June 15, 2004, Manchester escaped from the Brown Creek Correctional Facility by clinging to the bottom of a truck. He lived in a 4 by 10 foot closet in the store where he had routed water and ate stolen baby food to survive. He is accused now of robbing an adjacent Toys "R" Us store at gunpoint. At the time of his escape Manchester was 4 years into a 45 year sentence for armed robbery.

**Ohio:** On February 16, 2005, Republican Ohio Supreme Court justice Terrence O'Donnell, 59, reported that \$18,000 in cash had been stolen from his state car while he was being honored at a banquet. O'Donnell said the money was left over daily cash he had been saving every day of his adult life and had stuffed in a suit bag and placed in his car when it was stolen. O'Donnell stated he was going to deposit the money to use for repairs on a property he owned. O'Donnell told the *Columbus Dispatch* the money was his and not "ill gotten gain." He conceded

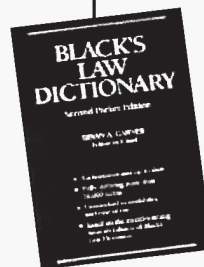
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that it looked "terribly peculiar" for him to have that much cash.

**Pennsylvania:** On December 28, 2004, Aquil Bond, 26, and another prisoner at the Philadelphia Industrial Correctional Center, were attacked and stabbed by eight other prisoners. Bond suffered a punctured lung and wounds to his head, hand, shoulder and neck. Seven of the alleged assailants are awaiting trial on murder charges while Bond is charged with several murders committed by a drug gang he was a member of. While the attack occurred in front of prison guards, no weapon was recovered.

**Texas:** On May 12, 2005, Dallas district court judge Faith Johnson was publicly admonished by the state's Commission on Judicial Conduct for "bringing public discredit upon the judiciary." Billy Wayne Williams had been granted bond by Johnson while awaiting trial on charges he has choked his girlfriend unconscious. He fled while awaiting trial and was convicted in ab-

sentia and sentenced to life in prison. When Williams was captured in October, 2004, Johnson had him brought to her courtroom which she had decorated with balloons and streamers and was celebrating his return with cake and ice cream. Johnson also notified a television crew which was on hand to record the event. Johnson told Williams: "You just made my day when I heard you had finally come home. We're so excited to see you; we're throwing a party for you." Texas, like most states, elects its judges.

**Texas:** On May 14, 2005, federal prisoner Javier Garza, 20, was handcuffed, removed from his cell in the Cameron County jail in Brownsville and beaten by guards. Garza suffered a broken jaw and broken rib. Garza was removed to federal custody after the beating and six jail guards and a sergeant were suspended during an investigation into the beating.

**Texas:** On May 20, 2005, 50 prisoners in the Limestone County Detention Center rioted. Police gave no details to media and claimed no injuries occurred during the uprising. The jail is run by the for profit company Civigenics.

**Virginia:** On December 30, 2004, 64 juvenile prisoners at the St. Brides Correctional Center in Chesapeake rioted in Unit F of the facility. Officials say the unit sustained extensive damage and was rendered uninhabitable. Some prisoners suffered mild injuries while no staff was injured. A prison "strike team" retook control of the unit several hours later.

**Virginia:** While attempting to escape from the Rappahannock Regional Jail on December 21, 2004, Horace Lavigne Jr., 31,

got out of his handcuffs, broke through the Plexiglas shield of the marked police cruiser and tried to get the gun of the deputy who was transporting him back to the jail from a court hearing. The unnamed deputy kept control of his gun and was able to get a tactical knife out of his pocket and stabbed Lavigne twice and crashed the cruiser into a culvert, ejecting Lavigne from the car. Lavigne was later spotted hiding behind trash containers and ignored police commands to surrender and was shot in the thigh. The deputy was severely beaten in the incident. Lavigne was charged with attempted capital murder, malicious wounding and felony escape. He was described by media as a "career criminal" that had been in prison most of the past 12 years.

**Washington:** In December, 2004, shortly before leaving office Governor Gary Locke issued a pardon to Susan Cummings, 37, who was serving a life sentence for the 1983 murder of an 88 year old Walla Walla woman. Cummings was an accomplice to two friends who beat, raped and robbed the elderly woman during a burglary. The actual rapists and killers, Joe Aguilar and Lillie Rowland, received lesser sentences in exchange for their testimony against Cummings. 50 current and former Department of Corrections employees wrote letters supporting Cummings clemency bid. Cummings will have spent 20 years in prison since her 1985 conviction. Locke also pardoned Ray Spencer, 56, a former Vancouver county policeman who was convicted of rape in 1985 and sentenced to life in prison. Locke cited legal problems in the case against Spencer, including the fact that

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the lead investigator in the case was having an affair with his wife.

**Washington:** Pam Roach is a political office shopping Republican state senator who is probably the most vicious anti-prisoner legislator currently in office in Washington state. She has successfully sponsored efforts to increase sentences and sanctions for criminal defendants and remove what few amenities prisoners in Washington have. She has also successfully killed legislative efforts to remedy injustices such as Washington's law that mandates the seizure of 35% of all funds sent to prisoners by their families. On February 14, 2005, Stephen Roach, 24, Pam's son, was arrested by Pierce county police on drug charges after he sold Oxycontin pills on three occasions to an undercover informant from a home owned by his parents. When the home was searched at the time of the arrest, young Stephen was found in possession of more Oxycontin pills, \$3,500 in cash, marijuana packaged for sale and three guns. Senator Roach could not be reached for comment. *PLN* predicts a quiet deal and no prison or jail time for Mr. Roach for committing a crime that would lead to a lengthy prison sentence if committed by someone who is not politically connected. Which once more illustrates the fact that America's "tough on crime" politicians lack the courage of their purported convictions when it comes to crimes committed by themselves and their friends and families. ■

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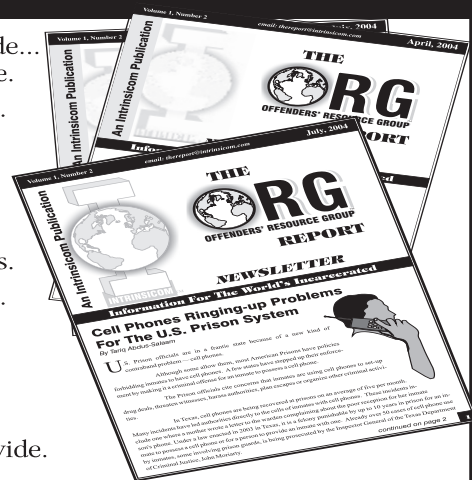
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## Michigan Prisoner Awarded \$376,525 For Back Injury Sustained In Crash

A Michigan prisoner has been awarded \$376,525 for back injuries sustained in a prison van crash. Lorenzo Johnson, a 40-year-old state prisoner, was being transferred from one prison to another when the van he was riding in hit a patch of ice on the highway, spun out of control, and rolled over.

Johnson suffered a cervical fracture of the C5 vertebrae which required surgery and left him paralyzed for a month. He was eventually able to walk without a cane, though not for long distances. Following his release from prison, Johnson was employable only at sit down jobs.

Johnson sued the Michigan Department of Corrections (MDOC) in the Clare County Circuit Court seeking damages for his injuries. In a separate action Johnson sued the guards driving and escorting the van, Edward Mileski and Robert Sherrick. The cases were consolidated.

Johnson specifically claimed that the guards failed to safely operate the

van and that the MDOC negligently entrusted the van to the guards. The MDOC disputed Johnson's allegations claiming that the guards faced an emergency situation when the van hit the ice; that he was not permanently impaired, had recovered, and the injury did not greatly affect his life; and that he was comparatively negligent for failing to wear his seatbelt.

In September 2004, after a bench trial, the court found in Johnson's favor and awarded him \$350,000 (\$150,000 for past non-economic damages and \$200,000 for future non-economic damages) plus interest and costs, for a total award of \$376,525.

Johnson was represented by Jason A. Waechter of Southfield. See: *Johnson v. Michigan Department of Corrections*, Clare County Circuit Court, Case No. unknown.

Source: *Michigan Trial Reporter*

## Other Resources

### ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

### Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

### Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

### CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP, PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

### Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rulings, administrative developments and news

about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

### Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: \$10 prisoners; \$20 all others. \$3 for sample issue, 37¢ for info (stamps OK). Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

### November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

### Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

### Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.

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**Represent Yourself in Court: How to Prepare & Try a Winning Case**, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

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**Spanish-English/English-Spanish Dictionary**, 60,000+ entries, Random House, \$5.99 Two sections, Spanish-English and English-Spanish. All entries listed from A to Z. Hundreds of new words. Includes Western Hemisphere usage. 1034

**Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. & Canada**, by Jon Marc Taylor, 341 pages. \$24.95. Includes contact info & outlines courses offered by over 250 education providers. Info on high school, vocational, paralegal, law, college and graduate courses. One of a kind prisoner resource. 1047

**The Citebook**, 21st ed., by Tony Darwin, Starlite, 306 pages, \$41.95. This plain language legal manual lists positive cases (cases that give you a right, not take one away) and gives a short synopsis detailing each. 1057

**Deposition Handbook**, by Paul Bergman and Albert Moore, 2nd Rev Ed., 352 pages, \$29.99. How-to handbook for anyone who will conduct a deposition or be deposed. Valuable info, tips & instructions. 1054

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**All Things Censored: Mumia Abu-Jamal**, ed. by Noelle Hanrahan, 303 pgs. **\$14.95**. Includes 75 articles by Abu-Jamal. Attacks capital punishment & critiques the dehumanizing prison system. 1040

**Prison Writing in 20th Century America**, by H. Bruce Franklin, Penguin, 1998, 368 Pages. **\$13.95**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022

**Soledad Brother: The Prison Letters of George Jackson**, by George Jackson; Lawrence Hill Books, 368 pages. **\$16.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 30 years ago. 1016

**The Politics of Heroin: CIA Complicity in the Global Drug Trade**, April 2003 Rev Ed, by Alfred McCoy; Lawrence Hill Books, 734 pages. **\$32.95**. Latest Edition of the scholarly classic documenting U.S. government involvement in drug trafficking. 1014

**No Equal Justice: Race and Class in the American Criminal Justice System**, David Cole; The New Press, 218 pages. **\$15.95**. Shows how the criminal justice system perpetuates race and class inequality, creating a two tiered system of justice. 1028

**Ten Men Dead: the story of the 1981 Irish hunger strike**, by David Beresford, 334 pages. **\$13.50**. Relies on secret IRA documents and letters smuggled out from the IRA political prisoners during their 1981 hunger strike at Belfast's infamous Long Kesh prison. 1006

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# PRISON

## Legal News

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*Dedicated to Protecting Human Rights*

September 2005

### Inside the American Correctional Association

*by Silja J.A. Talvi*

[Ed. note: *Prison Legal News* goes undercover at the American Correctional Association's 2005 winter conference in Phoenix, Arizona. "It's just business," as one prison medical administrator puts it. And what a surreal business it is.]

*"There is no doubt that good work is done at the penitentiary ... It only remains to go unto perfection," unnamed speaker at the 1874 Congress of the National Prison Association, later renamed the American Correctional Association.*

*"[We] linger at the gates of correctional Valhalla—with an abiding pride in the sense*

*of a job superbly done! We may be proud, we may be satisfied, we may be content," Harold V. Langlois, American Correctional Association (ACA) President, 1966.*

*"We'll have a hard time holding onto what we have now," Gwendolnn C. Chunn, ACA President, Winter ACA Conference, 2005. (Referencing the unprecedented prison expansion boom of the 1990s.)*

January 10, 2005—It was the third day of the American Correctional Association's winter fair in sunny Phoenix, Arizona. The spectacular southwestern sunrise and balmy outside temperatures aside, the inside of the Phoenix Civic Plaza didn't feel like a particularly pleasant place to be.

That is, unless you happened to be in the business of profiting from the \$50 billion per year prison industry, particularly as a member of the American Correctional Association.

In 1870, the National Prison Association was founded by a group of reform-minded prison wardens who saw promise in rehabilitation, religious redemption, and the importance of treating prisoners like human beings.

Held in Cincinnati, the first national Congress of the National Prison Association brought together 230 people, and featured a keynote speaker who put it thusly: "It is left to the philanthropic and Christian sentiment of the age to devise ways and means to elevate the unfortunate and wayward to the true dignity of manhood."

The organization was renamed the American Correctional Association

(ACA) in 1952. By the time that investigative journalist Jessica Mitford was invited to attend 101st Congress of the ACA in Miami Beach in 1971, there were 2,000 people in attendance. As she reported, reform and rehabilitation were no longer as prominent on the agenda; the *business* of corrections was the emphasis. Mitford wrote about exhibitors selling everything from tear gas grenades to prototypical versions of the stun gun. Prisons were also facing costly litigation instigated by prisoners. As Mitford reported in the 1973 book, *Kind and Usual Punishment: The Prison Business*, litigation was "very much on everybody's mind."

How much had changed over the course of 34 years?

The 2005 winter conference in Phoenix—attended by an estimated 4,000—found the ACA still touting its principles: "Humanity, Justice, Protection Opportunity, Knowledge Competence and Accountability." The organization stresses that it brings together individuals and groups "that share a common goal of improving the justice system." But with the prison industry now bringing in annual revenue of \$50 billion, the ACA seems most intent on "improving" profits.

Today's ACA is a sleeker version of the organization Mitford examined, complete with online certification courses for prison and jail employees (starting at \$29.95) and an expensive prison accreditation process that claims to instill transparency and accountability. Members are enticed to earn accreditation in order to receive up to a 10 percent discount on prison liability insurance.

Keeping litigation costs down is only

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**COLUMNISTS**  
**Mumia Abu Jamal, Denise Johnston, Daniel E. Manville, Kent Russell**

**CONTRIBUTING WRITERS**  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams & Mark Wilson**

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### **Inside the ACA (cont.)**

one way prison corporations profit from incarceration. In addition, for-profit prisons also increase revenues by contracting with other corporations to provide substandard or overpriced services to prisoners. In some states, companies like Starbucks and Nintendo pay prisons to employ prisoners at wages far below market rates.

Taking advantage of the unprecedented prison boom of the late '80s and '90s, prison administrators, politicians, lobbying firms and corporate boards created a prison-industrial complex in which everyone benefits except the prisoners.

In 1980, federal and state prisons incarcerated 316,000 people. In 1990, that number had grown to 740,000, not including jail populations. By 2000, the number of prisoners had surpassed 1.3 million. Prison construction accompanied this growth: More than 1,000 prisons are now in operation, and each new prison comes with a bevy of contracts for construction and services.

The ACA conference is where many of these transactions are cemented.

Noting that the prison population may have reached its apogee, ACA President Gwendolyn C. Chunn told members at the conference, "We'll have a hard time holding onto what we have now." But attendees seemed more than willing to try; everyone at the conference seemed to be riding high on the promise of growth, expansion and profits.

### **Just Business**

This conference's theme was "Corrections Contributions to a Safer World," and the conference program didn't try to hide the gathering's militaristic bent. The cover of the 201-page ACA booklet featured a soldier with an enormous phallic tank gun, superimposed over the blue planet earth. And ACA's three keynote speakers were prominent conservatives or military officers: retired Gen. Anthony Zinni, Michael Durant, the pilot of *Black Hawk Down* fame, and disgraced Homeland Security nominee Bernard Kerik.

The conference was financially supported by private prison giants such as the Corrections Corporation of America (CCA), The GEO Group (formerly known as Wackenhut), Correctional Services Corporation (CSC) and Correctional Medical Services. The titles of the dozens of overlapping workshops indicated what ACA

defined as the latest trends in corrections: "Faith-Based Juvenile Programming," "Anti-Terrorism in Correctional Facilities," and "Can't Simply Paint it Pink and Call it a Girl's Program."

One workshop—"Intensive Medical Management: How to Handle Prisoners Who Self-Mutilate, Slime, Starve, Spit and Scratch"—featured footage of a non-violent paranoid schizophrenic in Utah being forcibly extracted from his cell and then tied down to a restraint chair. After being strapped down naked for 16 hours, the delusional prisoner died. The session was facilitated by Todd Wilcox, the medical director of the Salt Lake County Metro Jail, who used the imagery as an example of how to avoid costly litigation. "Don't get personal with this," Wilcox said. "It's just business." He reminded the audience how important it is to sever the "emotional leash" that guards and nurses can form with prisoners. He also referred to some mentally ill patients with "Axis II disorders" as "the people we affectionately call 'the assholes.'"

### **Pain for a Price**

The real draw of the ACA conference was the exhibitors, who had two full days to showcase their wares. The exhibition hall corridors had been given names like "Corrections Corporation of America Court," "Verizon Expressway," "Western Union Avenue," and "The GEO Court Lounge," where one could sip Starbucks and eat free glazed donuts.

Here, the discussions were all about increasing profit margins, lessening risks and liabilities, winning court cases, and new, improved techniques and technologies for managing the most troublesome prisoners. In the glaringly bright exhibit hall, attendees buzzed around booths, snapping up freebies and admiring the latest in prison technology.

Exhibitors hawked restraint chairs, tracking systems, drug-detection tools, suicide-prevention smocks and prison facility insurance. Dozens of companies competed to sell private health care systems, pharmacy plans, commissary services and surveillance systems. Of particular interest were behavior modification programs, juvenile boot camps, and Internet and phone services. Interest in the latter brought in the "big boys" of telecommunications: Sprint, AT&T, NEC, MCI Communications, Verizon, Global Tel\*Link and Qwest. And why not? Prison phone contracts that overcharge prisoners



## Inside the ACA (cont.)

and their families generate an estimated \$1 billion a year.

The range of products went on from one corridor to the next: storage systems, money wiring, surveillance, security transport, fencing and prison medical packages. (Industry giant Prison Health Services brought in rescued owls and hawks to draw crowds. What was the connection to prison health? "Oh, nothing!") Vendors who couldn't afford dog-and-pony shows handed out free bags, pens, toothpicks, mugs, tape measures and sugarcoated churros. The exhibitors who didn't need giveaways to draw crowds included weapons manufacturers Smith & Wesson, Glock and Taser International.

Two smiling exhibitors, standing behind the Taser booth, allowed the curious to handle the latest in the 50,000-volt stun gun technology. On the Taser table a video looped on a monitor: A naked African-American man is being chased down by police officers. He is shot once and falls hard to the ground. Tasered again, his body shudders, before collapsing altogether. The contextless footage was meant to illustrate the efficacy of the stun gun, used by more than 6,000 police departments, that had become the leader in the "non-lethal weapons" industry, that is before a spate of negative press, including reports of an SEC investigation, had put the company's stock price into a tailspin.

In November 2004, Amnesty International issued a report that blamed at least 74 deaths since 2001 on Tasers and called for a suspension of their use until further studies could prove just how "non-lethal" these weapons were. Headline business news emerged during the ACA conference: Taser executives were reported to have sold \$91.5 million of their own stock, raising suspicions that they sought to maximize their own profits before their product lost ground. The company subsequently announced that sales were projected to slow in the months to come. The stock plunged 30 percent. As if all that weren't bad enough, Taser International President Tom Smith said in an interview that four active-duty police officers had been offered stock options for law enforcement training programs they supervised, which in turn had "led directly to the sale of Tasers to a number of police departments." [See June, 2005 *PLN* for more on tasers.]

It's a good thing that former Taser spokesman Bernard Kerik cashed in when he did. The former New York City Police Commissioner made more than \$6.2 million in pre-tax profits from the sale of Taser stock in the month leading up to his abortive nomination.

### Wining, dining and women

Scores of individuals from prison acquisition and purchasing departments, consulting agencies, and the ranks of high-level prison administrators had come to the conference for networking, recruiting and, above all, business. Private contractors, like food service businesses Aramark and Canteen, discreetly targeted these attendees for their off-site wine-and-dine dinners, issuing covert invitations to people whose badges indicated their importance in the field.

Following a day of tours at Arizona jails and prisons, about 60 conference-goers headed to the Canteen fete at an upscale Italian restaurant in the nearby Arizona Center. Cocktails and bottles upon bottles of wine were poured out prior to a multi-course meal. Wardens and top-ranking corrections administrators from Arizona, New Mexico, and Maryland sat in the outdoor patio under heat lamps. Salesmen from Canteen were pressing flesh and passing out business cards. There were smiles all around.

Like so many other private companies working in prisons, Aramark and Canteen have had their share of problems. Aramark was singled out by "Stop the ACA" union-organized protests outside of the conference. On the third day of the conference, protesters snuck in and placed informational materials in the toilet seat cover holders of convention center bathrooms.

On the fourth day of the conference, Aramark sought to spruce up its image with a faux-New Orleans-style gentleman's "entertainer," complete with pink top, feather cap and black fishnets. The heavily made-up young woman knelt before prison administrators giving them free shoe shines.

Aramark's low bids have succeeded in getting contracts in many jails and prisons. The company boasts that it provides more than a million meals a day to prisoners nationwide. Aramark materials also emphasize the company's adherence to ACA standards, but that hasn't stopped the allegations from piling up. In Dauphin County, Pa., for instance, a grand jury is

investigating charges of over-billing and poor food quality. In July 2004, New Mexico prisoners at Los Lunas prison, fed up with Aramark's low food quality and "inedible" meat-type products, organized a hunger strike. Similar problems have been reported in at least a dozen states.

### Privatization, politicians and payola

The glossy *GEOworld* magazine, distributed at the ACA conference, trumpeted the success of the largest "Private-Public Partnership in the World," a sprawling detention center complex in Pecos, Texas. Known as the Reeves County Detention Facility (RCDC), the complex consists of prisons for both Bureau of Prisons and Arizona state inmates. According to GEO, "the joint venture ... between GEO Group and Reeves County has been a rewarding challenge."

Unmentioned was that fact that a Reeves County judge, Jimmy Galindo, is facing a lawsuit over his role in granting the private operation and expansive construction of RCDC. According to the local *Odessa American* newspaper, building RCDC has led to the "near financial ruin of the county." RCDC is currently the subject of an FBI and Texas Ranger investigation over the tampering of government documents. (In addition, two guards resigned in early January 2005 over sexual molestation charges.)

The RCDC is a private-public partnership in more ways than one. Randy DeLay, the brother of House Majority Leader Tom DeLay, lobbied the Bureau of Prisons to send its prisoners to RCDC, at the behest of county officials.

Apparently, Randy DeLay isn't the only member of his family with an interest in corrections. In December, Rep. DeLay accepted a \$100,000 check from the CCA for the DeLay Foundation for Kids. He has since been indicted for election related improprieties.

CCA has become a leader in securing private prison contracts. In FY 2003, CCA generated over \$268.9 million in revenue. Greasing the palms of legislators nationwide hasn't hurt: In 2004 CCA's political action committee gave \$59,000 to candidates for federal office—92 percent to Republicans.

This is part and parcel of an industry in the business of locking up human beings. As the industry has grown, the ACA has moved away from the ideals of rehabilitation and redemption of the human spirit. Today, human beings behind

bars are little more than commodities to be traded on the open market.

Bill Deener, a financial writer for the *Dallas Morning News*, writing about recent gains in the private prison market, put it this way: "Crime may not pay, but prisons sure do."

In 1963, philosopher Hannah Arendt wrote about the "banality of evil." Contained within the packed exhibition hall of the ACA conference was evidence of what Arendt cautioned against: the normalization of dehumanization. Today, the banality of evil has found a home in the mundane marketplace that is the prison industry.

Three days before the ACA conference, MSN Money's Michael Brush issued a

glowing report on the investment potential for the CCA and GEO. The children of the baby boomers, he explained, are about to enter the 18-24-year-old age group—"the years when people commit the most crimes." He suggested now is the right time to buy into the trend: "[T]he nation's private prison companies look like solid investments for the next several years." ■

*Silja J.A. Talvi, an award-winning journalist, is currently writing a book about women in prison. In reporting this story, Talvi did not disclose her identity as a journalist. All the attributed quotes in this article come from individuals speaking in an official capacity at ACA events. She is a member of PLN's board.*

## Do You Like Adventure? Prisons for Iraq

by Silja J.A. Talvi

**D**ynCorp International, a subsidiary of Computer Sciences Corporation, was in heavy recruitment mode at the Winter, 2005 ACA Conference.

"The Dawn of Liberty," blared one flyer. "Join Us in the Fight for Freedom EVERYWHERE."

To get current and former correctional employees to consider "exciting opportunities in the Middle East," DynCorp was making Iraq sound like a trip to Disneyland. "Do you like adventure? Do you like to travel internationally?"

"In an ever increasing world of tension and instability, the U.S. Government has expanded its role in establishing societal stability through democratic style of governance."

With an "unblemished background," a civilian police officer in Iraq could earn \$120,632, with all lodging, meals, transportation, and logistical and administrative support provided at no cost. The small print on one flyer mentioned that a one-year contract was based on six-day workweek, 12 hours per day.

For a prison guard making \$12 an hour, this offer seemed mighty tempting. One female guard sat outside the convention center, looking over the materials. "I wonder if it's worth it?" she mused.

One of the ACA's workshops was even devoted to "Prisons for Iraq," featur-

ing ACA Board member Mark Sauder, a former warden in Ohio.

In March 2004, as he explained, he was sent on a "corrections mission" to establish the new Iraqi Corrections Service. His co-presenter was Chuck Ryan, a 25-year Arizona Department of Corrections (AZDOC) veteran and the top deputy director under former AZDOC Director Terry Stewart. Both Ryan and Stewart, who ran for president of the ACA in 2004, were known for setting the tone for a harsh and often brutal prison system. (Many other U.S. correctional administrators and prison guards with questionable histories were also sent to Iraq, including Specialist Charles Graner, the unrepentant Abu Ghraib torturer who was sentenced to 10 years in prison. See the September, 2004, issue of *PLN* for a more detailed history of the American prison officials who set up the Iraqi regime's new torture and murder centers.)

At the workshop, both Sauder and Ryan admitted that by April 2004, the prisons they were sent to oversee "exploded." To repair the damage from ongoing riots—and to control the prisoners—the U.S. contractors locked men up 30 to a cell, some of whom were shown in a slideshow at the workshop wearing nothing but white underwear.

Once the renovations were made, Sauder explained, he and his peers had to try to instill a new prison culture. "Our

mission was to teach Iraqis how to run a humane prison," he explained.

Speaking of the Abu Ghraib civilian prison, Sauder said: "Knowing they were not going to be beaten or killed helped inform trust between guards and prisoners."

Sauder proceeded to entertain the audience with photos of women visiting a mass of incarcerated husbands who could only have contact through a metal fence. When they women arrived, "it sounded like a turkey farm," he chuckled.

Sauder showed a picture of an Iraqi prisoner dripping with blood. The man had slashed his chest "to get attention."

"We knew better than to take this seriously," he said, referring to the common experience of American prisoners who self-mutilate while incarcerated.

Sauder also explained that one of his most interesting tasks was being able to assign the captured Saddam Hussein his official Iraqi Corrections Service number: 005666.

"It's the mark of the Antichrist," Sauder said of the 666 designation. "If you shaved [Hussein's] head, you would probably see it anyway." ■

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# Bursting At The Seams: The Arizona DOC, Privatization and Sheriff Joe

by Silja J.A. Talvi

The ACA's choice of Arizona for its Winter 2005 conference made perfect sense.

At last count, the Arizona Department of Corrections (AZDOC) was in charge of 32,200 prisoners, many of who are jam-packed into facilities that dot the outskirts of Phoenix.

Within the AZDOC, private-public prison "partnerships" like the ones that the ACA promotes have become commonplace. These kinds of business arrangements helped Arizona Correctional Industries generate \$20 million in sales for FY 2004 from prison slave labor. Among the companies operating on the "inside" are Eagle Milling Co., Sodexho-Marriott, Eurofresh, Farmer's Insurance Co., and Televerde. (Televerde contracts with the Perryville women's prison complex to use prison labor for "business-to-business" phone sales. The major employer is Microsoft, whose shiny banner hangs prominently in the prison call center.)

The AZDOC is simultaneously dealing with chronic understaffing and a deficit of 2,600 beds. As a result, the government agency has tried to reduce prison costs in a number of questionable ways, including cutting the number of meals offered to prisoners, and shipping prisoners out-of-state to deal with overcrowding. When Correctional Services Corp. (CSC) came in with a bid of \$38.50 per prisoner per day in 2002, the state jumped on the perceived savings of \$20 per prisoner, per day. But sending prisoners to privately-run prisons didn't work as well as officials had wished. Shortly after being shipped out, Arizona prisoners

who had been shipped out to a CSC prison in East Texas prison rioted over the poor conditions of their confinement, the distance from their families, as well as their personal items lost in transport. It was later revealed that related expenses and delays from the January 2003 riot cost Arizona taxpayers over \$400,000.

Those kinds of problems haven't been limited to prisoners sent out of state. A record-setting 15-day hostage standoff in January 2004 and the recent violence in a racially segregated unit of the Arizona State Prison Complex in Tucson in January 2005 pointed to serious problems *within* the prison system, just as the Department of Justice investigation highlighted egregious violations of human rights in the late 1990s. The allegations of abuse, as well as a resulting settlement which mandated a long list of remedies and immediate changes in policy, occurred under the leadership of former AZDOC Director Terry Stewart. (For more on Stewart, see sidebar on the influence of the corrections industry in Iraq.)

These days, Arizona Governor Janet Napolitano is seeking an additional \$700 million for FY 2006 to run the state's overburdened prison system. That amount breaks down to an incarceration cost of \$2 million per day.

Republicans in the state legislature are supportive of prison growth and the expansion of private prison operations. The money trail in Arizona is not hard to follow: In 2002 alone, CSC (which runs several prisons in Arizona in addition to the one in Newton, TX) gave \$70,000 to state legislators, 74% of which went to Republicans. CCA gave nearly \$58,000 in the same year to AZ legislators; 80% went to Republicans. The lesser known Management and Training Corporation is vying for more prison contracts in Arizona. The company contributed the largest amount in 2002, \$139,000. Of that amount, 96% went to Republican legislators.

## Sheriff Joe

"Sheriff Joe" Arpaio, who served as an ACA Arizona host committee chairperson, is widely revered in corrections circles for his law-and-order media savvy. At the January conference, all the buzz was about

Sheriff Joe's gleaming 620,000 square-foot 4<sup>th</sup> Avenue Jail in downtown Phoenix, which opened for business in 2004

Palm print and iris scanners, video-visitation systems (complete with "scratch screens" to prevent damage from angry prisoners), and a casino-style "switching" system to manage images from the facility's 700 cameras are among the high-tech bells and whistles featured in the windowless mega-jail. Many of the more than two dozen private companies who collaborated to create the 4<sup>th</sup> Avenue Jail were represented as exhibitors at the ACA conference, including architectural firm Durrant/HOK; Trussbilt (cell wall paneling, detention accessories, windows and steel doors); SpaceSaver (property shelving); and Multimedia Telesys, which provided the audiovisual equipment for each workshop.

The goal had been to create an ultra-secure jail that maximized efficiency, something that jail Captain Charles Johnson compared to "a car assembly line" in the July/August 2004 issue of *Correctional News*. Johnson also remarked that Sheriff Joe kept complaining that the outside of the jail looked "too pretty." The exterior of the facility was purposely designed so as not to upset locals and tourists headed to nearby Diamondback Stadium.

Things are certainly not pretty for Maricopa Jail prisoners, and Sheriff Joe wants to keep it that way. He made sure that the \$137 million jail did not displace Maricopa County's highly controversial tent city, where prisoners are housed in the desert and put to work. Pink handcuffs, underwear and sheets for male prisoners are used in all of the Maricopa County jails, as a way of assuring "theft prevention"—or humiliation, as the case may be. Low-quality, cost-saving meals have been another way to assure that prisoners get the taste, look and feel of Sheriff Joe's style of punishment.

Leading up to Kerik's opening keynote, Phoenix Mayor Phil Gordon touted Sheriff Joe as the "toughest sheriff in the country," adding that if conference-goers found a bit of that infamous jailhouse green bologna in their catered meals, they should "blame Joe."

The audience laughed heartily. ■

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# What's Wrong With the ACA?

by Elizabeth Alexander

The American Correctional Association (ACA) is the largest and best-known organization of prison and jail staff in the country. It offers higher education programs designed to train prison industry professionals and, like a traditional professional association, it certifies persons as members in good standing of the profession. Of course, the major organizational function of the ACA is accreditation of prisons, jails, and juvenile facilities on the basis of published standards that the ACA has promulgated. Unfortunately, the ACA's actual performance of this function does not assure that minimum professional standards are observed. In fact, the ACA's process substitutes the standards and accreditation process for any form of more meaningful corrections oversight.

The ACA appears to embrace the deployment of their standards and accreditation process to protect facilities from outside scrutiny. On their website is a list of benefits that a prison obtains by being accredited. The first benefit is that the cost of liability insurance will decrease, because it will be harder to sue the prison successfully. The second benefit states that "accredited agencies have a stronger defense against litigation" because accreditation shows that the prison is trying to do things right.

The ACA claims that prisons are safer from being sued because the conditions in accredited facilities are better. But it is hard to find compelling evidence in support of this proposition. A few years ago I represented a prisoner from the Maximum Security Facility in Lorton, Virginia in a case that challenged denial of medical care for his glaucoma and skin cancer, and the conditions of confinement in his cell. Conditions included being locked up for extended periods of time in a cell flooded with human waste from other cells, without ventilation in temperatures over 100 degrees, over twenty-three hours a day without ever getting outside or even seeing the outside. The laundry facilities did not work, the heat sometimes did not work in the winter, and the entire cellblock was filthy and noisy.

This facility had been accredited by the ACA just before the litigation began, despite the fact that an internal report of the prison system acknowledged that

the facility failed to meet the ACA standards. How could that happen? The ACA inspection team simply waived the failure to meet the standards and accredited the prison anyway. Luckily in this case, the jury was not impressed with the fact that the facility was accredited and awarded about \$175,000 in damages, including punitive damages.

What happened at Lorton is not an aberration. Recently, the Suffolk County Detention Center in Massachusetts received a score of 98.96 in the ACA's accreditation process. Shortly after accreditation, seven guards were charged with federal crimes for assaulting and abusing prisoners. In addition, a number of women prisoners have come forward to report rapes and other forms of sexual abuse by male guards at the jail.<sup>1</sup>

In another case, the ACA accredited a Louisiana juvenile facility in 1996. That same year, in a one-week period, 28 children at the facility were treated for broken bones or other injuries. On one day eight children suffered broken eardrums

as a result of beatings by staff. The ACA never revoked the accreditation.<sup>2</sup> There are many more horrifying examples that could be cited.

How can that be? It is easier to understand why these dangerous and disgusting facilities secure accreditation in light of the membership of the accreditation committee. The person in charge of the accreditation process at the Suffolk County Jail was Harold Clarke, then the Director of the Nebraska Department of Corrections and currently the secretary of the Washington Department of Corrections.<sup>3</sup> Just before Mr. Clarke led the audit at the jail, a Nebraska state agency issued a devastatingly critical report about medical care in his corrections system. The beginning of the report quotes a prison doctor who exposed the dangerous neglect within the system: "I am ashamed of what I have become, I really am...For the first time, I stood up and said, I can't kill any more. Too much. These are human beings, for crying out loud."<sup>4</sup> In response to the controversy about Mr. Clarke's ac-

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## What's Wrong with ACA? (cont.)

creditation of Suffolk County, an ACA official refused to release the names of any prisons or jails that had actually been refused accreditation, but did claim that some actually exist.<sup>5</sup> Only after the problems at Suffolk County led to wide-spread news coverage did ACA auditors return to perform a more critical examination of the jail.<sup>6</sup>

It is not just that the ACA accreditation process allows the auditors to waive compliance with standards. The standards themselves reflect the same weakness. The ACA chose as head of its standards committee, Ronald Angelone, the controversial former director of the Department of Corrections in Virginia.

For several years, the State of Connecticut sent prisoners to Wallens Ridge State Prison, a supermax prison in Virginia. Two mentally ill Connecticut prisoners died there over a short period of time. One committed suicide and another died after being repeatedly shocked with a stun gun and then placed in restraints. After these events, the National Prison Project sued over the treatment of the Connecticut prisoners.

Furthermore, a Connecticut state agency, the Office of Protection and Advocacy for Persons with Disabilities, attempted to inspect Wallens Ridge to evaluate the treatment of mentally ill prisoners there. Director Angelone refused to allow the agency to inspect his prison despite a federal law that denies his ability to do so.

Prior to Director Angelone's current position, he served as the director of corrections in Nevada until 1994. The National Prison Project sued Nevada because of its unconstitutional use of force policies around the same time. In the course of the lawsuit, the NPP found that at one prison, from July 1993 to June 1994, there had been 50 incidents in which staff shot prisoners, 20 incidents of the use of chemical agents against prisoners, and 128 incidents involving hands-on use of force. The year after Angelone left, there were only eight reported uses of firearms. The use of chemicals fell to a fraction of its previous level, and the number of hands-on use of force incidents decreased nearly 50 percent. The state's new director and the prison's warden admitted in sworn testimony that the past practices, during Angelone's tenure, were improper.

When Angelone came to Virginia he brought with him many of the same dangerous policies and practices. Prison guards in Virginia now carry guns in the housing units and have access to various devices for delivering electric shocks to prisoners. An editorial published in *The Virginian-Pilot* in Norfolk, Virginia, declared that "if the price is vindictive or even abusive treatment of prisoners—while hurdles are placed in the way of public oversight - then the price is too

high and [Angelone] should go."<sup>7</sup>

I testified before Mr. Angelone and the rest of the Standards Committee in support of a policy of keeping juveniles out of adult prisons, because a juvenile in an adult prison is several times more likely to be raped or to commit suicide if placed in an adult prison rather than a juvenile facility. Angelone led a successful fight at that meeting to water down the standards.

The decision of the ACA membership to put in charge of the Standards Committee someone like Angelone, who advocates dangerous and reactionary practices, and who has displayed indifference to public accountability of corrections, is extraordinarily revealing. Absent complete restructuring, the ACA is as much a barrier to meaningful reform of prison conditions as it is an ally. ■

*Elizabeth Alexander is the director of the ACLU's National Prison Project. The article previously appeared in the NPP journal.*

### Endnotes

1. Francie Latour, "Suffolk Jail Audit Group is Faulted, Critics to Demand New Review Panel," *The Boston Globe*, 20 June 2001.
2. Ibid.
3. Ibid.
4. *Ombudsman's Report: Examination of the Medical System of the Nebraska Department of Correctional Services*, 23 Nov. 1999.
5. Francie Latour, "Suffolk Jail Audit Group is Faulted, Critics to Demand New Review Panel," *The Boston Globe*, 20 June 2001.
6. Francie Latour, "Report Blasts Operation of Suffolk Sheriff's Office," *The Boston Globe*, 19 July 2001.
7. Editorial, *The Virginian-Pilot*, 14 May 2000.

## From the Editor

by Paul Wright

As mentioned in previous issues of *APLN*, our website has been a major undertaking and now makes available all back issues of *PLN* in various formats, including all articles in *PLN*'s customized and searchable database as well as the issues in PDF format. The website has met with very positive responses and we continue to add materials to it on a daily basis. We welcome suggestions and ideas on how we can bring still more information and news to our readers.

Subscribers will soon receive *PLN*'s annual fund raising letter and a survey seeking input about the content of the print

magazine. Please respond to the survey as it allows us to better serve your needs.

Due to delays in production over the summer we got behind on our publishing schedule. To get back on schedule we are publishing on a bi weekly schedule until we get caught up. Please bear with us during this process and we apologize for the delay but we believe that switching to a new desk top publishing program, while inconvenient at first, will allow us to further improve our quality and services.

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The *Disciplinary Self-help Litigation Manual* is written by Daniel E. Manville, Co-Author of the Prisoners' Self-Help Litigation Manual (3rd edition). The DSHLM has 332 pages of text. It is sold only in paperback. The price of \$34.95 to prisoners includes the price of postage. The price of \$64.95 to non-prisoners includes the price of postage.

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# USP Beaumont, Texas: Murder and Mayhem in the Thunder Dome

by Leah Caldwell

Located in East Texas, the Federal Correctional Complex (FCC) at Beaumont is made up of a trio of federal prisons that are home to 5,667 prisoners. These prisons are run by the Bureau of Prisons, which is the federal arm of the U.S. prison system and an agency of the Department of Justice. The BOP oversees more than 150,000 U.S. prisoners; 21,488 of them are imprisoned in Texas.

It is normally the failings of the private prison industry that receive the most attention, but by taking a closer look at the federally-managed Beaumont complex, a number of questions are raised regarding the management of federal prisons.

*"Recognizing the inherent dignity of all human beings and their potential for change, the Bureau of Prisons treats inmates fairly and responsively and affords them opportunities for self-improvement to facilitate their successful re-entry into the community."*

**(All italicized quotes are excerpts from the Bureau of Prison's "Vision Statement" from the "State of the Bureau 2001" Report.)**

The U.S. Penitentiary in Beaumont is home to what prisoners call the "thunder dome." This moniker, borrowed from the *Mad Max* fantasy flicks of the 1980s, refers to the place where "two go in and only one leaves alive," as the film synopsis puts it—a place where two men fight to the death.

At USP Beaumont, witnesses claimed that guards paired up rival segregation prisoners in the 15-by-20 ft. recreation cages and let the prisoners go at it. In January 2001, one of the matches was fatal. Prisoners Shannon Wayne Agofsky and Luther Plant were in a "rec cage" when, according to a Beaumont prison guard's testimony in July 2004, Agofsky stomped on Plant's head, which caused his death nearly two hours later. Forensic experts testified that Plant had drowned in his own blood.

While BOP and FBI officials acknowledge that this was the fifth murder at USP Beaumont since its opening in 1997, they refused to disclose any details to the media relating to the three other homicides, such as the name of the victim, date, time or manner of death, even though these types of facts are routinely released to news media in non-prison homicides.

The prosecution was able to seek the death penalty for Agofsky in 2004 under a 1994 crime bill that made murder by a federal prisoner a death penalty offense. Agofsky, who was serving a life sentence without parole, was cast by the prosecution as an experienced martial artist waiting to attack. Agofsky has a black belt in Hwa Rang Do, a branch of martial arts which translates literally as "The way of the flowering manhood."

A November 2000 letter written by Agofsky was also presented at the trial. He wrote, "All I do is work out, wait to leave and hope the cops mess up and let me around some other scumbag so I can test out my hand!" The authorities apparently gave him that opportunity when he was put in the rec cage with his opponent, Plant, who had served eight years of his 15-year sentence on charges of arson in a 1987 nightclub fire in Texas.

Christopher Matt, a Beaumont prison guard testified that it was his responsibility to pair up the prisoners in the rec cages, and he said that he did not sense hostility between the two prisoners. Witnesses at the trial maintained that pairing up prisoners in cages and allowing them to fight was a common practice, so common that nicknames sprouted up like "gladiator school" and the aforementioned "thunder dome." Prison officials deny this. Agofsky's defense contended that the guard did not even witness the fight, and three prisoners testified that Agofsky was not the instigator. Agofsky, who had recently lost his 2000 appeal for the 1989 kidnapping and murder of Dan Short, a Missouri bank president, was convicted and sentenced to death in the murder of Plant in September 2004.

After his conviction, Agofsky was transferred to the ADX in Florence, Colorado, the BOP's "super max" prison in the Rocky Mountains. The Bureau of Prisons tried to prevent contact between this reporter and Agofsky on a few separate occasions. Letters between Agofsky and I were delayed and false information was given to me by a bureau employee at the Colorado ADX where Agofsky is imprisoned, [the federal death row is located at the U.S. Penitentiary in Terre Haute, Indiana]. These actions were seemingly intended to cause confusion and delay correspondence.

I was told by a Colorado ADX employee that a phone conversation between Agofsky and I could be arranged, yet Agofsky would have to place the call. I sent a letter to Agofsky with my phone number and awaited a call. I got a call, but it was from Agofsky's mother. Her son had contacted her and instructed her to phone me. She related to me that it would be impossible for Agofsky to call me because he was allowed limited calls per month and those were restricted to family members. During this conversation, Agofsky's mother told me that Agofsky had sent me a letter detailing his experiences. Months later, I have yet to receive any letter from Agofsky. Agofsky's trial and appellate counsel refused to comment on the circumstances of the murder citing the pending appeal.

Agofsky is not the only Beaumont prisoner to be transferred to the Colorado ADX.

In April 2005, two more prisoners at USP Beaumont were indicted in a 1999 stabbing death of another prisoner. Arzell Gulley and David Lee Jackson are now in Colorado facing charges of first degree murder and the use of a dangerous weapon in a federal facility. If convicted, they face the death penalty or a life sentence. The US Attorney's office did not explain the six year lapse between the murder and the indictment.

In an unrelated case, prisoner Keith Barnes was transferred to USP Beaumont in May 2005. Originally convicted in Washington D.C. for murder and conspiracy to rob, Barnes had testified against a codefendant for a reduction in his sentence and, as a result of his cooperation with authorities, bounced from prison to prison seeking protection from the codefendant's numerous connections within the prison system. According to the family's spokesperson, Sharon Brown, Barnes knew he was going to die. Fellow prisoners targeted Barnes incessantly, at one point he was placed in a cell with another prisoner who fought him all night long. At this point, Barnes was supposed to be under protective custody. He sought removal from the BOP system, but instead he was transferred to USP Beaumont on May 6, 2005. The next day, Barnes was dead with 69 stab wounds. Since then, Beaumont has been tight-lipped with

information surrounding the murder and Barnes' family is trying to be patient, but they want answers.

Brown said the family only wanted to know the basics surrounding Keith's murder as well as ensure protection for his mother who fears for her life. Brown has called USP Beaumont looking for answers, but she has come to the conclusion that they were "giving her the run around" and keeping everything "hush-hush." When USP Beaumont did release information to the family, this information has not always been consistent. After receiving notification of Keith's death on Mother's day, the family was told that Keith had been found dead. Only later did they learn that Keith was pronounced dead at the hospital. "We have the right to know what happened to him," Brown said.

*"The Bureau ensures the physical safety of all inmates through a controlled environment which meets each inmate's need for security through the elimination of violence, predatory behavior, gang activity, drug use, and inmate weapons."*

There are 153,084 prisoners incarcerated in Bureau of Prison facilities and 88,619 (54%) of those prisoners are convicted drug offenders, according to

the BOP website. At USP Beaumont, 33% of the prisoner population is in for drug offenses. With a fair amount of people imprisoned for drug offenses, the demand for drugs inside prisons has not ceased. In a 2001 report by the Office of the Inspector General, USP Beaumont was reported to have the highest percentage of positive drug tests and drug misconduct rate in the entire BOP. In the Inspector General's report, approximately 8% of the approximately 1,300 prisoners at USP Beaumont tested positive for drug use and the overall drug misconduct rate was 23%. (By comparison, the BOP national rate for positive drug tests was 2% and 3% for high security prisons.)

Access to drugs in prisons, more specifically high security prisons, generally requires complicity from prison employees. The prisoners at USP Beaumont have not been hard-pressed to find this cooperation. Since 2003, at least five guards are known to have been indicted for either conspiracy to possess and/or possession of a controlled substance with intent to distribute solely in the Beaumont prisons. The monitoring of staff involvement in drug smuggling by the BOP is meager,

and this lack of oversight has contributed to the amount of drugs available inside prisons.

A 2003 report entitled *The Federal Bureau of Prisons' Drug Interdiction Activities*, from the Office of the Inspector General, is primarily dedicated to addressing the BOP's "drug problem," and it details the role of the prison staff in making drugs accessible to prisoners.

In 2000, a prison guard attempted to smuggle "109 grams of crack cocaine, 73 grams of black tar heroin, and 25 grams of white heroin" into USP Beaumont. The report demonstrates how staff involvement in drug smuggling can increase the reach and amount of drugs in the prisons when this quantity is packaged and distributed.

The report also documents the effects of ion spectrometry technology, which allows prison officials to monitor the inflow of drugs through the random scanning of prison visitors for any drugs. A test run of the technology at many of the BOP facilities was used to gauge its effects on levels of drug usage in a select group of federal prisons. Though the ion spectrometry was effective in reducing drug usage in low and medium security prisons, it did not have the

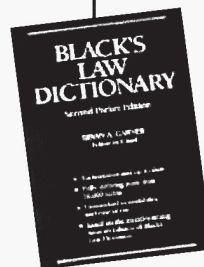
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## What's Wrong with ACA? (cont.)

intended results in high security prisons. Staff are not subjected to ion scans.

USP Beaumont was blamed for the disappointing figures. The report stated, "Another factor cited that affected the overall figures for high security institutions was the emergence of USP Beaumont, Texas, from a new penitentiary that was relatively drug-free to a penitentiary that demonstrated a very high rate of drug misconducts with an increase of 70.3% in its drug misconduct rate."

Even when addressing drug use in the BOP as a whole, the Beaumont prisons have stood out as exemplary cases for some of the core problems that have afflicted the system. In 2001, USP Beaumont was reported to have the highest percentage of positive drug tests and drug misconduct rate in the entire BOP.

*"All Bureau of Prisons staff share a common role as correctional workers, which requires a mutual responsibility for maintaining safe and secure institutions and for modeling society's mainstream values and norms."*

According to an official at USP Beaumont, there were 31 prisoner-on-prisoner assaults in fiscal year 2001; 25 prisoner-on-staff assaults; and the figures for staff-on-prisoner assaults are not in the database. But the official said that assault by staff on prisoners "doesn't happen a lot." But without figures, however reliable, this assertion cannot be verified one way or the other.

Yet the Beaumont federal prisons have seen their share of staff assault cases. In 2001, Bryan Small, a Beaumont prison guard, was indicted for "conspiracy to defraud the United States." Small was the supervisor of guards at the Federal Correctional Institution in Beaumont, another BOP-run facility, while prisoners were allegedly being assaulted by guards for several months in 1999. Small was the only guard charged.

Rhonda Nicole Mims, another guard at the complex in Beaumont, is facing charges of sexual contact with a prisoner. She faces a six month prison term and a \$5,000 fine if convicted.

In the Office of the Inspector General's semi-annual report to Congress, it was reported that the OIG received 2,606 complaints involving the BOP from April 1 to Sept. 30, 2004. The report said, "The most common allegations made against

BOP employees included job performance failure, use of unnecessary force, official misconduct, and off-duty misconduct. The vast majority of complaints dealt with non-criminal issues that the OIG referred to the BOP's Office of Internal Affairs."

From these complaints, 236 cases of BOP employee misconduct were opened. The report said that the misconduct ranged from "bribery of a public official, sexual abuse of inmates, and introduction of contraband."

The Beaumont prisons are not the

sole manifestations of a woefully inadequate system. Simultaneously, the full extent of BOP mismanagement has yet to be fully reported because of the highly effective damage control by its press corps and its ability to restrict public access to information. Yet even with the limited amount of information available, the troubles at just one Texas prison in the BOP system should be troubling for any American. ■

*Leah Caldwell is a history student at the University of Texas at Austin.*

## Interest Awarded in New Hampshire Canteen Surcharge Fee

The New Hampshire Supreme Court held that the state was required to pay interest to "all prisoners who receive pecuniary damages as a result of" *Starr v. Governor*, the New Hampshire canteen surcharge case.

Darren Starr, a prisoner of the New Hampshire State Prison system brought suit challenging "the legality of a 5% surcharge assessed on all goods sold at the canteen pursuant to RSA 662:7-b(2001). At the time of the lawsuit, the proceeds of the surcharge were deposited in the victims' assistance fund into the fund exceeded \$750,000; thereafter the access was deposited in the general fund."

As we previously reported the New Hampshire Supreme Court held in *Starr v. Governor*, 148 N.H. 72, 802 A.2d 1227 (2002) (*Starr I*) "that because the 5% surcharge 'neither funds of the maintenance, overhead or operation of the commissary, you're reimbursed to prison for providing a commissary,'... the surcharge or the tax." The court "further concluded that because the only transactions subject to the tax or those that took place at the prison canteen, the tax was disproportionately applied and therefore unconstitutional." See: *PLN*, 2004).

"On remand, the trial court ordered the State to reimburse those individuals... who were required to pay the 5% surcharge. The State appealed and [the Supreme Court] summarily affirmed the trial court's order. *Starr v. Governor*, No. 2003-0465(N.H. 2003)." The State then moved for relief, Starr responded and the trial court denied the request.

On appeal, the Supreme Court agreed with Starr that as a prevailing party, he

was "entitled to judgment interest pursuant to RSA 524:1-b(Supp. 2001)." In so holding, the Court rejected the State's argument that the award of interest under the statute is discretionary. The Court also rejected the States argument that Starr's request for interest was untimely.

Next the Court rejected the State's argument "that because RSA 524:1-b applies only to 'parties,' any award should be limited to" Starr. The Court noted "that the trial court found that earlier in the proceedings, the State had objected to the plaintiffs request for certification of a class action, representing that at the plaintiffs prevailed, 'all prisoners who were subjected to the 5% surcharge would be reimbursed.'" Therefore, the Court held that "all prisoners who receive pecuniary damages as a result of this equity action are entitled to judgment interest."

Finally, the Court declined to address Starr's claim "that the trial court failed to consider his... argument that the prison canteen's subsequent collection of a 6% surcharge without amendment of its procedures was illegal." Finding "no evidence in the record that [Starr]... ever alerted the trial court to this alleged error," the Court concluded "that the issue [had] not been preserved for [its] review." Starr represented himself pro se in this action. See: *Starr v. Governor of New Hampshire*, 864 A.2d 348 (2004). ■

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# CCA Guard Arrested for Sexually Abusing Vermont Prisoners

Sexual abuse by a Corrections Corporation of America (CCA) guard has spurred three lawsuits against CCA and resulted in the guard's arrest.

The legal activity resulted from incidents at CCA's prisons at the Marion Adjustment Center (MAC) and St. Mary's Kentucky. MAC was home to Vermont prisoners that relocated to another state to ease overcrowding. *PLN* reported the September 2004 riot at MAC. [*PLN* March 2005].

The matter came to a crescendo on January 26, 2005, after 26-year-old Joel Becks, a former MAC guard, was arrested on charges of sexual abuse and official misconduct for sexually abusing two prisoners by Kentucky's Nelson County Sheriff's Department.

Becks' charges stem from two incidents occurring in April 2004. Becks "stayed over" from his shift ending at 3 p.m. on April 12. Around supertime, Becks entered cell D205, finding prisoners John Doe and John Roe violating rules by smoking. Becks closed the cell door. He ordered Doe to the back of the cell and Roe to watch for guards.

Becks dropped to his knees, pulled Doe's sweats down, fondled him and commenced to performing fellatio. Doe neither became erect or ejaculated. Frustrated by Doe's lack of response, Becks said "I want the kid anyway."

Becks then ordered the two prisoners to switch positions. He then commenced his fondling and fellatio on Roe despite his

protestation. When Doe advised a guard was coming, Becks ceased his abuse.

Becks seemed infatuated with Roe, as on April 29 he entered Roe's segregation unit. Becks was prohibited from being in that unit, but told the guard on duty he was there to relieve him. When that guard left, Becks went to Roe's cell, ordering him to cuff up. Becks then fondled and attempted to perform fellatio on Roe. Becks stopped after prisoners alerted the Unit Sgt. came to investigate Becks improper relief status.

Prior to being hired by CCA on February 16, 2004, Becks had never held a job besides three years in the Army. He was a burly man who lived with his parents. Upon hiring, CCA placed him as a guard without training him.

Beck's hiring exhibits CCA's desperation to fill as many vacant \$7.81 an hour guard posts. To fill those posts, CCA has resorted to bringing in guards from Minnesota, paying them \$14.60 an hour with a \$60 weekly food stipend. Paying Kentucky residents that pay may prevent CCA having to hire people such as Becks, who admitted in his final interview he was "flaky, irresponsible, spontaneous."

Before his May 1, 2004, termination, Becks was known around MAC to be a sexual predator. "I'm fearing for my life and my safety here knowing that (guard Becks) can open my cell, handcuff me, and rape me," said one prisoner grievance.

Becks ultimately admitted his sexual abuse to a state trooper. Becks' abuse resulted in lawsuits by Doe and Roe; it

outlines abuse against three other prisoners besides them. Doe's suit was settled for a confidential amount by CCA on the day of Becks' arrest, January 26, 2005. In an unusual move in prison litigation, CCA did not file *any* pretrial motions before settling with Doe. Along with a suit filed by Doe, a suit filed by prisoner Barrett Downey is pending against CCA for Becks' abuse.

*PLN* will report future developments in this matter. The prisoners have been represented by Vermont attorneys Tom Costello of Brattleboro and Barry Kade of Montgomery. *PLN* editor Paul Wright has also been involved in two of the cases. See: *Doe v. Corrections Corporation of America*, U.S. District Court, Vermont District, Case No: 2:04-CV-144. ■

Additional Sources: *Brattleboro Reformer*.

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# First They Came For Lynne Stewart...

by Marjorie Cohn

*First they came for the communists,  
and I did not speak out—  
because I was not a communist;  
Then they came for the socialists, and I  
did not speak out—  
because I was not a socialist;  
Then they came for the trade unionists,  
and I did not speak out—  
because I was not a trade unionist;  
Then they came for the Jews, and I did  
not speak out—  
because I was not a Jew;  
Then they came for me—  
and there was no one left to speak out  
for me.*

—Pastor Martin Niemöller, 1945

Now they're coming for the lawyers, and we must all speak out.

On February 10, 2005, after 13 days of deliberations, prominent New York civil rights attorney Lynne Stewart was convicted of conspiracy, providing material support to terrorists, and defrauding the United States government. Her 7-month trial was held in the same federal courthouse where the Rosenbergs were tried for conspiracy to commit espionage more than 50 years ago. Stewart faces between 35 and 45 years in prison.

Stewart was indicted in March 2002. The indictment was based on governmental monitoring of conversations between Stewart and her client, Shiek Omar Abdel Rahman, which occurred two and a half years before the terrorist attacks of September 11, 2001.

Rahman is serving a life plus 65-year sentence for conspiring to bomb several New York City landmarks and solicit-

ing crimes of violence against the U.S. military and Egyptian President Hosni Mubarak.

Beginning in 1997, the Bureau of Prisons, at the direction of the Attorney General, imposed special administrative measures (SAMs) on Rahman, limiting his access to the mail, the media, the telephone and visitors.

Stewart was obliged to sign an affirmation agreeing to be bound by the SAMs, before being allowed to see her client. She agreed "only to be accompanied by translators for the purpose of communicating with inmate Abdel Rahman concerning legal matters" and not to "use my meetings, correspondence, or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman."

The government charged that Stewart allowed the Arabic translator to read letters to Rahman regarding Islamic Group matters, and to conduct a discussion with Rahman regarding whether Islamic Group should continue to comply with a cease-fire in Egypt. It also alleged that Stewart concealed those discussions from prison guards, and announced to the media that Rahman had withdrawn his support for the cease-fire, in violation of the SAMs.

Stewart denied these allegations, and testified that she believed in good faith that relaying Rahman's statement calling for more consultation about the Egyptian cease-fire did not violate the SAMs. She said she was trying to have Rahman transferred to Egypt to serve his sentence by keeping him visible. Rahman is old, blind, does not speak English, and has been kept virtually incommunicado in a federal prison in Minnesota.

Her good-faith belief, Stewart testified, was based on actions of former U.S. Attorney General Ramsey Clark, another of Rahman's attorneys. Clark also signed these SAMs, held press conferences, and conveyed Rahman's statements about Egyptian politics to the press. Yet, Clark was never prosecuted.

Clark, who testified for Stewart at her trial, told Amy Goodman of Democracy Now!, "I don't know of anything that Lynne did that I didn't do." He said, "This case would never have been brought except

for the fear generated, and the advantage that the Bush administration was taking of it, by the events of September 11, 2001. In ordinary times and circumstances, it would be recognized that everything that Lynne did was exactly what an effective attorney representing a client zealously would be obligated to do."

At a 2002 conference, Stewart noted, "Usually if one breaks a Bureau of Prisons edict, one is told one can't visit the prison again, or one gets some sort of administrative slap on the wrist of some kind. One does not usually get indicted for aiding a terrorist organization."

Why did the government wait so long before indicting Lynne Stewart? According to Heidi Boghosian, executive director of the National Lawyers Guild, Stewart was a "prime target for the Attorney General, who needed desperately to show that the Justice Department was actively fighting terrorism."

When Stewart was indicted, John Ashcroft had arrested only one person since September 11—John Walker Lindh. "By indicting Stewart," noted Boghosian, "Ashcroft effectively sent the dual message that he could indict other lawyers who represented clients with unpopular beliefs and that such clients do not deserve defense."

The same day Bush signed the USA Patriot Act into law, General Ashcroft announced an interim amendment to the Bureau of Prisons regulation, which took effect five days later, without the usual public comment period. It permits the Department of Justice (DOJ) unlimited and unreviewable discretion to eavesdrop on confidential attorney-client conversations of persons in custody, with no judicial oversight and no meaningful standards. It applies not only to convicted prisoners but to all persons in the custody of the DOJ, including pretrial detainees, material witnesses, and immigration detainees who have not been accused of any crime.

At a 2002 convention of the National Lawyers Guild, Stewart expressed alarm at what her indictment portends for the future of the attorney-client privilege and criminal defense. She said, "This is about protecting the right to defend. Once the attorney-client privilege is lost, there is no right to defend as we know it." Speaking about the government's monitoring of

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her conversations with her client, Stewart stated, "The question you should be asking is not what I was doing in that room, but what was the government doing in that room?"

During the McCarthy period of the 1950s, in an effort to eradicate the perceived threat of communism, the government engaged in widespread illegal surveillance to threaten and silence anyone who had an unorthodox political viewpoint. Many people were jailed, blacklisted and lost their jobs. Thousands of lives were shattered as the FBI engaged in "red-baiting."

Since September 11, those who question government policy have been, and will continue to be, branded "terrorist." Even though "terrorism" was not an element of any of the offenses with which Lynne Stewart was charged, and Osama bin Laden was not part of any of the charges, the prosecution was permitted to bring bin Laden's name into the trial.

A written threat from the Jewish Defense Organization was posted on the door to Stewart's home after 10 1/2 days of jury deliberations in the trial. It referred to a message purporting "to reach out so the jurors understand what she is. And that's been done." The message gave Stewart's home address and said she "needs to be put out of business legally and effectively." It threatened to "drive her out of her home and out of the state." If this message did reach any jurors who were sitting on the fence, it may have pushed them over to the guilty side.

Stewart told Amy Goodman, "These SAMs said you know, 'If you break these regulations, you may be cut off from your client.' That was our greatest concern, that we would be cut off from the client. The idea of prosecution never entered our minds." Stewart continued, "I believe with my mind and heart that it was the right thing to do."

Lynne Stewart's indictment, and conviction, will also chill attorneys from taking on cases of unpopular clients. "The purpose of this prosecution," said Michael Ratner, president of the Center for Constitutional Rights, "was to send a message to lawyers who represent alleged terrorists that it's dangerous to do so."

Stewart's attorney, Michael Tigar, does not blame the jury for this injustice. "We have all in our lifetimes seen well-meaning juries get caught up in the media-dominated government rhetoric of their time, based mostly on fear," Tigar

said after the verdicts were announced. "I do not criticize these jurors ... I have every confidence this verdict will be set aside."

Lawyers representing Guantánamo detainees are being asked to sign agreements that their consultations with their clients will not be confidential. Tigar told Amy Goodman, "The only way that we will ever get to the bottom of the American concentration camp abuses at Gitmo and Abu Ghraib is if the lawyers for these prisoners are permitted to tell their stories to the world. If the government can shut off that communication, which they have attempted to do over and over and over again, these activities will continue in secret."

It is essential that people feel safe in these perilous times. But, as Supreme Court Associate Justice Sandra Day O'Connor wrote in a 1995 opinion, "It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis." The confidential relationship between attorney and client sits at the heart of our criminal justice system. We must zealously guard it or we will all be at risk.

Stewart will be sentenced on December 22, 2005. Letters on her behalf for the sentencing judge should be sent to her attorney at:

Jill R. Shellow-Lavine, Esq.  
2537 Post Road  
Southport, CT 06890

Letters should be addressed to the Honorable John G. Koeltl. Counsel will present the letters to the court prior to sentencing. Writers, especially former clients, should urge the court for leniency given Stewart having dedicated her life to providing zealous advocacy on behalf of the poor and unpopular accused of crimes. More information about the case and what you can do to help is available online at: <http://www.lynnestewart.org>. 🐾

*[Editor's Note: The muzzling of prisoners in general and political prisoners in particular has gone unnoticed in this case. Rahman has an opinion on political events in Egypt and is not allowed to express it. The right to express political opinions is fundamental for all humans, yet under the SAM's the attorney general becomes the arbiter of what is considered acceptable opinion.]*

Marjorie Cohn, a professor at Thomas Jefferson School of Law, is executive vice president of the National Lawyers Guild.

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# Houston Grand Juries Mostly Law-Enforcement and Government Employees

by Matthew T. Clarke

Ever since a ruling by the U. S. Supreme Court in *Smith v. State of Texas*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940), grand juries have been required to represent “a broad cross-section” of the community. Apparently, in Harris County, Texas, it is sufficient for grand juries to represent a broad cross-section of law enforcement and other government employees. Furthermore, only one in eleven grand jurors were Hispanic—and most of them were non-voting alternate jurors—in a county that is one-third Hispanic.

There are two methods of grand juror selection used in Texas. A state district judge can appoint three to five commissioners who select another fifteen to forty residents. A state statute requires that the residents “represent a broad cross-section of the population of the county, considering the factors of race, sex and age.” From the residents selected, the judge selects twelve grand jurors and two nonvoting alternates. The other method is to select

qualified residents randomly from the regular jury pool and have them constitute the grand jury. The commissioner method is used in Harris County. Of the five largest Texas counties, only Harris (Houston), Travis (Austin) and Tarrant (Fort Worth) still use the commissioner system.

In 2002 and 2003, Harris County had 129 grand jury commissioners. Of those, sixty-five had connections to local government or the Harris County legal system. This included twenty-four employees of the Harris County courts; fourteen attorneys (two of whom are former prosecutors and one a current appeals court judge); eleven jailers, parole, or probation officers; six current or retired police officers and the spouse of a high-level police officer; two private investigators; two bail bondsmen and one bail bondsman’s spouse; and four Houston City or Harris County governmental agency employees.

An obvious problem with the commissioner system is that the district judge

is likely to select his friends, colleagues or employees as commissioners. Just as judges are most likely to know people who work for the government, those government employees selected as commissioners are most likely to select people they know—friends, colleagues and employees. For instance, one judge selected grand jury commissioners exclusively from his court’s employees. Thus, the grand jury selection method becomes skewed toward government employees.

Another problem with the commissioner method is that many of the district judges were themselves prosecutors before they were elected to the bench.

“It’s not that (the commissioner) are intentionally conspiring or doing something bad,” according to Larry Karson, a criminal justice instructor at the University of Houston’s Downtown Campus whose review of 32 Harris County grand juries brought the problem to light. “But it’s not a fair representation of the community to have half of your grand jury commissioners come out of the court system.”

Harris County sends more criminal defendants to Death Row than any other political entity in the nation. It is proud of its tough-on-crime reputation. However, as Karson notes, this makes it even more important to avoid the appearance of impropriety in the grand jury selection system.

Murry B. Cohen, a former appeals court judge, agrees.

“When you’re indicting someone for the ultimate crime for which we give the ultimate penalty, it’s important that the system not just be fair but, in addition, look fair,” said Cohen. “The system should strive to avoid creating legitimate questions about its own legitimacy.”

Another area of concern involves police officers who shoot citizens. Of the 193 local police shootings since 1999, only two officers were indicted by Harris County grand juries. Why is this so? A *Houston Chronicle* investigation showed that one grand jury that was investigating the scandal at the Houston Police Department Crime Lab had a Houston police officer as a member. That grand jury failed to indict any of the people involved in the scandal over fabricated evidence and biased testimony. Instead, it merely issued a statement

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critical of the crime lab and the District Attorney's Office. Another grand jury investigating the fatal shooting of a Houston police officer had a retired Houston police officer as a juror. The investigation also showed that retirees—who are quicker than younger people to take the word of police officers, prosecutors and others in authority—are frequently and repeatedly used as grand jurors.

Former district judge and currently member of Congress Ted Poe described another abuse of the grand jury system in Harris County—"grand jury shopping," the ability of the prosecutors to present an indictment one grand jury failed to true bill to other grand juries as many times as the prosecutors desire.

"I think the District Attorney's Office selects the grand juries that they want to present cases to—especially the hard cases," said Poe. "The District attorney's Office should present cases to those grand juries in a lottery system. That's the fairest way for the defendant, the victim and the state."

District judges also tend to reappoint the same group of people as grand jury commissioners year after year. 262nd Judicial District Court Judge Mike Anderson defends this practice by claiming that few people are willing to invest the time and energy required of grand jury members.

"There's not a huge contingent of people who want to do this," said Anderson.

However, Cliff Stricklin, a state district judge in Dallas, has another take on the subject. He used the commissioner system when first elected, but has since changed to the jury pool system.

"I think it opens the doors to people who wouldn't normally even know about how to serve on a grand jury," Stricklin said.

That, of course, is the quintessential meaning of "cross-section of the population," the inclusion of people who, under the commissioner system, would never be given an opportunity to serve on a grand jury.

Houston State Senator John Whitmire is planning to add concerns about grand jury selection to the hearings scheduled to be held on the Houston Police Department and Texas Department of Public Safety crime lab scandals.

"I want to throw this into our hearings and just pull some district attorneys and judges in there and ask them to explain it to us," said Whitmire. "There needs to be some transparency in the system." ■

Source: *Houston Chronicle*.

## Parole Violators Flood Pennsylvania Prisons

by Michael Rigby

In the latest performance of justice by the numbers, a behind the scenes power struggle is playing out between the Pennsylvania Department of Corrections (DOC) and the state Board of Probation and Parole (BPP). As usual, prisoners are caught in the middle.

Conflicting priorities are fueling the dispute. The DOC, recipient of large expansion-related budget increases in recent years, is ostensibly trying to curtail costs by keeping a lid on its once-exploding prison population. The BPP on the other hand, is flooding the system with "technical violators"—parolees who are returned to prison merely for violating the terms of their parole. The BPP claims the revocations are necessary to avoid another incident like that of Robert "Mudman" Simon, a parolee who murdered a cop within weeks of being released in 1995.

Though both sides deny it, the conflict has created "tension between Parole and Corrections," said. M.L. Ebert, president of the Pennsylvania District Attorney's Office. Money is the reason. "I really think it comes down to dollars and cents," said Julia Ingersoll, director of Legal Studies at Harcum College. "The cost is phenomenal to have people constantly in prison." Currently, Pennsylvania spends \$29,907 a year on each state prisoner; by contrast, it costs the BPP only about \$3,000 a year to monitor each parolee.

Unfortunately for parolees, the BPP seems to be winning. The number of

parolees returned to prison swelled from 3,860 in 1998 to 5,808 in 2004—a 50% increase. Consequently, 38% of all incoming prisoners in 2004 were violators. Many had been revoked for technical violations. In fact, the DOC reported that nearly half (42%) of all parole violators imprisoned in March 2005 were technical violators.

Parole officials contend that by violating parolees for relatively minor infractions—missing a scheduled appointment with their parole officer, smoking marijuana—they are preventing some impending crime spree that could lead to new convictions. "The actual recidivism numbers have stayed pretty steady over the years," said board Spokeswoman Lauren Taylor. "It's been pretty consistent. The right people are going back at the right times."

But DOC Secretary Jeffrey Beard disagreed with the Board's logic. "[T]here is no evidence" to support the board's assertion that technical parole violations "are a precursor to criminal behavior," he said.

The DOC is now purportedly implementing treatment and education programs aimed at lowering recidivism rates. This necessarily includes making sure prisoners successfully complete their parole, says Beard. "Once they've violated, they're more likely to come back a second or third time," he said. "We need to divert them when we can." ■

Source: *The Morning Call*

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# Texas Prison Expert Pays the Price for Telling the Truth

by Matthew T. Clarke

**T**ony Fabelo was the head of the Texas Criminal Justice Policy Council for two decades. He survived multiple changes of administration by doing a great job as the state's top number-cruncher on prison issues. Legislators of both parties say the Cuban-born Ph.D., a nationally-known authority on prisons and prison construction, served the state well during its dramatic build up of the prison system. However, Tony Fabelo no longer has a job.

O.K., technically Fabelo wasn't fired. No, Governor Rick Perry simply signed a line-item veto eliminating the council's \$1 million biannual appropriation from the state budget. Fabelo, who recognized the irony of being the head of an unfunded government entity, then resigned and became a nationwide consultant on prison issues.

Why was Fabelo's council, which was doing such a good job, eliminated? Perry says that the council's job was done and he wanted to save the money. Neither aspect of that rationalization makes sense. The state still has one of the largest prison systems in the world and will still need advice on how to manage it. During its existence, the council collected twice as much money in federal grants as it received from the

general revenue, giving Texas taxpayers lots of bang for the buck. Capitol insiders say the problem was Fabelo's insistence on telling the truth, even if it ran contrary to the administration's desired policy.

The first rift between Fabelo and Perry occurred in March 2003, when he was allegedly asked to "cook the books" to soften the anticipated consequences of the governor's order to cut the prison system's budget by 14%. Fabelo's analysis had shown that Perry's budget cuts would have dire long-term consequences for the prison system. He refused to change his analysis.

A larger rift occurred when Fabelo analyzed the consequences of Grand Prairie Republican Representative Ray Allen's HB 1669, a 2003 bill to privatize the entire 21-prison state jail system. The move would have put 11,000 state jail felony prisoners under the management of Corrections Corporation of America (CCA). Austin Republican Representative Jack Stick had authored a similar prison privatization bill, claiming that the state would receive the benefit of great savings in the cost of operating the state jails.

Allen's bill required that the savings be at least 5% to trigger privatization. Fabelo's analysis put the savings at 3%

to 4%. That—combined with a legislative memory of the poor-performance and guard-on-female-prisoner rape scandal that occurred while Wackenhut ran the Travis County Correctional Center (a state jail in the capitol, Austin) from 1997 until 1999—killed the privatization effort for the 2003 legislative session. According to capitol insiders, this angered former-CCA-lobbyist-turned-governor's-chief-of staff Mike Toomey. Toomey wanted CCA, which was managing one state jail at the time, to heavily expand its management of the state jails. With the Fabelo analysis, he was only able to engineer the expansion of CCA's management to five state jails.

What is the reality of cost savings with CCA? CCA's winning bid for the five state jails quoted daily per prisoner charges of \$30. The state's prison system pays \$37. Simple? Not quite! CCA won't accept seriously ill prisoners and the \$30 figure doesn't include most of the education and health care costs (which are picked up by the state). The \$37 figure includes everything and is an average for all prisoners, regardless of their health status. Furthermore, the \$37 figure is a post-Fabelo figure calculated by prison officials who "got the message" about bucking the administration's privatization plans. Fabelo's analysis had come up with a total per prisoner cost of \$32 for the state-run jail system, a much more competitive figure.

Even with the new cost figures, CCA is not necessarily going to be cleared to take over the state jail system this legislative session. Legislators worry that Fabelo's last analysis found that private prison guards were paid 28% to 37% less than state prison guards. Many of the legislators have been fighting for years to improve the pay of Texas guards—who are among the lowest paid prison guards in the nation—to help retain high-quality current employees and hire better-trained and more reliable guards. There's also that nagging scandalous history of private prisons in Texas. Texas may not be such a pushover for CCA, even if they have their man in the governor's office and managed to neutralize that pesky Tony Fabelo and his Criminal Justice Policy Council. One can always hope. ■

Sources: *Austin Chronicle*.

## Michigan: Money Bilked From Prisoners Used For Bonuses

**W**hile Michigan was trying to boost its cash-starved budget through spending cuts and tax increases, those in the Attorney General's Office were feasting on money squeezed from state prisoners.

In October 2004, Attorney General Mike Cox paid \$340,000 in merit bonuses to his legal staff, most of them assistant attorneys general who already earn up to \$100,000 a year. The bonuses ranged from \$150 to \$1,700 for each of the 240 employees.

Money for the bonuses came from \$1.7 million in assets seized from prisoners during the previous year. The assets were confiscated by the attorney general's office purportedly to cover the costs of imprisonment. "We collected more in prisoner reimbursement than anyone thought we could, and we decided to share some of it with folks in the office," Cox said.

An official in Governor Jennifer Granholm's administration said the money should have gone into the state's general fund instead of being used to pay bonuses.

Officials with the Michigan State Employees Union—who swallowed \$230 million worth of pay concessions in fiscal year 2003-04 and were being asked to take another \$148 million hit in 2004-05—were understandably riled by the impromptu payments.

"These attorneys are getting bonuses up to 3 percent, and we've been asked to take zero percent this year after taking what amounted to a 9 percent cut last year," said Jack Yoak, president of the 4,000-member union. "That's unfair, and we're not real happy about it." ■

Source: *State Journal*



## \$7,500 of Personal Injury Award Exempt From Attachment By Illinois DOC

A court of appeals in Illinois ruled that the Illinois Department of Corrections (DOC), which was seeking to attach a settlement awarded a prisoner in a personal injury suit, could not attach \$7,500 of the award. That ruling was later affirmed by the Illinois supreme court.

Lonnie Booth was an Illinois state prisoner in May 2001 when he received a \$41,715.57 settlement in a personal injury suit after attorney fees and costs were deducted. In January 2003, the DOC filed suit seeking to recover \$40,656.89 plus court costs as reimbursement for the costs of Booth's incarceration. Booth failed to appear at a hearing and the judge entered an order awarding the DOC \$40,656.89. Booth then moved for declaratory judgment, claiming the settlement award was exempt under section 12-1001(h)(4), Code of Civil Procedure [735 ILCS 5/12-1001(h)(4)].

Section 4-101(11) of the Code of Civil Procedure [735 ILCS 5/4-101(11)] states that the Attorney General may attach the property of prisoners' in cases brought under Section 3-7-6 of the unified Code of Corrections. However, 735 ILCS 5/12-1001(h)(4) provides for a \$7,500 exemption for payments in personal injury cases. 730 ILCS 5/3-7-6(e)(3) allows the DOC to seek reimbursement of costs of incarceration from any asset in the possession of a prisoner or former prisoner. However, the attachment of the assets

must conform with state and federal limitations on the collection of money judgments. [Readers should note that states cannot seize section 1983 judgments or settlements under the supremacy clause of the U.S. constitution.]

The DOC moved for summary judgment alleging no material facts were in dispute. The trial court granted the motion, but exempted \$7,500 of the settlement award from attachment. The DOC appealed, claiming that section 3-7-6 did not provide any exemptions from attachment in suits for recovery of incarceration costs brought by the DOC.

Booth failed to file an appeal brief. Normally, this would be fatal to his position on appeal. However, in this case, the appeals court held that the record was so simple and the issues were so clear cut that it could decide the case on the merits without Booth's brief.

The last sentence in Section 7-3-6(e)(3) states: "No provision of this Section shall be construed in violation of any state or federal limitation on the collection of money damages." The court of appeals held that the attachment sought by the DOC was therefore subject to all limitations on it provided by state and federal law. Because state statute, 735 ILCS 5/12-1001(h)(4), clearly exempted \$7,500 of the personal injury settlement award from attachment, the DOC could not attach the \$7,500. The court

did not need to use the construction aids the state suggested because the language of the statute was plain, clear, and unambiguous, requiring no further construction. The judgment of the trial court was affirmed. See: *Illinois v. Booth*, 815 N.E.2d 1206 (Ill. App.3d Cir. 2004).

The Illinois supreme court granted review and on May 19, 2005, issued a brief ruling affirming the appeals court ruling that the DOC could not attach \$7,500.00 of Booth's damage award in this case. See: *People ex rel. Dir. of Corr. v. Booth*, 215 Ill. 2d 416 (Ill. 2005). ■

## Nebraska Law Automatically Restores Felon Voting Rights

On March 10, 2005, Nebraska lawmakers overrode a veto by the governor and passed legislation automatically restoring the voting rights of felons.

With the passage of Legislative Bill 53, Nebraska felons will automatically have their voting rights restored two years after completing their sentences, including any parole or probation. Currently, felons must wait 10 years and then petition the Board of Pardons for restoration of their voting rights.

Few make the trip, said Senator Di-Anna Schimek, who introduced the bill. Though about 1,000 people per year complete their sentences, only 145 made petitions to the board in fiscal

year 2003-2004, Schimek said.

Governor Dave Heineman had vetoed the bill a day earlier. But with a vote of 36-11, the Legislature easily collected the 30 votes necessary to override the veto.

In support of the bill, Speaker Kermit Brashear reminded lawmakers that the issue was not about the governor or even victims' rights. Rather, it was about those who have done their time and returned to society with a desire to participate.

"What is it about our personality that would put that off for 10 years," asked Brashear. "This is a positive, affirmative thing for people who would have paid all their dues." ■

Source: *Lincoln Journal Star*

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This book does not deal with legal defense against criminal charges or challenges to convictions that are on appeal. Edition last revised in 2002.

# Habeas Hints

by Kent Russell

*This column is intended to provide "habeas hints" to prisoners who are considering or handling habeas corpus petitions as their own attorneys ("in pro per"). The focus of the column is habeas corpus practice under the AEDPA, the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.*

## THIS YEAR IN HABEAS U.S. Supreme Court Term: 2004-2005.

As 2005 comes to a close, this column takes its annual look at the U.S. Supreme Court decisions that impacted habeas corpus practice during this past term. At the end of each of the summaries, I've included one or more "Habeas Hints" based on the Court's decision.

***Pace v. DiGuglielmo*, 125 S.Ct. 1807 (2005).**

***Johnson v. United States*, 125 S.Ct. 1571 (2005).**

***Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005).**

In this trio of procedural decisions, the Court clarified the circumstances under which the AEDPA statute of limitations would be tolled (suspended from running out) because of the pendency of a "properly filed" habeas corpus petition in state court.

In *Artuz v. Bennett*, 531 U.S. 4 (2000), the Court had held that a state petition which was "properly filed" would toll the AEDPA statute of limitations, even if the state court ultimately denied the petition

on procedural grounds. However, the Court left open the question as to whether a state court habeas corpus petition that was denied for "untimeliness" in a state which allowed certain exceptions for to the state's time limit would qualify as a petition that had been "properly filed". In *Pace*, the Court answered that question in the negative, holding that a petition which the state court denied as "untimely" was not properly filed, and therefore the petitioner was not entitled to statutory tolling of the AEDPA during the time it had been pending in the state courts.

In *Johnson*, the petitioner was given an enhanced federal sentence based on a number of prior convictions that he had suffered under Georgia law. More than one year after his conviction became final, he filed a state habeas corpus petition in which he alleged that the priors which had been used to enhance his sentence were the product of constitutionally invalid guilty pleas. The state court agreed, and entered an order reversing the prior convictions. Based on this favorable ruling in state court, the petitioner filed a federal habeas corpus petition attacking his enhanced sentence. Johnson's federal habeas corpus petition was filed only 3 months after the state court had granted him relief by striking his prior convictions, and the Supreme Court agreed with his contention that there was no way of knowing that his federal sentence was invalid until the state court had ruled in his favor. Nevertheless, the Court found that his federal petition was untimely, because more than a year had elapsed *before* he filed his state habeas corpus petition.

In *Gonzalez*, the petitioner filed a Rule 60(b) motion arguing that his previous federal habeas corpus petition had been improperly dismissed under the AEDPA statute of limitations. The prior petition had been denied because the federal court had refused to grant statutory tolling for a state petition that was ultimately dismissed on the basis of a state procedural default—a decision that was later shown to be incorrect in *Artuz v. Bennett* (see above). The petitioner then filed a Rule 60(b) motion to set aside the previous dismissal. The lower federal courts denied the Rule 60(b) motion primarily on the basis that the petitioner had not sought and obtained permission from the Circuit Court of Appeals to file a "successive

petition"—permission which is effectively impossible to obtain. The Supreme Court disagreed, holding that a Rule 60(b) motion which attacks only the procedural basis for the earlier dismissal and does not contain any habeas "claims" which directly attack the petitioner's conviction and sentence is *not* a "successive" petition, and therefore does *not* require circuit court approval to be filed. Nevertheless, the Court upheld the denial of the motion on the basis that the petitioner had waited too long to seek review after his first petition had been dismissed.

### *Habeas Hints:*

➤ Be aware of the difference between state habeas petitions dismissed on the basis of state procedural defaults (statutory tolling of AEDPA is allowed) vs. petitions which the state court dismisses as "untimely" (no statutory tolling allowed).

➤ Don't risk having good claims denied on the basis of untimeliness. Have your case reviewed for potential habeas claims by a lawyer or competent jailhouse lawyer as soon as possible after your direct appeal is over, and in no event beyond the running of the AEDPA statute of limitations.

➤ In attempting to deal with a previous dismissal of a federal habeas corpus petition that was dismissed on a technicality rather than on the merits, use a Rule 60(b) motion (which does not require prior circuit court approval) rather than federal habeas corpus petition under § 2254 (which requires circuit approval you won't be able to get). But don't delay; bring your Rule 60(b) motion as soon as possible after the case is dismissed.

***Rompilla v. Beard*, 125 S.Ct. 2456 (2005).**

*Rompilla* was a capital case in which the state sought to impose the death penalty on the basis of several aggravating factors, one of which was that the defendant had a significant history of prior felony convictions indicating the use of violence. Defense counsel went to trial without checking the court file on the priors, and as a result did not become aware of facts relating to the priors which would have been "mitigating". The defendant was convicted and sentenced to death and his conviction was affirmed on direct appeal. He then filed a state habeas corpus petition alleging that his trial counsel had

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been ineffective. The state court denied the petition on the basis that trial counsel had relied on what their client had told them and that the lawyers had consulted several expert witnesses. However, the Supreme Court reversed, finding that, regardless of whatever else they had done, the defense lawyers were deficient in failing to examine the court file on the prior convictions.

► Where your sentence was enhanced on the basis of prior convictions which you think are of questionable validity (e.g., because you were not represented by counsel at the time of your plea to the prior, the transcript does not reflect the necessary explanation of the consequences of the conviction, etc.), obtain your trial counsel's file and see whether the actual court files containing the prior conviction are in there. If not, order the prior conviction file yourself from the court to see if there is anything in it that is helpful to challenging the prior; if so, bring an IAC claim based on *Rompilla*.

***Shepard v. United States*, 125 S.Ct. 1254 (2005).**

In its 1998 decision in *Apprendi*, the Court held that a defendant could not be sentenced in excess of the statutory maximum for an offense unless the factors on which the enhanced sentence was based had been submitted to and found by the jury to be true, beyond a reasonable doubt. However, the *Apprendi* majority carved out an exception for prior convictions, which could be determined by the judge alone. *Shepard* held that, despite the exception in *Apprendi* for prior convictions, a sentencing judge could *not* look to police reports or complaint applications to determine whether a prior guilty plea supported a conviction for burglary as a "violent" crime.

► Where your sentence has been enhanced on the basis of a prior "violent" felony, but the prior did not actually involve violence (burglary is the most promising example), check the transcript to see how the prosecution established violence as to the prior. If they did so on the basis of anything other than the statutory definition, charging document, or plea transcript, consider attacking the prior as unconstitutional under *Shepard*.

***Rhines v. Weber*, 124 S.Ct. 1528 (2005).**

In *Rhines*, the Court held that a federal district court judge has discretion to order stay and abeyance (that is, granting a motion to stay a "mixed" petition con-

taining both exhausted and unexhausted claims while the petitioner goes back to state court to exhaust the latter) as an alternative to a dismissal. However, the Court held that stay and abeyance is only to be used in "limited circumstances", namely where the petitioner can show: (a) good cause for the failure to exhaust the un-exhausted claims before filing in federal court; and (b) that the un-exhausted claims are "potentially meritorious".

► If the Respondent moves to dismiss your petition because it contains both exhausted and unexhausted claims, file with your Opposition to the dismissal motion a motion to stay and abet the federal proceedings, and agree to dismiss the unexhausted claims if the court will grant your request for a federal stay pending exhaustion back in state court. Support your motion for a stay with a declaration showing good cause for the failure to exhaust the claims earlier (e.g., bad lawyering, newly discovered facts, etc.) and briefly setting out the potential merits of your habeas claim(s) to show that they are not frivolous.

***Miller-El v. Dretke*, 125 S.Ct. 2317 (2005).**


Previously the Court had used *Miller-El* to broaden the basis for issuance of a Certificate of Appealability, holding that a COA should be granted so long as the issue in question was "debatable" among reasonable jurists. In re-visiting the case this past term after a COA had been granted but relief on the merits had been denied, the Court held that in deciding whether a prosecutor had violated the Constitution by striking minorities from the jury, the reviewing court should look at the issue of discrimination "cumulatively". Among the numerous factors that the Court looked to in throwing out a Texas conviction where the prosecutor had struck 10 of 11 Black panelists were the past practices of the prosecutor's office in question and differences in the way in which the prosecutor questioned minority jurors it had stricken vs. non-minority jurors who had been accepted on the jury.

► If you are seeking a COA, cite *Miller-El* to remind the court that you only need to show that the issues which you have raised in objecting to the denial

of your petition are "debatable".

► If you were convicted by an all-White or nearly all-White jury and the prosecutor struck a number of seemingly eligible minority jurors by using peremptory challenges, obtain and review the transcript of the jury voir dire in order to see whether the jurors who were stricken expressed views close to or identical to the views of non-minority jurors who were accepted by the prosecution. If so, consider using that to mount a "Batson" challenge along with any cases or other materials reflecting discriminatory jury selection practices by that same prosecutor's office in other cases. 📧

*Kent A. Russell specializes in habeas corpus and post-conviction cases. He is the author of the California Habeas Handbook, which explains habeas corpus and the AE-DPA. The latest edition (Ed. 4.04.1, revised in May of 2005) is now shipping, and can be purchased for \$29.99 (cost is all-inclusive for prisoners; others pay \$5 extra for postage and handling). No particular order form is necessary; just send your check or money order to the Law Offices of Russell and Russell, 2299 Sutter Street, San Francisco, CA 94115.*



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# Antibiotic Resistant Staph Infections Continue to Plague Prisons, Jails

by Michael Rigby

Chelsea Johnson, 30, said it began as a small pimple that formed on her right cheek shortly after she arrived at the Orange County Jail in 2003. Three days later, her entire face was swollen and she felt feverish. A nurse examined her but failed to prescribe any medication, she said.

Johnson was released after 6 days, but it took another 4 months and several trips to the doctor before the culprit—Methicillin Resistant Staphylococcus Aureus, or MRSA—was diagnosed. By that time, the infection had spread over her face and body. “I felt like a leper,” she said. “I just didn’t want to go outside. I couldn’t live my life.”

With outbreaks of MRSA on the rise nationwide, stories like Johnson’s are becoming more common. “It’s an emerging epidemic,” said Dr. Gonzalo Ballon-Landa, an infectious disease consultant in San Diego County. “Doctors in California

and the whole community are not picking up yet on the fact that [it] is here.”

Staph bacteria is commonly found on the skin and in the nose of healthy people. When it enters the body through the skin or another route, however, it can cause a variety of illnesses, including pneumonia and infections of the skin, bone, and bloodstream. MRSA is an especially virulent form of the bacteria that is resistant to most antibiotics and is often fatal. Because it is passed through contact with skin or other surfaces such as linens and towels, MRSA is particularly problematic in hospitals, prisons, and jails.

**California.** Perhaps nowhere is the problem more obvious than in the Los Angeles County Jail where about 200 prisoners a month are diagnosed with MRSA. In 2002, Los Angeles County jails originally misdiagnosed the MRSA infections as spider bites. That year, 921 prisoners contracted Staph; in 2003, 1,849 were identified as having the infection; and in 2004 the number of new cases rose to 2,480.

In addition, four guards have also contracted MRSA. One claims he passed the infection to his newborn. Jail officials have yet to confirm that the infections were contracted at the jail, but the guard’s union remains concerned. “When you’re processing close to 1,000 new people on a daily basis, it’s a huge problem,” said Steve Remige, vice president of the Association for Los Angeles Deputy Sheriffs.

MRSA is also prevalent in California prisons. At the Pelican Bay State Prison several prisoners were reportedly under quarantine on December 30, 2004. In 2004, Pelican Bay experienced about 4 new cases of MRSA per month, said spokeswoman Margot Bach. She said prisoners diagnosed with MRSA are housed individually at a separate unit and denied visitors. Bach noted that the particularly cramped conditions of prison life cause sporadic outbreaks of MRSA in the state’s prison system. Three prison guards are also suing the DOC claiming they were exposed to the bacteria.

**North Carolina.** In North Carolina, confirmation that two prisoners were infected with MRSA prompted the state Department of Corrections (DOC) to

halt all prisoner transfers. One prisoner was diagnosed with the infection on July 16, 2004, the second on July 21. MRSA infection was suspected in 17 other prisoners, said DOC spokeswoman Pam Walker. Some prisoners were treated at a hospital and released.

**Tennessee.** In December 2004, “several” prisoners were quarantined at the Williamson County Jail in Tennessee and treated with antibiotics after an MRSA outbreak there. Jennifer Mitchell’s husband, Matt Mitchell, was one of those infected. “My husband was put in quarantine with 10 or 15 other people. He had a big lump, the size of an egg, under his arm and it was bleeding,” she said. “They have a nursing staff over there, but they said they weren’t sure what it was. There were other people with bumps on their arms, too.”

**Other locales.** Other jails have also been affected by outbreaks of MRSA. According to an *Associated Press* article, the Dallas County (Texas) Jail reported that more than 700 prisoners were infected in a recent three month period and that about 120 sheriff’s department employees had contracted MRSA since 2002. At the Calhoun County Jail in Battle Creek, Michigan, two prisoners died on March 1, 2004, from MRSA infections.

Despite the growing prevalence of MRSA—especially in prisons and jails—the government has been slow to respond. This is disturbing since prisoners may pass the bacteria to guards and family members who then carry the infection back to community. “It is a concern to us, and we’re doing everything we can to address it,” said Los Angeles County Sheriff’s Chief Chuck Jackson. “But it’s not a perfect world, and we’re not going to catch it every time.”

The best way to prevent Staph infections, notes the federal Center for Disease Control, is through frequent hand washing, keeping cuts and scrapes clean and bandaged, and by not sharing personal items such as razors and towels. *PLN* has reported extensively on MRSA. See indexes for more. ■

Sources: *Los Angeles Times*, *AP*, *Miami Herald*



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# Iowa's Governor Grants Ex-Prisoners Automatic Voting Rights Restoration

by Matthew T. Clarke

On July 6, 2005, Governor Tom Vilsack of Iowa signed an Executive Order which enacted a blanket restoration of citizenship rights to ex-prisoners who have completed their sentences. This allows persons previously convicted of a felony or aggravated misdemeanor to recover their rights to vote and hold public office. It does not restore their right to own firearms. The move could affect up to 50,000 Iowans in the next election cycle.

Under Iowa law, persons convicted of aggravated misdemeanors and felonies lose their rights to vote and hold public office. Under previous law, such persons who had completed their sentences and fully paid all fines, restitution, and other financial obligations could individually petition the governor for restoration of their citizenship rights. The process took up to six months. The Executive Order removes the requirement of fully paying restitution, fines and financial obligations and makes the restoration process automatic upon application following completion of the sentence.

Nationally, disenfranchisement serves

to deny voting rights to 6.7 million Americans, 500,000 of them war veterans and 1.6 million of them black. Thus, it has a disproportionate effect on blacks who make up 2% of the population, but almost 25% of the disenfranchised ex-prisoners. Iowa has one of the highest rates of incarceration for blacks in the country.

Nebraska and Iowa were the last two states outside the South to ban voting by ex-prisoners, according to Catherine Weiss, associate counsel at the Brennan Center for Justice at New York University School of Law. The Brennan Center recently sued Florida in an attempt to overturn its prohibition on voting by ex-prisoners. The Florida law disenfranchises about 600,000 people. Ms. Weiss also noted that the Second Circuit court of appeals will consider whether the New York law denying voting rights to felons on parole violates the Voting Rights Act by disproportionately disenfranchising minorities.

Ryan King, a research associate at the Sentencing Project, noted that only Kentucky, Alabama, Florida and Virginia

still permanently disenfranchise any person convicted of a felony or aggravated misdemeanor. If those states passed laws similar to the Iowa Executive Order, about a million ex-prisoners would have their voting rights restored. King praised Vilsack.

"The governor's choice of doing this on July 6 is very symbolic," said King. "It's a celebration of democracy."

However, some victims' rights groups were critical -complaining that Vilsack should not have removed the requirement of having fully paid restitution before voting rights could be restored. Republican State Senator Chuck Larson of Cedar Rapids accused Vilsack of "making criminals' rights far more important than victims' rights." Vilsack countered by pointing out that ex-prisoners with restored rights are still required to pay fines and restitution. ■

Sources: *New York Times*, *Des Moines Register*.

## Florida Bans Sex Offenders from Hurricane Shelters

A new Florida policy bans sex offenders who are not allowed contact with children from public hurricane shelters. Instead, they will be shuttled to their own shelters-prisons across Florida.

The rule applies to offenders not allowed contact with children as a condition of their probation. This regulation and a flurry of laws have been approved since 9-year-old Jessica Lunsford was discovered murdered in March, 2005 in Citrus County.

When placed on probation, sex offenders are asked to provide a home address for the state's registry of sex offenders, along with an alternate location they can go to in case of emergencies such as hurricanes. If they do not have an alternative, or if their back-up plan goes awry, sex offenders can talk to their probation officers about going to a local jail or prison, where there is less chance of

them being with or harming a child.

State officials say that offenders seeking shelter in a prison or jail won't be placed with other prisoners since they are not being arrested. At the jail or prison, sex offenders will wear an ID badge and can use the telephone. 7,458 sex offenders are currently on probation in Florida.

Critics say children are under better supervision in shelters than their own neighborhood. "Kids don't show up in hurricane shelters alone. They show up under parental supervision," said Howard Simon, executive director of the ACLU in Florida. He said the new laws were created "to convince the public that they are now protecting children more than they have in the past. A lot of this is smoke and mirrors. It's good politics, but it's not providing a lot of protection for children." ■

Source: *Miami Herald*.

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# Mother of New York Prisoner Awarded \$377,200 for Suicide

by Michael Rigby

On March 14, 2005, a court of claims in White Plains, New York, awarded \$377,200 to the mother of a suicidal state prisoner who died while in custody.

While serving time at New York's Green Haven Correctional Facility for automobile-related crimes, William E. Newborn Jr. became concerned about the outcome of his upcoming parole review. Consequently, he told a social worker on July 19, 1997, that he would commit suicide if he was not approved. Ten days later his parole was denied. On August 1, 1997, Newborn overdosed on Pamelor—a tricyclic antidepressant—and at least one of three other medications in his possession.

Newborn, who had a history of mental illness and had been under the care of a prison psychiatrist at the time, was transferred to an outside hospital. Over the next 13 days, Newborn experienced occasional awareness while undergoing a number of painful medical procedures—intubation, venal and urinary catheterizations, a tracheotomy. He died on August 13, 1997, from related complications.

Following his death, Newborn's mother, Christine Newborn Arias, sued the state for wrongful death. On May 8, 2003, Judge Stephen Mignano granted summary judgment to Ms. Arias on various claims of negligence, including medical malpractice for providing Newborn a bottle of Pamelor despite a Department of Correctional Service's (DOCS) policy requiring psychotropic medications to be administered by a nurse. [See *Arias v. State of New York*, 195 Misc.2d 64, 755 N.Y.S.2d 223 (NY Ct. Cl. 2003).]

At the ensuing trial for damages, the Court awarded Ms. Arias a total of \$377,200. Referring to testimony provided by Ms. Arias's expert, Dr. Irving Friedman (neurology, psychiatry, and neurophysiology) Mignano concluded that "every day between August 1 and August 12, 1997, [Newborn] endured periods of conscious pain and suffering." For this he awarded Arias \$350,000.

Next, after determining that Ms. Arias was entitled to \$2,200 for funeral expenses, Judge Mignano addressed prison officials' failure to comply with DOCS

Directive 4451 and Green Haven's own policy requiring them to notify the next of kin when a prisoner is admitted to an outside hospital. Ms. Arias testified that she was not aware of her son's condition until a priest told her on August 13, 1997, that he had died.

Ms. Arias further testified that had she known of her son's hospitalization, she would have been there to comfort him and that she still felt "anger, guilt and grief" for which she required psychological counseling six years later. Based on "the totality of the circumstances," Judge Mignano awarded Ms. Arias \$25,000 for her personal claim relating to prison officials' failure to notify her.

Judge Mignano declined to award damages for pecuniary loss, however, noting that Newborn had an unstable work history and had in fact "never earned enough money in any given year to require him to file a tax return." Ms. Arias was represented by attorneys John D. B. Lewis and Gray E. Divis of Manhattan. See: *Arias v. State of New York*, White Plains Court of Claims, Case No. 97942. ■

## 300 More Washington Prisoners Headed to CCA Prisons

As we predicted, Washington's "sentencing reform" has sharply increased the state's prison population to approximately 17,600—1,400 prisoner's overcapacity—adding 2,100 prisoners within the last two years alone.

Worse yet, nothing, including slashing sentences by up to 50 percent for a few hundred prisoners, has stemmed the flow and there is no end in sight.

As prison officials scrambled to find beds for this influx of new prisoners, they have resorted to shipping prisoners to rental beds in other states. In May 2003, 100 prisoners were sent to Nevada prisons, followed by 140 more later that summer. Still the problem persisted.

The 2004 Washington Legislature then attempted to put a \$320 million, 2,400 beds, prison expansion Band-Aid over the emblem. Only, that prison building boom won't be complete until 2008, doing nothing to ease current overcrowding.

Despite the abysmal track record of private prisons—extensively reported in *PLN*—prison officials opted to send 290

prisoners to private prisons operated by Corrections Corporation of America, (CCA), the nation's largest private jailer, in 2004.

In true CCA form, problems soon followed. On July 24, 2004, dozens of Washington and Wyoming prisoners gathered on the yard at the CCA-run prison in Onley Springs, Colorado. They had a list of grievances and demanded to see the warden. Within 30 minutes, the prison was in chaos and it took hundreds of guards a full day to quell the largest prison riot in Colorado history.

Over a dozen prisoners were injured in damage was estimated at \$1 million. Numerous Washington prisoners were then transferred to a CCA prison in Minnesota and eight Washington prisoners face criminal charges stemming from the riot.

"A post-riot investigation by the Colorado Department of Corrections faulted CCA for understaffing and poorly trained staff, and for building a prison with materials, such as porcelain things, which could be accused as weapons." This

is nothing new for CCA-run prisons.

"I just don't have a lot of trust for the privately run prisons," says Jeannie Danielle, Washington Representative and Vice Chairwoman of the House Corrections Committee.

Apparently prison officials do not share Representative Danielle's concerns, as they plan to send up to 300 more prisoners to CCA prisons across the nation during the summer of 2005; bringing the total of Washington prisoners confined in out-of-state rental beds to 830.

"We don't have beds in state to house those offenders, and we have to put them in beds," said Anne Fiala, a senior Washington prison official. "The only option we have is to put them in beds in other states."

If that means confining prisoners thousands of miles away from family and other community support, in unsafe private prisons with a long history of abuses and poor living conditions, and so be it. ■

Source: *Seattle Times*.



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## New York Prisoner Awarded \$5,250 for Prison Welding Shop Injury

On July 27, 2004, the Court of Claims in Rochester, New York, awarded Noel Atkinson, a New York state prisoner, \$5,250 for past pain and suffering due to an injury he received while working in a welding shop at the Cape Vincent Correctional Facility. During the bench trial, Judge Phillip J. Patti also found 30% comparative negligence against Atkinson. Therefore, he reduced the award to \$3,675.

Atkinson was injured on July 29, 1996, when he received cuts and bruises on his left ankle and foot and his left foot's fifth metatarsal was fractured. He was treated at the prison's infirmary and an outside hospital, but complained of continuous pain which temporarily prevented him from running and sports activities. He filed suit alleging an unsafe workplace and won his case on liability during a bench trial on Sept. 22, 2003.

At trial, it was proven that Atkinson entered the prison system with drop foot and had to wear a leg brace if he wore sneakers. The court found no evidence of long-term disability or future pain since

the fracture had healed smoothly.

The court also awarded Atkinson post-judgment interest backdated to the date of the liability decision. He was represented by attorney Bernard B. Schachne. See: *Atkinson v. State of New York*, No. 96282, Court of Claims, Rochester, New York, 7/27/04. ■

Source: *VerdictSearch*—New York.

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# Hawaii Settles Class Action Wrongful Imprisonment Suit for \$1.2 Million

by Michael Rigby

The state of Hawaii has agreed to pay \$1.2 million to settle a class action federal lawsuit involving hundreds of wrongfully imprisoned individuals. The state also agreed to implement measures ensuring the timely release of prisoners.

The lawsuit, brought under 42 U.S.C. § 1983 by the American Civil Liberties Union (ACLU) of Hawaii, alleged that the Hawaii Department of Public Safety (HDPS) routinely violated prisoners' constitutional rights by holding them past their release dates for hours, days, or weeks in substandard conditions, and, in some cases, forcing them to undergo humiliating strip and body-cavity searches.

Lead plaintiff Gregory Tapaoan, a pre-trial detainee at the Oahu Community Correctional Center (OCCC), was one such unfortunate. After being acquitted of all charges against him on January 30, 2001, Tapaoan was placed in a holding cell at the courthouse for several hours. He was then shackled and transported back to OCCC where he was strip searched and placed in another holding cell. During this

time, according to the complaint, Tapaoan was "denied proper nourishment, denied permission to make a phone call, forced to wear jail clothing, and harassed and threatened by prison guards angry over his acquittal."

Tapaoan expressed relief that others would be spared similar experiences. "I was innocent from the start and it's hard to put into words the feeling of having your freedom stripped away," he said. "I was so happy to win my [acquittal] but then had to face being subjected to confinement, and in front of my family no less."

Under the terms of the settlement, tentatively approved by the U.S. District Court for the District of Hawaii on February 8, 2005, individuals imprisoned between December 1999 and December 2002 are eligible to receive \$1,000 for each day they were held past their release date and a one time payment of \$3,000 if they were strip searched upon returning to prison. The \$1.2 million settlement also covers attorney fees and administrative costs. The deadline for making a claim is November 30, 2005.

The agreement also provides that prisoners entitled to release by court order—including dismissal of the charges, conditional release, supervised release, release on own recognizance, deferred acceptance of a guilty plea, or a grant of probation—shall be released "as soon as reasonably possible, but in no case later than 11:59 p.m. on the day that individual is entitled to release."

The defendants further agreed to implement procedural safeguards to prevent wrongful imprisonment due to late, lost, or missing paperwork. In addition, the HDPS will keep statistical

records and conduct yearly "audits or reviews of release practices and policies at each holding facility to ensure that inmates are being released in a timely manner," according to the settlement agreement.

A significant portion of the suit had already been addressed before the settlement. In 2002, a State Circuit Court issued an order notifying prosecutors and defense attorneys that acquitted defendants were to be immediately released from court.

Attorney Mark Davis, who assisted with the lawsuit, appeared pleased with the outcome. "This important victory will ensure that Hawaii inmates, who have earned their release through acquittal, will have their freedom immediately restored regardless of administrative red tape," he said. "Our system of justice has become more efficient and fair as a result of the safeguards imposed by this settlement."

The settlement is likely a relief to Leo Toilolo as well. Toilolo, one of the nine named plaintiffs, was ordered released by the district court on July 24, 2000, after his case was dismissed. At the time, a court clerk informed OCCC guards that it would take a few minutes to process the release paperwork. Rather than wait, however, the guards simply told the clerk to mail the paperwork later. Toilolo was then shackled and taken back to OCCC, where he was forced to "strip naked, squat, and bend over for a visual body cavity search," according to the complaint. He remained there another 7 days and underwent at least four more body cavity searches. Toilolo repeatedly asked why he was not being released during this time, and each time the guards told him they were waiting on the paperwork. He was finally released on July 31, 2000.

The plaintiffs were represented by Brent T. White and Susan Dorsey, attorneys with the ACLU of Hawaii, and attorneys Mark S. Davis, Michael K. Livingston, and Stanley E. Levin of the Honolulu law firm Davis, Levin, Livingston & Grande. See: *Tapaoan v. Cayatano*, USDC D HI, Case No. 01-00815 DAE LEK. ■

## U.S. Torture Information Needed

Because the United States has signed the United Nations Convention Against Torture, they are required to submit reports on the status of US compliance to the Treaty every five years. In May of this year, the US submitted their "Second Periodic Report of the United States of America to the Committee Against Torture". Several national prisoner advocacy groups are planning to issue what is called a "Shadow Report" to supply the Committee with credible evidence of US violations of the Convention which are ignored in the official report. The Convention not only prohibits torture but also "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" committed by a government official. We are seeking testimonies from prisoners on torture and abuse, including isolation and use of devices of torture (stun guns, stun belts, restraint beds, restraint chairs and other restraint devices, spit hoods, black boxes, etc.). Please send testimonies of your experiences and how the authorities dealt with any complaints you made to: Bonnie Kerness, AFSC Prison Watch Project, 89 Market Street, Newark, NJ 07102. We very much appreciate your help.



## New York Prisoner Awarded \$1,000 for Uncleaned Prosthetic Eye

On September 1, 2004, a court of claims in White Plains, New York, awarded \$1,000 to a state prisoner because prison personnel failed to timely clean his prosthetic eye, causing him pain and suffering.

Lionel Walker, a prisoner at the Fishkill Correctional Facility, went to the infirmary on July 14, 2000, complaining of an itchy right eye socket. He also asked infirmary personnel to perform the required biannual cleaning of his prosthetic eye. The last cleaning had been performed in January 2000.

Despite his request and several additional trips to the infirmary over the next six weeks, no cleaning was performed. An appointment to clean the eye was finally scheduled with an outside specialist for November 17, 2000, but Walker missed the appointment because the guard driving the transport vehicle got lost on the way.

After continuing to complain, Walker was examined by a prison doctor on December 19, 2000. The doctor determined the prosthesis needed to be cleaned and reconditioned.

Walker sued the state of New York, pro se, claiming that the prison's medical staff was negligent in caring for him and that the delay in cleaning his prosthesis caused him pain, irritation, and itchiness.

The judge, Stephen J. Mignano, held that Walker could not support a medical malpractice claim because he failed to present expert testimony. However, Walker could support a claim of negligence, the judge ruled, based on the common knowledge that the prosthesis required cleaning.

Mignano ultimately determined Walker had established the necessity of biannual cleanings and that the cleanings had been performed regularly in the past. Accordingly, he awarded Walker \$1,000 for his injuries. See: *Walker v. State of New York*, Court of Claims, White Plains, Case No. 104261. ■

Source: *VerdictSearch New York Reporter*



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# U.S. Supreme Court: Michigan Plea Bargainers Have Right to Counsel On Appeal

by John E. Dannenberg

The U.S. Supreme Court ruled that Michigan defendants convicted pursuant to a plea of nolo contendere or to a plea bargain are constitutionally entitled to appeal their convictions to the Michigan Court of Appeals, and if indigent, are entitled to a state appointed attorney. In so holding, the high court held that Michigan Constitution Art. 1, § 20 (rev. 1994), codified at Mich. Comp. Laws Anno. § 770.3a, which provided that such appeals were only available by leave of the court, violated due process of law as established in *Douglas v. California*, 372 U.S. 353 (1963). (The Court had previously reserved this question in *Kowalski v. Tesmer*, 125 S.Ct. 564 (2005). See *PLN*, July, 2005).

Antonio Halbert had pled nolo contendere to two counts of second-degree sexual misconduct. At his sentencing hearing, his counsel requested concurrent sentencing, which Halbert expected. When the judge sentenced him to

consecutive terms, i.e., the maximum, Halbert asked the next day to file an appeal. He attempted to comply with the Court of Appeals filing form, after being denied his request for assistance of counsel to prepare the application. Because he was uneducated and had learning disabilities, he was assisted by jailhouse lawyers to file pro se. His application for leave to appeal was denied by the Court of Appeals and review was denied by the Michigan Supreme Court. The U.S. Supreme Court granted certiorari to the Michigan Court of Appeals ruling.

The question for the high court was whether Halbert's rights were dictated by its precedent in *Douglas* [due process mandates the right to one level of appeal] or in *Ross v. Moffitt*, 417 U.S. 600 (1974) [discretionary appeals do not entitle one to appointed counsel]. Halbert asserted that *Douglas* controlled because his was a "first-tier" appeal and as an indigent, mentally ill person, he could not effectively prosecute an appeal without counsel. Michigan argued that because § 770.3a made appeals from pleas discretionary as a matter of law, *Ross* controlled.

Although the U.S. Constitution itself does not impose an obligation of appellate review of criminal convictions, once a state provides for such review, equal protection and due process considerations compel that indigent persons not be disadvantaged in gaining access to the process. In its analysis, the Court focused on the fact that first-tier appeals yield an adjudication on the "merits." Moreover, first-tier reviews, "having the full benefits of written briefs and oral argument by counsel," (*Douglas*, supra at p.356) usefully develop the record from which higher appeals {which are not guaranteed counsel, per *Ross*} can be forcefully perfected. The Michigan Court of Appeals had earlier held that because "plea proceedings are ... shorter, simpler, and more routine than trials" (*People v. Bulger*, 462 Mich. 495, 503-04 (2000)), plea defendants "accede to the state's fundamental interest in finality." The high court rejected this circular argument.

The Court focused on the fact that the Court of Appeals is an error-correcting forum guided by the merits of the particular defendant's claims, whereas the Michigan Supreme Court only hears questions of law it deems important to its own jurisprudence. Thus, the unavailability of review by the Court of Appeals leaves a defendant with no state "court of last resort" to review mistakes made in obtaining plea convictions.

Justice Ginsburg, writing for the Court, was particularly concerned that Halbert was mentally impaired. Citing U.S. Department of Justice Bureau of Justice Statistics sources, Ginsburg further observed, "Approximately 70% of indigent defendants represented by appointed counsel plead guilty, and 70% of those are incarcerated. Sixty-eight percent of the state prison population did not complete high school, and many lack the most basic literacy skills. Seven out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article." The Court relied upon *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), "The services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." Indeed, the Court observed that Michigan's very procedures for seeking leave to appeal a plea may have the perverse effect of intimidating the uncounseled.

Undaunted, Michigan argued that even if Halbert had a constitutionally guaranteed right to appointed counsel for first-tier review, he waived it by pleading nolo contendere. The Court flatly rejected this, noting that at the time Halbert entered his plea, he had no recognized right to appointed appellate counsel that he could elect to forgo. Accordingly, the Court vacated the judgment below and remanded for further proceedings not inconsistent with its opinion. See: *Halbert v. Michigan*, 125 S. Ct. 2582 (2005). ■

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# Massachusetts DOC Fails to Meet Women's Special Needs

by Michael Rigby

The failure of the Massachusetts Department of Corrections (MDOC) to address the special needs of women in prison impedes the effective maintenance of family ties, according to a March 2005 research report by the University of Massachusetts's Center for Women in Politics and Public Policy.

In 2003, 182,000 women were imprisoned in the U.S. Of these, 136,000 were mothers of approximately 314,000 children under age 18, the researchers estimated. Because 65% of these mothers had been the children's primary caretaker before their imprisonment (compared to 25% for male prisoners), "the children of mothers in prison experience far greater dislocation than do the children of male prisoners."

Though most experts agree that regular contact with children is essential for maintaining the parent-child relationship, this sadly is not the case for many imprisoned women. The report notes a 1997 national study that found "half of the mothers in prison never received a visit from their children, one-third never received a phone call, and one-fifth never received mail."

This separation has devastating consequences on the children. Those aged 2-6 are predisposed to separation anxiety, guilt, and shame, while older children may experience withdrawal or rage. Many also develop serious behavioral problems. One study cited by the report found that 29% of 11 to 14-year-olds whose mothers were in prison were subsequently arrested and/or imprisoned.

The report noted a number of obstacles to maintaining family ties, including the generally inaccessible location of prisons, restrictive policies governing visitation and phone privileges, inadequate substance abuse and mental health treatment, and, upon release, welfare policies that restrict aid to women with criminal histories, especially those convicted of drug offenses.

To counter these obstacles as they apply to female prisoners in Massachusetts, the researchers designed the Family Connections Policy Framework, which spans "all phases of involvement women may have with law enforcement, criminal justice, and corrections systems." With regard specifically to women in Massachusetts prisons, the researchers advocate, among other things: 1) fostering mother-child re-

lationships by maintaining family-friendly visitation areas and visitation policies, facilitating phone contact, and encouraging the exchange of letters, drawings, photographs, and audiotapes; 2) expanding opportunities for weekend furloughs, overnight visits, and work release; and, 3) ascertaining the number of women prisoners with children, identifying their concerns, and assessing the children's circumstances.

Unfortunately, the problems faced

by women in Massachusetts prisons are emblematic of those faced by female prisoners nationwide. As the report observes, responsible prison administrators must recognize and accommodate the gender-specific needs of women in prison—needs that should not be ignored simply because they represent a small percentage of the overall prison population. ■

Source: *Women In Prison In Massachusetts: Maintaining Family Connections*

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# Only One California Jail Has State-Mandated Psychiatric Treatment Center Licensure

by John E. Dannenberg

Although California law has since 1998 required all county jails that provide inpatient medical or psychiatric care to have a correctional treatment center license, only one (Los Angeles) has obtained one. The issue was highlighted when the San Jose *Mercury News* wrote that the Santa Clara County Main Jail (SCC), which has a 43 bed section that treats and stabilizes prisoners who are a danger to themselves or to others, has operated for five years without licensure.

In 1988, state legislators began a ten-year struggle to improve local jail health care. But putting regulations in place in 1998 was not a panacea for health care deficiencies. At most, only those new health care facilities being built after 1998 would be able to comply, unless older facilities were substantially remodeled.

Such is the case of SCC, which was built in the late 1980s. Although it is modern in many respects, its cells for psychiatric care are only 1/2 the size required by the new, 1998 regulations. Because of this deficiency, SCC cannot gain licensure. It is estimated it will take \$4.6 million in renovation costs to meet the new standards. The conundrum is that while the local advocacy group Public Interest Law Firm (PILF) is considering court action to force compliance, SCC consultant HOK Advance Strategies praised the acute psychiatric unit's level of care as "very high." SCC associate director of Adult Custody Health Services Maryann Barry commented, "We don't see it as a problem. We know that we are providing the level of

care that meets the criteria for licensure." SCC's attorneys argue that licensure is not needed because SCC only provides short-term treatment and stabilization consistent with California's Lanterman-Petris-Short Act. The average length of stay is six to eight days. SCC rents empty beds to neighboring counties for \$1,200 per day.

PILF director Kyra Kazantis nonetheless feels that having state Department

of Mental Health oversight would be helpful in monitoring the quality of services. SCC spends \$25 million per year in medical and psychiatric care. But SCC Lt. Stephen Smith cautioned that overhead costs of state supervision, standards and staff levels would greatly increase costs, possibly cutting into funds available for actual prisoner care. ■

Source: *San Jose Mercury News*.

## Acting Pro Se, NJ Prisoner Beats Charges of Spitting on Guard

A New Jersey jury took only three hours to declare William Victor not guilty of spitting on a Northumberland County Prison (NCP) guard in 2003. NCP's warden called the verdict "ridiculous." Considering Victor proceeded through trial representing himself, incredible is a more fitting adjective.

Charged with aggravated harassment by a prisoner, Victor remained calm during trial while questioning witnesses. He showed little emotion when the jury foreman read the "not guilty verdict."

On the opening day of trial, guard Bernard Bogus, 60, testified he pointed a flashlight into Victor's cell shortly before midnight. After noticing Victor was not on the top bunk, a light search of the cell found him sitting on the toilet.

After the light was placed on him, Victor allegedly told Bogus, "if you don't get that fucking flashlight out of my face, I'll spit in your face." Bogus responded

by telling Victor he was just doing his job of making sure he was safe. Victor then stood up and allegedly spit on Bogus' face and shirt.

The prosecution also brought in Warden Ralph "Rick" Reish, guard Kerri DeCosta, and Sgt. Theresa Noworski to testify. Of course, there was also a jail house snitch, former county prisoner Frank Nahodil, Jr. of Shamokin. None all these witnesses, however, actually saw Victor spit on Bogus.

After its March 18, 2005, verdict, the jury cited the lack of DNA evidence and inconsistencies in testimony to support its unanimous verdict. "There just wasn't enough evidence for us to find him guilty. The DNA just wasn't there and that certainly hurt the case," said juror Angel Medina.

Victor has the opportunity to duplicate his pro se victory. He is scheduled to stand trial on multiple charges related to his throwing of a courtroom speaker at Northumberland County Chief Public Defender Edward Greco, who suffered a minor hand injury from the incident. At the recent trial, Judge Robert B. Sacavage ordered the microphone at the defense table taped to the table. Both Victor and the prosecutor had to remain seated during their opening and closing summations.

Victor should consider himself fortunate. As *PLN* has previously reported, other prisoners convicted of spitting on a guard have received sentences that range from a year to life in prison. ■

Source: [www.zwire.com](http://www.zwire.com).

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# Miami-Dade Pays \$6.25 Million to Settle Illegal Strip Search Suit

A Florida federal district court has approved a \$6.25 million settlement in a lawsuit alleging thousands of female prisoners were illegally strip searched at the Miami-Dade County Correctional Facilities.

The settlement entitles 10,000 women who were strip searched after being picked up on prostitution or other minor charges to receive payments of \$1,000 to \$3,000. An additional 100,000 women and some men who were arrested on more serious charges, and strip searched without advanced written authorization as required by state law are entitled to \$10 each.

The lawsuit originated after three female protesters were arrested during the 2003 Free Trade Area of the Americas Conference. One of them, Judy Haney of Oakland, California, was arrested in Miami on November 31, 2003. The 50-year-old Haney was charged with failing to disperse.

After being up frisked and taken to Miami Dade's Women's Detention's Center, Haney was told to remove her clothes. The guard told her "to turn around, and bend all the way over and spread my cheeks." Haney was then told to squat

and "bunny hop" a method of dislodging contraband. When she couldn't remove her navel piercing, the guard came back with large clippers and cut it off.

Haney and the other four women who represented the class—Liat Mayer, Jaimie Loughner, Darcy Smith, and Amanda Wells—will divide \$300,000. Total payment for all verified claims is \$4.55 million. If claims go higher, payments to class members will be reduced proportionately. Any money remaining after the September 1, 2005, claim deadline returns to the county.

The three attorneys who represent the class will split \$1 million legal fees plus \$100,000 in costs. The lawyers are Randall Berg, executive director of the Florida Justice Institute in Miami, Mark E. Merin of Dickstein & Merin in Sacramento, California, and Andrew C. Schwartz of Casper, Meadows, and Schwartz of Walnut Creek California. See: *Haney v. Miami-Dade County*, USDC SD FL, Case No. 04-20516-CIV-Jordan/Brown.

Discovery showed that the strip search of misdemeanants was applied only to women. Said Haney: "to perform an

unreasonable strip search, which in effect is visual rape, is outrageous enough, but to do it to women only and not to men on the same minor nonviolent charge revealed the practice to be doubly unjust."

On February 8, 2005, Miami-Dade discontinued its blanket strip search policy for prisoners charged with misdemeanors.

Sources: *The Miami Herald*; *Law Com.*

## California Guards Assigned Word Puzzles to Satisfy Training Requirements

California State Assembly Member Rudy Bermudez, himself a member of the powerful prison guards union (CCPOA) while on leave from his prison job to serve elective office, sharply criticized the practice of solving word puzzles used by California prison guards to complete part of their annual training requirement.

"It's unbelievable what they're doing. Just totally unacceptable."

California guards must complete 52 hours of annual retraining in such things as firearms, use of force and prisoner transportation. Of this, only 40 hours are "hands on." Pursuant to a union contract change effective July, 2004, the remaining 12 hours may be earned by studying bulletins pertaining to policy changes, rules updates and solving puzzles.

One exercise involved guards finding the names of professional football teams hidden among jumbled letters. Another sought the hidden words "elf," "snow," and "gingerbread." Guards were given the train-

ing material and told to complete the puzzles while on duty guarding prisoners, Bermudez reported. This was particularly embarrassing in light of the Inspector General's report on the January 10, 2005 murder of a Chino State Prison guard that was tied to lax training, among other problems.

A union spokesman blamed the puzzle practice on a lack of funding for real training. CCPOA Vice-President Lance Corcoran predicted that because of "woeful underfunding," guards will continue to train by "doing word searches and handwriting exercises."

Source: *Associated Press.*

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# Summary Judgment for CMS/NJ DOC Reversed in Physical Therapy Suit

A New Jersey state appellate court issued an unpublished opinion reversing a lower court's grant of summary judgment to Correctional Medical Services (CMS) and the New Jersey Department of Corrections (DOC).

On November 7, 1996, Craig Szemple, a prisoner at the New Jersey State Prison, underwent two surgeries to correct carpal tunnel syndrome and ulnar nerve entrapment. The treating physician ordered physical therapy to begin as soon as possible and continue for three months. This order was noted in Szemple's prison medical file on November 21, 1996.

"Nevertheless, it was not until December 9, 1996 that Dr. Acheloe, the Group Medical Director of the Central Region of CMS, reviewed [this] recommendation and authorized physical therapy. "CMS policy required that Acheloe's recommendation also be approved by his supervisor, the statewide medical director for CMS.

Acheloe again recommended physical therapy on January 27, 1997 and February 25, 1997, because it had not yet begun. Szemple did not receive his first physical therapy evaluation on March 17, 1997 and did not begin receiving physical therapy until approximately April 1, 1997.

Szemple brought suit in state court against CMS and DOC alleging that they negligently delayed his physical therapy. Pursuant to N.J.S.A. 2A:52A-27, which requires that an "Affidavit of Merit" (AOM) be submitted in negligence actions, Szemple submitted an AOM by Dr. Devin Belden.

"In August 2001, CMS moved for summary judgment on several grounds relating to Dr. Belden's qualifications to make the Affidavit..., the sufficiency of the Affidavit and its non-compliance with the statute. The motion was denied[.]"

DOC then "moved for summary judgment and CMS sought reconsideration of its earlier motion." Both motions were denied on April 8, 2002. Not to be deterred, however, defendants again moved for summary judgment, and "[i]n a remarkable reversal of fortune, the judge concluded that his earlier rulings had been in error, and granted the motions by order of February 13, 2003[.]" This order was based on Dr. Belden's failure to offer an expert opinion concerning whether "CMS failed to develop, implement and supervise [its] policies, procedures, investigations and evaluations' concerning the need for timely post-surgical therapy."

The appellate court acknowledged that Szemple was "critical of the judge for his change in position" and admitted that "it is certainly unusual to permit repeated 'bites of the apple' in the manner"

that occurred. It concluded, however, that "the limits, if any, on such repeat summary judgment applications before the same judge must be left to the judge's well-considered discretion." The court even commended the judge for "his willingness to re-examine his earlier rulings."

The court reversed the grant of summary judgment, agreeing with Szemple "that his claim falls within the realm of common knowledge, not requiring expert testimony or, therefore, an AOM." Rather, "a jury could, without the aid of an expert, decide whether the cumbersome, bureaucratic procedure" employed by CMS "was adequate to achieve the need for prompt therapy[.]"

The court rejected DOC's argument that it is entitled to summary judgment, because there is no independent basis for plaintiff's claim against it. "Since the lower court did not reach this question, the court indicated that DOC was free to address the claim on remand. See: *Szemple v. Correctional Medical Services*, No. A-3842-02T2 (Sup. Ct. of NJ App. Div., November 17, 2004). █

## California Guards Union Intimidates Prison Staff For Infracting Guard Misconduct

California Correctional Peace Officers Association (CCPOA) local chapter president Chris Trott, of Calipatria State Prison in Imperial, admitted his union placed a rat trap on the prison CCPOA bulletin board in an intimidating retort to three union members having been placed on paid administrative leave pending an investigation regarding their alleged use of excessive force to subdue a prisoner. The symbology, according to the accompanying union flyer, was to "catch" the Captain and Warden and to challenge the suspensions. Trott added that the rat trap was a union "tactic" to complain about unspecified management problems at Calipatria.

Todd Slosek, spokesman for the California Department of Corrections (CDC) said that this intimidation of the "rat-

ting" Captain was precisely the type of "Code of Silence" misconduct that CDC wants to stop, calling it "unacceptable" and "completely unprofessional."

The three suspended staff, a sergeant, a guard and a medical technical assistant (MTA), were observed by Captain Serchel Leapheart subduing life prisoner Adron Cowains after Cowains allegedly assaulted an MTA at the Facility B clinic. Leapheart wrote the three up.

Not satisfied with just intimidating Captain Leapheart, the union also posted a display reading, "2005: The Year of Shame," accompanied by a picture of acting Warden Ryan. The union has long ridiculed Corrections Secretary Roderick Hickman—whom they nicknamed "Spud"—and called him a disgrace to their profession for attacking the Code of Silence. But from the other side of their mouths, union leaders still insist that no such Code of Silence exists. █

Source: *Los Angeles Times*.

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# Total Exhaustion Rule Not Applicable to § 1983 Claims; 90 Days of Unusually Harsh Condition States Due Process Claim

The Second Circuit Court of Appeals has held the total exhaustion rule does not apply to a prisoner's 42 U.S.C. § 1983 action, and that 90 days of unusually harsh confinement conditions can state a due process violation.

This is the second time this case has been before the court. The first time, the court appointed counsel and ordered briefing on two issues: (1) whether the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997E(a), requires dismissal in its entirety a claim brought pursuant to 42 U.S.C. § 1983 with respect to conditions of confinement if the complaint contains any claim that has not been administratively exhausted in the prison system and (2) whether a period of confinement of less than 101 days which alleges unusually harsh condition in a Special Housing Unit (SHU), can survive a Fed.R.Civ. P. 12(b)(6) motion to dismiss. See: *Ortiz v. McBride*, 323 F. 3d 191 (2d Cir. 2003) [*PLN*, July, 2004].

This lawsuit was filed by New York prisoner Jose Ortiz stemming from events at Arthur Kill Correctional Facility on September 29, 1998, Sergeant D. McBride confronted Ortiz with allegations of a confidential informant that Ortiz was smuggling drugs into and selling them within, Arthur Kill. Ortiz denied the allegations. After four negative urine tests for drug use, McBride instituted disciplinary proceedings against Ortiz, who was subsequently found guilty and sentenced to 90 days SHU. On the 90<sup>th</sup> day of confinement, the disciplinary action for smuggling and selling drugs was administratively overturned. Ortiz's civil rights complaint alleged: (1) His 90 day sentence in SHU under unusually harsh conditions violated his Fourteenth Amendment Due process rights; and (2) his treatment in the unit violated his Eighth Amendment right to be free from cruel and unusual punishment. On

appeal, Ortiz conceded his second claim was not viable for failure to exhaust administrative remedies.

That concession left the court to decide if the total exhaustion rule—required dismissal of the entire complaint for bringing both exhausted and unexhausted claims in the same complaint. The second circuit held a § 1983 action should not be dismissed, but should be cured when it presents “mixed” claims. Mixing exhausted and unexhausted claims in a federal habeas corpus proceeding results in dismissal of the entire petition. The Tenth Circuit recently held the “total exhaustion rule” applies to a prisoner's § 1983 action. See: *Ross v. County of Bernalillo*, 365 F. 3d 1181 (10<sup>th</sup> Cir. 2004).

The Second Circuit found the rationale of *Ross* misplaced, for it was based on fundamental principles of sovereignty. There is no comity issue of equivalent gravity “involved in prisoners’ civil right actions, since prisoners are not required to press their claims in state courts and prison administrators generally limit their review to determining whether prison policy has been violated,” the court said. Hence, analogies between habeas corpus and § 1983 are problematic. Because a § 1983 action, unlike a habeas corpus petition, usually contains several claims based on several sets of facts, courts will rarely have to duplicate efforts addressing claims in separate proceedings, assuring courts review claims involving a single set of facts in one proceeding underlies the habeas “total exhaustion rule.” Accordingly, the Second Circuit held that district courts should dismiss unexhausted claims in a

§ 1983 actions and proceed on the merits of the exhausted claims.

As a result, Ortiz's due process claim was remanded to proceed as to that claim the court said that the alleged “unusually harsh” condition state an “atypical and significant hardship in relation to the normal rigors of prison life,” despite the fact that confinement lasted only 90 day. In so holding the court created an exception to its rule that confinement of less than 101 days is not an atypical and significant hardship.

The Second Circuit reversed the district courts dismissal order and remanded for further proceedings. See: *Ortiz v. McBride*, 380 F.3d 649 (2<sup>nd</sup> Cir. 2004).

On remand, the district court appointed counsel and ordered briefing as to whether the court and, if the case proceeded to trial, jury should visit the SHU where McBride was confined in order to view conditions and the size of the cell. See: *Ortiz v. McBride*, 2004 U.S. Dist. LEXIS 21983. ■

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# Ban On Male Guards In Michigan Women's Prisons Upheld

by Michael Rigby

The U.S. Sixth Circuit Court of Appeals has held that a Michigan Department of Corrections policy prohibiting male guards from holding certain positions in the state's female prisons did not violate Title VII of the Civil Rights Act of 1964.

For many years, the problem of sexual abuse and mistreatment of female prisoners has gone unchecked in Michigan prisons. By its own admission, the Michigan Department of Corrections (MDOC) investigated 217 allegations of sexual misconduct against female prisoners between 1994 and January 31, 2001. Only 47 were deemed unfounded. Moreover, of the 20 male prison employees nationwide convicted of sexually abusing female prisoners in 1997 and 1998, fully half (10) were in Michigan.

The rampant sexual abuse of female prisoners in Michigan has also been documented by several reports in the last dozen years. In 1993, for instance, the Michigan Women's Commission reported that "sexual assault and harassment are not isolated incidents and that fear of reporting such incidents is a significant problem." In 1996, a report by Human Rights Watch (HRW) described a continuing pattern of rape, sexual assault, and other abuses of females by male guards that has consistently been overlooked by officials at all levels within the MDOC. The report also noted that male guards violated the women's privacy rights by watching them shower and use the toilet and by abusing their power to conduct pat-down searches. In 1998, another HRW report detailed "a campaign of retaliation by corrections staff against several women who had made public accusations of sexual abuse." A 1999 report by the United Nations Commission on Human Rights seconded HRW's allegations.

Also during this period the MDOC found itself embroiled in a pair of high-profile lawsuits, both of which involved the sexual abuse of female prisoners. One of the lawsuits was filed by the U.S. Department of Justice (DOJ) on March 10, 1997. This suit resulted from a DOJ investigation which found, among other things, a pattern of sexual abuse, ubiquitous lewd comments, and sexually aggressive acts by guards such as fondling prisoners during pat-down searches, rubbing their bodies

against prisoners, and exhibiting their genitals to prisoners. The DOJ's lawsuit settled on May 25, 1999, with the MDOC agreeing to, among other things, limit pat-down searches of female prisoners by male guards, require male guards to announce their presence when entering a housing area, and "minimize access to secluded areas and one-on-one contact between male staff and female inmates." [See *PLN*, February 2000, p. 18.]

The other lawsuit, filed on March 27, 1996, by Linda Nunn and 31 other female prisoners, alleged myriad constitutional violations stemming from widespread sexual misconduct, sexual harassment, violation of privacy rights, and retaliation by prison personnel. The case settled on July 31, 2000, for nearly \$4 million and the MDOC's promise to implement sweeping policy changes. Pursuant to this settlement, the MDOC further agreed to, "maintain areas where inmates may dress, shower, and use the toilet without being observed by male staff" and to implement many of the changes agreed to in the first lawsuit. [See *PLN*, August 2001, p. 7.]

After the settlement agreements were formalized and implemented, the MDOC continued to explore ways to minimize sexual abuse in its female prisons. Ultimately, the department concluded that the best way to shield itself from additional sexual abuse lawsuits was to "designate approximately 250 Correctional Officer (CO) and Residential Unit Officer (RUO) positions in housing units at female prisons as 'female only.'" On August 14, 2000, the plan was approved by the Michigan Department of Civil Service.

On July 12, 2000, affected prison employees sued the MDOC alleging the plan violated Title VII of the Civil Rights Act of 1964, which broadly prohibits gender discrimination in the workplace. After a bench trial, the district court found for the plaintiffs and enjoined the MDOC from implementing the plan. See: *Everson v. Michigan Department of Corrections*, 222 F.Supp.2d 864 (ED MI 2002). The MDOC appealed.

The Sixth Circuit reversed and remanded holding that the MDOC's plan did not violate Title VII. In reaching this decision, the Court first noted that gender discrimination is allowable under title VII "in those certain instances where...

sex...is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(2001). Traditionally, the Court noted, this exception has been very narrowly interpreted by the federal Circuit Courts and the U.S. Supreme Court.

According to the Court, three principles guided its decision.. First, "it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes, and an employer must have a 'basis in fact,' for its belief that gender discrimination is 'reasonably necessary'—not merely reasonable or convenient—to the normal operation of its business." Second, the Supreme Court has stressed that "in order to qualify as a BFOQ, a job qualification must relate to the essence, or to the central mission of the employer's business." Third, the Sixth Circuit "imposes on employers asserting a BFOQ defense the burden of establishing that no reasonable alternatives exist to discrimination on the basis of sex."

With these guidelines in mind, and giving proper deference to "the reasoned decisions of prison administrators" (which the district court failed to do) the Court held that excluding males from the CO and RUO positions is "reasonably necessary" to "the normal operation" of the MDOC's female prisons. "The MDOC reasonably concluded," the Court found, "that a BFOQ would materially advance a constellation of interests related to the 'essence' of the MDOC's business—the security of the prison, the safety of inmates, and the protection of the privacy rights of inmates—and reasonable alternatives to the plan have not been identified."

Thus, the Court held, in this limited instance, the female gender is a BFOQ for the positions in question. See: *Everson v. Michigan Department of Corrections*, 391 F.3d 737 (6th Cir. 2004). ■

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# \$1,340,000 Libel Verdict Against *The Final Call* Upheld; Damages Reduced

by Robert H. Woodman

Proving that Free Society despises the label "prisoner," the Supreme Court of New York, Appellate Division, First Department, upheld a jury determination that *The Final Call* newspaper committed libel by depicting an innocent woman as a prisoner. The court, however, modified the judgment in part and ordered a new trial on damages. The jury had awarded \$1,340,000 in damages at trial.

Tatia Morsette is a young mother with no criminal background. She has a good reputation and works in music and the performing arts. *The Final Call* (TFC) is the official weekly newspaper of the Nation of Islam with a circulation of 400,000 readers, mostly among African-Americans. The June 3, 1997 edition (volume 16, number 31) of TFC ran an article entitled *Mothers in Prison, Children in Crisis* in large, bold print. The article's illustration, both on the cover and on page 3 where the story ran, depicted three young women—one of them Tatia Morsette—in prison uniforms.

Morsette's picture was randomly selected from a file photo by TFC's graphic artist. He retouched the photograph, editing out her child and her smile and changing her clothing to prison garb. The editor, who knew nothing about Morsette, approved the retouched picture

without attempting to identify Morsette or obtain her permission to use the photo.

Family members alerted Morsette to the photograph. Clients aware of the picture asked if she had been in prison. Consequently, Tatia "became depressed, anxious, embarrassed to be around others and reclusive," gained 50 pounds, could no longer function well socially and professionally. TFC never apologized to Morsette for its use of her image, but did print a factually flawed "correction" more than two years later, which the Court labeled "rather uninspired."

Morsette sued TFC for libel in the Supreme Court of New York County. A jury entered judgment against TFC for libel and awarded Morsette \$40,000 for injury to reputation, \$100,000 for past mental anguish, \$500,000 for future mental anguish, and \$700,000 in punitive damages, for a total of \$1,340,000. TFC appealed the verdict and the damages.

Although courts must preserve "a vigorous and uninhibited press[.]" private individuals are more vulnerable than public figures to libel and more deserving of recovery. Thus, States must provide means for private individuals to sue for defamation. Media defendants can be held liable for gross irresponsibility in how they gather and use their facts.

New York law allows media defendants to be held liable for defamation through use of photographs or cartoons. Here, the jury found, and the appeals court agreed, that TFC "was guilty of a gross departure from the standards of responsible journalism when, without Plaintiff's permission, it removed her picture from its files and altered it to indicate she was a convict."

"[D]espite the callous indifference with which the defendant doctored random photographs to imply criminal conduct[.]" the appeals court held that punitive damages could not be awarded. Morsette failed to make the necessary demonstrations under New York State law for punitive damages. Likewise, New York law compelled a retrial on the future damages award unless Morsette agreed to stipulate to \$300,000 damages. The court affirmed the remaining damages as awarded. Readers should note the heavy damages attached to the stigma of being a prisoner. This may be especially useful for people who are wrongly convicted or falsely identified as sex offenders, felons, etc.

The lower court judgment was affirmed in part and modified in part with a retrial solely on future damages, subject to Plaintiff's stipulation. See: *Morsette v. The Final Call*, 309 A.D.2d 249, 764 N.Y.S.2d 416 (2003). ■

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## Seventh Circuit Reverses Summary Judgment for CMS, Prison Doctor

In an unpublished decision, the Seventh Circuit Court of Appeals reversed a grant of summary judgment to a prison doctor, holding that the doctor manifested a substantial departure from accepted professional judgment in the treatment of a prisoner's cluster headache condition.

Illinois prisoner James Edens suffers from cluster headaches, which "are a rare and intensely painful form of vascular headache that, although individually of relatively short duration, usually occur several times a day over the course of weeks or even months before going into remission." If left untreated, cluster headaches "are severely painful, even to the point of disability."

"While at the Logan Correctional Center ... [Edens] was taking ... Elavil (a tricyclic anti-depressant), which ... brought his headaches under control." In February 1999, however, Edens was transferred to the Pinckneyville Correctional Center and his Elavil prescription was discontinued.

Dr. Dennis Larson "suggested 'meditation and relaxation' after Edens speculated that the attacks might be stress-related." Larson did not prescribe any medication at that time. "Subsequently, another physical prescribed Fioricet which also controlled Edens' headaches and remained his primary treatment until mid-autumn 1999, when the physician left Pinckneyville.

On November 8, 1999, Larson discontinued Edens' Fioricet prescription, replacing it with Tylenol. According to Edens' medical records, the headaches had returned by December 7, 1999, and were occurring up to five times a day. Edens again requested that Larson re-prescribe Fioricet but was told only Motrin, Tylenol or aspirin could be prescribed.

In February 2000, Larson was replaced by Dr. Alfred Garcia. He also refused to prescribe Fioricet, opting instead to prescribe Inderal (a beta blocker) and Dilantin (an anti-epileptic drug). Neither was effective. Garcia indicated that none of the drugs which had previously worked—Fioricet, Midrin, Elavil, and Prednisone—was available.

Edens was eventually returned to Logan, where he was seen by Dr. Donald Hinderliter. He refused to prescribe Fioricet until he could examine Edens during an attack because he was concerned about prisoners faking illness to

get drugs. Subsequently, another physical prescribed Neurontin, which left Edens headache-free.

Edens brought suit, alleging that Drs. Larson, Garcia and Hinderliter, Correctional Medical Services, Inc., (CMS) and others were deliberately indifferent to his medical needs. The court noted that aside "from his own narrative, the primary support Edens offered for his claims was a collection of excerpts from medical textbooks and other sources of information about cluster headaches." Larson and CMS moved to strike these materials, but the district court refused, concluding that they were potentially admissible at trial.

The district court granted summary judgment to defendants, "concluding that Edens' disagreement with the treatments he had received did not demonstrate that any of the doctors had acted in anything but their best medical judgment."

On appeal, the Seventh Circuit concluded that there is no doubt that the potential harm caused by cluster headaches was sufficiently serious for purposes of the Eighth Amendment. The court then turned to the state of mind of the defendants.

"Although the question [was] a

close one," the court concluded "that Edens...met his burden with respect to... Dr. Larson[ ]" because Larson "offered no explanation as to why it was appropriate to offer Edens no other form of treatment" when discontinuing his Elavil. Additionally, when subsequently discontinuing the Fioricet, Larson did not explain "why Tylenol was a reasonable replacement." The court noted that "Edens has presented evidence (somewhat thin, but more than a scintilla) that conventional analgesics (like Tylenol) are commonly recognized as ineffective treatment for cluster headaches."

The court concluded that Edens failed to show that Drs. Garcia or Hinderliter were deliberately indifferent. Although Garcia's actions "suggest[ed] a degree of negligence, they [did] not admit an inference of deliberate disregard of Edens' condition."

The court also upheld the grant of summary judgment to CMS, concluding that "Edens presented no non-hearsay evidence that [CMS] had a policy of restricting...access to medication, and so he cannot hold them liable for the doctor's actions." See: *Edens v. Larson*, 110 Fed. Appx. 710 (7<sup>th</sup> Cir. 2004). ■

## Seventh Circuit Upholds Indiana Sex Offender's Banishment From City Parks

In a decision that further restricts the already limited movement of sex offenders, the en banc U.S. Seventh Circuit Court of Appeals has held that banning a convicted child molester from all public parks in the City of Lafayette, Indiana, did not violate the offender's constitutional rights under the First and Fourteenth Amendments.

In January 2000, Plaintiff John Doe, an admitted pedophile with convictions dating back to 1978, stopped at a city park on his way home from work and watched five youths in their early teens playing on a baseball diamond. Doe fantasized about having sex with them for 15-30 minutes but left without acting on his urges. The incident so upset Doe, who has been receiving psychological treatment since 1986, that he immediately notified his therapist and started receiving weekly shots of Depo-Provera to help suppress his urges. Doe was also encouraged to discuss the incident with his Sexual Addicts

Anonymous group, which he attended voluntarily.

Sometime later, an anonymous source informed Doe's probation officer of the January park incident and of Doe's thoughts at the time. Upon being apprised of the situation by the Lafayette Police Department, city officials banned Doe for life from all public parks operated by the City, which included a sports stadium, a golf course, several city pools, and a zoo.

In related depositions, Doe admitted to fantasizing about the youths but stated he realized the thoughts were unhealthy and that "I needed to leave the park, which is what I did." Doe's psychologist, Dr. Patricia C. Moisan-Thomas, further asserted that Doe's decision to leave illustrated progress because, "in the second phase of recovery, we actually encourage the patient to begin to determine the boundaries of what's safe and what's not safe."



In November 2000, Doe challenged the ban claiming it illegally infringed on his rights under the First and Fourteenth Amendments. The U.S. District Court for the Northern District of Indiana granted summary judgment to the city, see: *Doe v. City of Lafayette*, 160 F. Supp. 2d 996 (N.D. Ind., 2001) and Doe appealed.

The U.S. Seventh Circuit Court of Appeals affirmed. The Court initially noted that while the First Amendment is predicated on the right of self-expression, Doe went to the park not to engage in self-expression but to look for children to satisfy his sexual urges. The Court further held that Doe was not punished for his private thoughts in violation of the First Amendment because, rather than engage in pure thought, Doe acted on his urges by going to the park.

Similarly, the Court found no merit in Doe's claim that the ban violated his substantive due process rights under the Fourteenth Amendment. Doe had argued that the ban was unconstitutional because it infringed on his "basic right to wander and loiter in public parks." The Court held, however, that this was not a "fundamental" right for two reasons: first, because the Supreme Court has not specifically recognized it as such, and second, because other than the January 2000 incident, "Mr. Doe has not even entered the City's parks since at least 1990."

Lastly, the Court reasoned that the ban was not arbitrary or irrational, but was instead "rationally related to a legitimate government interest."

In a strongly worded dissent, 3 of the 11 Circuit Judges diverged from the majority arguing that the ban did indeed unconstitutionally punish Doe for his thoughts. These judges also noted that the ruling would serve to deter former sex offenders from participating in one of the few treatments available--openly discussing their urges, denial, lack of empathy, etc. with others in group therapy. "The chilling effect of this ruling, i.e., that the communication of one's thoughts may result in being banned from public spaces, is frightening," the dissenting justices lamented.

Notably, both the majority and the dissenting minority expressed their puzzlement at Doe's failure to challenge the ban on the grounds that it is unconstitutionally overbroad. See: *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004)(en banc). ■

## Ninth Circuit Upholds Preliminary Injunction Against Webcams In Arizona Jail

by Michael Rigby

The U.S. Ninth Circuit Court of Appeals has upheld a preliminary injunction prohibiting an Arizona sheriff from displaying live video of prisoners in the Maricopa County Jail on the internet.

This case arises from Maricopa County Sheriff Joe Arpaio's latest publicity stunt. Already known for humiliating prisoners by dressing them in pink underwear, warehousing them in "tent cities," and forcing them to toil in chain gangs, Arpaio has chosen to take his contempt for the rights of prisoners and pretrial detainees one step further—broadcasting their every move on the internet for all the world to see.

At the County's Madison Street Jail, Arpaio installed four webcams that captured a men's holding cell, two intake areas, and a portion of the women's holding cell—including the toilet (this webcam was repositioned to a hallway after the lawsuit was filed). The video was originally streamed to the County Sheriff's server, but later moved to Crime.com because of the heavy traffic. Visitors to the website could view live video from each of the webcams.

In response to Arpaio's sadistic intrusion on their privacy, 24 pretrial detainees challenged the webcam policy in state court. The Sheriff and the County, perhaps seeking a more favorable venue, removed the case to federal district court. However, the Sheriff's voyeuristic proclivities found no particular favor there, either. Relying on *Bell v. Wolfish*, 99 S.Ct. 1861 (1979), the U.S. District Court for the District of Arizona held that the policy unconstitutionally punished the jail's pretrial detainees and issued a preliminary injunction. The defendants appealed.

A panel of the Ninth Circuit affirmed, with one judge dissenting. The Court initially noted that the case was not moot. The Court then addressed Arpaio's challenge to the preliminary injunction, which it contended was reducible to two arguments: "the district court misidentified the applicable law and the district court misapplied the law to the facts of this case."

Examining the first issue, the Court held that *Bell*--rather than the four-factor

"reasonable relation" test delineated in *Turner v. Safely*, 107 S.Ct. 2254 (1987)--was the correct legal standard. *Turner* was inapplicable, the Court held, because "Turner dealt with convicted prisoners, not pretrial detainees." (Notably, in another challenge by pretrial detainees against the same sheriff, the Ninth Circuit held that *Turner* was the correct standard. See: *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999) (en banc). The court further concluded that webcams were "plainly an excessive response to Sheriff Arpaio's interest in maintaining jail security."

The Ninth Circuit also agreed with the district court's application of *Bell*. In *Bell* the Supreme Court held that the Due Process Clause prohibits punishing a pretrial detainee before an adjudication of guilt. The *Bell* court further held that for a governmental action to constitute punishment, the action must cause a detainee to suffer some harm or "disability," and must be intended as punishment.

In the instant case, the court held that the plaintiffs were definitely harmed by the policy, which subjected every moment of their daily activities to global scrutiny. "Exposure to millions of complete strangers, not to mention friends, loved ones, co-workers and employers, as one is booked, fingerprinted, and generally processed as an arrestee," the court opined, "constitutes a level of humiliation that almost anyone would regard as profoundly undesirable and strive to avoid."

Continuing, the Court held that the webcams were imposed for the purpose of punishment. Arpaio had claimed that

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## Injunction Against Webcams (cont.)

the policy served as a public deterrent to crime. The Court held, however, that “‘retribution and deterrence are not legitimate non-punitive governmental objectives’ that can justify adverse conditions of detention for pretrial detainees.” As to Arpaio’s contention that the County’s

interest in keeping its pretrial detention centers open to public scrutiny justified the policy, the Court countered that “‘turning pretrial detainees into the unwilling objects of the latest reality show’ to be broadcast around the world was not ‘rationally connected to goals associated with educating the citizenry of Maricopa County.’”

Finally, the Court rejected Arpaio’s

absurd contention that the preliminary injunction violated his First Amendment rights. The webcams were operated for a governmental purpose, the Court observed, not Arpaio’s own personal communication. Accordingly, the Ninth Circuit affirmed the preliminary injunction. See: *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004). The supreme court denied Arpaio’s motion for review. ■

## Confiscation of “New Afrikan” Literature May Violate First Amendment

The Second Circuit Court of Appeals reversed a New York district court’s dismissal of a prisoner’s complaint alleging violation of his rights under a Religious Land Use and Institutionalized Persons Act (RLUIPA) and his rights to free exercise and free speech under the First Amendment.

New York prisoner Shabaka Shakur filed a civil rights action alleging facts that occurred around five separate events. The first occurred on Christmas Eve 1999 at Great Meadows Correctional Facility. Guard Daniel Hurlburt searched Shakur’s property that day, finding and confiscating 26 books and pamphlets of “New Afrikan political literature,” which he characterized as “Nubian gang materials.” Shakur was issued a misbehavior report for violation of Institutional Rule of Conduct 105.12 provides “[i]nmates shall not... possess... or use unauthorized organizational insignia materials.” “An unauthorized organization is any gang or organization which has not been approved by the Deputy Commissioner for program services.”

At a hearing on the misbehavior report, Shakur requested to have the confiscated materials sent to Great Meadows’ Facility Media Review Committee (FMRC) was denied. Guard Dolan, the hearing officer, found the confiscated materials were not authorized because they reflected a “revolutionary” organization “designed to create... and mobilize a well armed war movement.” Shakur was sentenced to 18 months Special Housing Unit for the violation.

A second search and confiscation of a “New Afrikan Self Development Program” occurred on January 2, 2002. Guard P. Foley wrote Shakur a second Rule 105.1 misbehavior report. Once again, Shakur’s request to send the material to the FMRC was denied at the hearing, which resulted

in a penalty of 30 days keeplock.

The third search and confiscation of “New Afrikan Literature” occurred at Attica Correctional Facility in July 2002. Once again, the materials were not sent to the FMRC, and a penalty of 60 days in keeplock was imposed against Shakur.

A fourth and final confiscation of “New Afrikan Literature” occurred in August 2002. This time, however, the sergeant on Shakur’s block granted his request to send the materials to the FMRC. The FMRC’s review found three pages containing drawings that would “incite disobedience and violence.” It approved the remainder of the literature to be returned to Shakur after redaction of the objectionable portions.

Shakur also alleged an RLUIPA a violation for being prevented from attending the Eid ul Fitr feast at Attica on January 19, 2002 by guard Beyler, who refused to release Shakur for the scheduled event to participate in the feast and receive the “required” religious meal.

The district court, in reviewing the complaint for in forma pauperis status, dismissed the complaint in its entirety for failing to state a claim. Shakur appealed.

In reviewing Shakur’s First Amendment claims, the Second Circuit held that Rule 105.12, on its face, sweeps more broadly than allowed by precedents that allow prisons to confiscate or reject publications prisoners may possess. The Rule creates an across-the-board exclusion of materials from “unauthorized organizations.” That is too broad to meet the standard in *Turner v. Safely*, 482 U.S. 78 (1987), which requires review of each publication on an individual basis. Thus, a free-speech claim was stated.

The Court also found merit in Shakur’s claim that the confiscations were not for a neutral objective, but were made for rea-

sons out of “personal prejudice.” A failure to adhere to established procedures or standards can evince an improper objective. Absent Rule 105.12, the challenged confiscations would have been subject to FMRC review. The defendant’s decision to bypass that review suggests the confiscations were not made for legitimate and neutral penological objectives. The single review by FMRC, which resulted in return of most materials, buttresses that conclusion. The Court held that if Rule 105.12 did not authorize the confiscations; a claim of free expression has been stated.

The Court found Shakur waived his equal protection claim on appeal and the due process claim was properly dismissed. The Court held due process was provided at the misbehavior report hearing despite the refusal to invoke the requested FMRC review.

The RLUIPA claim was also reversed because the district court used the wrong analysis as it relied upon a case that has been reversed. The Second Circuit held that Eid ul Fitr “it is one of two major religious observances in Islam.” Refusing to allow Shakur to participate in that feast could be held to be a substantial burden upon practice of his religion.

Accordingly, the matter was reversed and remanded for further proceedings upon the First Amendment free-speech and free exercise claims that the RLUIPA claim. This is not a ruling upon the merits. See: *Shakur v. Selsky*, 391 F.3d 106 (2<sup>nd</sup> Cir. 2004). ■

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# Florida Jail Prisoner Awarded \$60,000 For Untreated Forearm Fractures Against CMS and Sheriff

On May 12, 2004, a Florida court awarded \$60,000 to a former county prisoner whose fractured forearms went untreated for a week. Defendants, the Hillsborough County Sheriff's Department and the jail's contract medical provider, Correctional Medical Services (CMS), were found to be equally negligent.

Jackie B. Coakley, 33, was arrested on August 23, 1995, after fleeing from a Tampa police officer who was trying to arrest him on an outstanding warrant. According to Coakley, when he was apprehended the officer struck him once on each arm before handcuffing him. Coak-

ley was then taken to the Hillsborough County Jail, where he received no medical attention for seven days, he alleged.

Coakley sued the Tampa Police department claiming they used excessive force which resulted in fractures to his left and right forearms. Coakley also sued the Sheriff's Department for negligence in failing to timely provide him with medical attention. Because of the injuries, Coakley contended, he now has difficulty lifting heavy objects.

The Tampa Police Department settled with Coakley for an unknown sum, but the other defendants did not. On the first day of trial, Judge Sam D. Pendino

ruled in Coakley's favor and awarded him \$60,000 (\$30,000 from the Sheriff's Department, and \$30,000 from CMS). The defendants also stipulated to costs of \$19,790.08.

Coakley had retained experts Howard N. Chipman, M.D. (orthopedic surgery) of Tampa, and George Kirkham, Ph.D. (police procedures) of Lake Worth. Coakley was represented by Michael J. Trentalange of the Tampa law firm Trentalange & Kelley. See: *Coakley v. Tampa Police Department*, Hillsborough County Court, Case No. 98-6042. ■

Source: *Florida Jury Verdict Reporter*

## Guard Denied Qualified Immunity in MI Prisoner's Retaliation Claim

The Sixth Circuit Court of Appeal has affirmed a Michigan District Court's order denying a guard's qualified immunity defense in a suit filed by prisoner David J. Scott, a prisoner at Carson City Regional Facility. Scott's complaint alleged guard Philip Bair retaliated against him for filing grievances.

On July 6, 1995, Scott reported to Bair to check into a prison building to appear for an unrelated misconduct ticket. Bair said to Scott of his misconduct ticket, "[T]hat doesn't surprise me." Scott requested Bair to explain the remark. At that point, Bair walked over to Scott, and said, "you don't know who you're f\_\_\_ing with." Bair then grabbed Scott by the back of the neck and continued, "you want to f\_\_\_ with me, b\_\_\_!"

Later that day, Scott filed a grievance alleging the above facts. The following day, Bair filed a misconduct ticket against Scott for insolence. The hearing officer later dismissed the infraction because Bair's creditability was "questionable," relying in part on the fact the charge was filed "24 hours later, after the inmate had claimed to have been assaulted."

In contesting Bair's motion for summary judgment, Scott provided the District Court the affidavit of fellow prisoner Richard F. Thomas, who overheard a conversation between Bair and another guard, Dale Feldpausch, on July 6. Bair described to Feldpausch the events, consonant with Scott's version of the facts. Bair told Feldpausch he did like Scott due to Scott's repeated conflicts with Feldpausch over Scott's jailhouse lawyer activities. Feld-

pausch recommended to Bair that in order to cover up his wrong doing, Bair should write up a false ticket against Scott, alleging that Bair had patted down Scott after a verbal threat—this version of events was ultimately wrote into the charge.

On appeal, Bair asserted Scott suffered no tangible harm. The Sixth Circuit rejected that argument as misguided, holding that qualified immunity should be based on the actions of the guard and the reasonably foreseeable consequences of those actions, not subsequent events outside the guard's control. Hence, the fact the hearing officer cleared Scott of misconduct did not make Bair's conduct any less unconstitutional. The court affirmed the district court's denial of summary judgment. See: *Scott v. Churchill*, 377 F.3d 565 (6<sup>th</sup> Cir. 2004). ■

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# Rehabilitated California Ex-Cons Have No Privacy Protection From Media Productions Based Upon Public Court Records

by John E. Dannenberg

The California State Supreme Court, reversing its 33 year old precedent, held that privacy rights of a former prisoner were trumped by the First and Fourteenth Amendment rights of television producers who mined twelve year old court records to make a TV documentary based upon his earlier crime.

Steve Gates pleaded guilty in 1992 to accessory after the fact in a murder for hire. He did his three years in prison, and thereafter led an obscure, lawful and productive life; he even gained a court certificate of rehabilitation. But to his horror, Discovery Communications, Inc. (Discovery) aired a TV documentary in 2001 based upon data gleaned from official court records of his crime. Worse yet, the TV version implied he was guilty of conspiracy to murder, a crime of which he was not convicted. Gates sued for defamation of character and invasion of privacy.

The California Supreme Court had previously decided this question (*Briscoe v. Reader's Digest Association, Inc.*, 4 Cal.3d 529 (1971)) in favor of such a person's privacy rights. But Discovery argued that intervening U.S. Supreme Court decisions compelled the state high court to revisit the question. It relied upon *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) for the proposition that "the inter-

est in privacy fades when the information involved was already in the public record." *Cox* held that "In preserving [our] form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."

Subsequent U.S. Supreme Court cases upheld variants of this theme with respect to rape victims and juvenile proceedings—virtually any type of case except one where the records had been sealed

by the court. Although the courts have held media liable for untruthful reports or malicious ones, the non-malevolent use of public data mined from official court records is not an invasion of privacy and will not support a defamation claim.

Accordingly, the California Supreme Court officially overruled its own precedent in *Briscoe, supra*, and upheld the appellate court ruling denying Gates' claims. See: *Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679; 101 P.3d 552 (2004). The U.S. supreme court subsequently denied certiorari. ■

## Washington Prisoner's Uninformed Disciplinary Plea Agreement Upheld

The Washington Court of Appeals, Division I, upheld a prisoner's disciplinary plea agreement even though his punishment was more extensive than what he had agreed to. The agreement was only upheld, however, because no good time was taken.

Garridan Nelson, a Washington state prisoner in the Airway Heights Correctional Center, was cited for a disciplinary violation after guards found a watch belonging to another prisoner in his hobby craft storage box. Before a hearing was conducted, Nelson agreed to enter a guilty plea—which involved waiving his right to a hearing and an administrative appeal—in exchange for a punishment of 10 days cell confinement. But instead of honoring the agreement, prison officials suspended Nelson from both his prison job and the hobby shop, took 5 custody points, and barred him from requesting transfer to another prison for 1 year.

In response, Nelson filed, a pro se personal restraint petition on March 17, 2003, challenging the plea agreement. Specifically, Nelson contended that because he was never

informed about the possible consequences of the plea agreement, he was "entitled to choose between specific enforcement or withdrawal of the agreement."

The Court of Appeals (COA) disagreed. The COA first observed that prisoners do not share the same due process protections as criminal defendants. In *Sandin v. Connor*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), the Supreme Court held that a prisoner's "constitutionally protected rights are implicated only when he or she faces restraint that 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" Loss of good time is such a restraint, the COA noted.

Relying on the *Sandin* standard, the COA noted that Nelson had lost no good time. The Court then held that the disciplinary sanctions resulting from Nelson's uninformed guilty plea did not "rise to the level of atypical and significant hardship" because they were within the expected parameters of his sentence. Moreover, there was no indication the disciplinary infraction itself would have lasting or significant consequences because, by the time his petition was reviewed, Nelson's hobby privileges and custody points had been reinstated and he once again had a job. Thus, the Court denied his petition. See: *PRP of Nelson*, Washington Court of Appeals, Division I, Case No. 51992-1-T (unpublished). ■

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## News in Brief:

**Arizona:** In August Pima county jail officials ordered the mass drug testing of all 200 minimum security jail prisoners and 20% tested positive for the use of illegal drugs.

**California:** On October 3, 2005, Long Beach police shot and killed a parolee who fled from them while being checked on at his home by police. A police dog was shot and killed by the parolee during the chase. Police issued a statement mourning the death of the dog, Ranger, but not the parolee.

**California:** On September 21, 2005, 120 immigration detainees at the Mira Loma jail in Los Angeles staged a six hour sit down strike to protest the slow pace of their immigration hearings. Immigration proceedings routinely take four to six weeks before being held due to a backlog in cases. The jail holds 950 men awaiting deportation hearings or who are seeking political asylum.

**California:** On September 22, 2005, 200 Black and Hispanic prisoners at the California Institution for Men in Chino rioted for three hours before being subdued by guards with pepper spray, foam bullets and tear gas. Eight prisoners were injured, two critically and one guard suffered a back injury during the incident. No cause was given for the riot.

**Colombia:** On October 2, 2005, Jerry Benavides, 40, the Bureau of Prisons representative in Colombia, was found dead of a self inflicted gunshot wound to his head in an apartment in Bucaramanga. Benavides was part of a U.S. embassy program designed to tell Colombians how to run their prison system.

**Florida:** On September 8, 2005, a Lake County jury convicted Bureau of Prisons guard Purdie Burkes, 36, of DUI manslaughter for killing Michal McPherson as the latter rode a bicycle.

**Guatemala:** On September 20, 2005, members of the Mara Salvatrucha gang burst into the Etapa II youth prison near Guatemala City armed with guns and grenades and killed 12 prisoners who were members of the rival Mara 18 gang while they slept. At least two of the dead were decapitated and another 12 prisoners were injured in the attack. Prison guards fled the prison when the attack occurred. On September 6, 2005, members of Mara 18 had attacked Salvatrucha members at the facility, injuring 12 members. On September 19 three members of Mara 18

were killed by Salvatrucha members at a prison in Puerto Barrios.

**India:** Prison officials in the state of Bihar announced plans in September, 2005, to install mobile phone jammers in prisons to prevent prisoners from using contraband cell phones.

**Indiana:** on September 2, 2005, Jason Patrick, 23, was killed during a fight with other prisoners at the Indiana State Penitentiary in Michigan City. Patrick was sentenced to 65 years in prison after being convicted of beating and stabbing a ten year old boy to death. Prosecutors had sought the death penalty but Patrick was mentally retarded, thus not allowing the punishment. Upon hearing the news of his death the prosecutor in the case told media it was "poetic justice."

**Michigan:** Claiming a lack of funds, the state Department of Corrections announced plans to eliminate \$1 million from its budget aimed at testing and treating prisoners with hepatitis C in state prisons. Prison officials have resisted identifying prisoners with HCV claiming it would cost over \$130 million to treat the estimated 18,000 of Michigan's 48,000 prisoners who are believed to harbor the virus.

**Nebraska:** On October 3, 2005, former criminal prosecutor for Cheyenne County, Gregory Lauby, 58, was sentenced to 5-10 years in prison for raping a twelve year old girl that had run away with him to his home. The rapes occurred while Lauby was working as a prosecutor and he was calling the victim at home from his workplace in the courthouse. The child's parents had repeatedly asked Lauby to stop contacting their daughter and had told him she was 12 years old.

**New Jersey:** On September 20, 2005, a 17 year old juvenile resident of the Bonnie Brae School attacked a prisoner at the East Jersey State Prison in Woodbridge where he was attending a "Scared Straight" program with 18 other juveniles. The

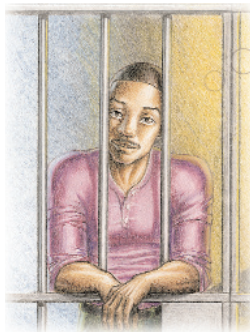
juvenile was charged with simple assault and the program, where prisoners purport to tell youth about the horrors of prison life with the goal of making them not engage in criminal activity, was suspended. Prison officials claim the assault was gang related. Apparently at least one juvenile has not been "scared" as he came to prison to commit an assault. Prison guards who witnessed the assault told media that at least four of the juvenile visitors took part in the assault on two prisoners, who were badly beaten. They claim the attackers and victims were also members of the Crips street gang.

**New York:** On September 10, 2005, police shot and killed Joseph Henry, an intake guard at the Vernon C. Bain Center, a floating jail barge, shortly after Henry shot and killed Damien Greenslade, 26, who was sitting in a car with his estranged former girlfriend in the Bronx. He shot the girlfriend in the leg. When confronted by police Henry refused to surrender.

**New York:** On September 14, 2005, Cutis Kubiak, 58, a guard at the Albion

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## News In Brief (cont.)

Correctional Facility was arrested on charges that he raped one prisoner and gave a gift to another at the female prison. He pleaded not guilty and was released on his own recognizance.

**Nigeria:** On September 21, 2005, prisoners at the Ikoyi Prison in Lagos, rioted leaving at least 10 prisoners and six guards dead and unknown numbers injured. The riot began when prison officials attempted to move a number of prisoners to another prison and they resisted. The warden's office and records office were burnt to the ground during which at least six guards burned to death. The Prison Minister spokesman, Ope Fatinukun, denied that what happened was a riot and instead said it was a "misunderstanding."

**North Carolina:** On August 17, 2005, Governor Mike Easley refused to pardon Sylvester Smith, 54, who had been convicted of first degree rape and sexual offense in 1984. Smith was freed from prison when the alleged victims recanted their testimony that Smith had assaulted them. Easley had prosecuted Smith while serving as district attorney for Brunswick County. Smith said he believed Easley had a conflict of interest and was incapable of admitting he had made a mistake. At the same time, Easley pardoned Leo Waters, 56, who had served 21 years in prison for a rape in which he was exonerated by DNA evidence. A pardon allows wrongly convicted North Carolina prisoners to seek up to \$20,000 a year in damages for each year spent in prison, up to \$500,000.

**North Carolina:** On October 3, 2005, Jason Chess, 28, a Fayette county probation officer, was charged with supplying a female prisoner at the local jail who was on his case load with three miniature bottles of liquor, a pack of cigarettes and chewing gum.

**North Carolina:** On September 20, 2005, Edna Honeycutt, 69, was arrested at the Harnett Correctional Facility and charged with attempting to smuggle five Darvocet pills and 8 Clonazepam pills to her son Christopher Bass, 37. Honeycutt was on probation for having been convicted of previously smuggling narcotics to her son while he was in prison.

**North Carolina:** On September 29, 2005, Constance Locklear, 25, a guard at the Scotland Correctional Institution was arrested and charged with shooting a man in the wrist that had gotten into a fight with her father.

**Ohio:** Citing budget problems, Ashtabula county prosecutor Thomas Sartini told media in May, 2005, that his office lacked the resources to prosecute crimes in the county's two private prisons, the North Coast Correctional treatment Facility and the Lake Erie Correctional Institution. Records indicate only attacks on staff and drug smuggling are prosecuted while attacks on prisoners by other prisoners are not prosecuted. Readers can speculate where crimes by staff fit into this scenario.

**Ohio:** In July, 2005, Ross Correctional Institution deputy warden Jeffrey Lisath was suspended for five days after he accidentally showed prisoners an HBO television show with some sexual content.

Lisath said he meant only to record a boxing match and show it to prisoners when he accidentally recorded the unnamed show following the boxing match.

**Oregon:** On September 28, 2005, Leighton Bates, 44, pleaded guilty to kidnapping and weapons possession charges stemming from taking prison guard Rebecca McLauchlin hostage at the Oregon State Penitentiary, on April 25, 2005, for three hours. Bates was sentenced to 19 years and seven month imprisonment, to be served consecutive to the 51 year sentence he is already serving for prior sexual assaults, kidnappings and escapes. McLauchlin received an award from the Oregon Department of Corrections in recognition of the professional way she behaved while hostage. However, that did not last long and on September 19, 2005, McLauchlin resigned and is undergoing criminal investigation for unspecified criminal behavior.

**Pennsylvania:** In September, 2005, Joseph Ciccone, 45, a former Bergen county sheriff was convicted in 2001 of selling jobs and promotions to his employees and shaking down vendors for campaign contributions, was hired to teach criminal justice and police organization and administration courses at the East Stroudsburg University. As part of his sentence Ciccone is forbidden from holding government employment.

**South Carolina:** On October 5, 2005, Dorchester county jail guard Christopher Fralix, 28, was arrested on charges that he pointed a pistol at trusty prisoners working on jail grounds.

**Sri Lanka:** On September 26, 2005, three prison guards and a prisoner were

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killed when unidentified gunman stopped a prison bus transporting prisoners to court in Gampaha town. No motive was given for the attack. Sri Lanka has faced a protracted civil war as the Tamil minority seeks independence.

**Texas:** On September 1, 2005, 8 people including Geo Corporation guards who worked at the San Antonio jail, Angelica Guerra and Sophia Martinez, pleaded guilty to bank fraud charges for stealing money from banks by opening accounts, depositing money then over drawing the accounts. Prosecutors claim the scheme was masterminded by Santos Lopez III, 27, who started the scheme and recruited the guards while imprisoned in the San Antonio jail. Both guards were fired by Geo.

**Thailand:** On September 24, 2005, prisoners at the Lop Buri Central Prison burned down a furniture factory and a cell block to protest a lack of water in the prison and the denial of TV privileges to watch boxing matches on television. In response to the 14 hour riot, Corrections Department chief Nathee Chitsawang agreed to improve the water supply, restore kickboxing television shows and transfer the prison warden. The ban on boxing had been instituted to curtail

prison gambling after family members complained prisoners were falling deeply into debt over the matches. Prison officials claimed that book makers, angry at lost profits, had engineered the riot.

**Washington:** In early September, 2005, the Washington Corrections Center in Shelton fired prison guards Willie Shannon, 26, and Sean Dack, 25, after the guards got into a fight with former prisoner Randy Hinchcliffe, 38, at a bar in Olympia. All three men were arrested and charged with disorderly conduct. While in a holding cell in the Olympia city jail Shannon urinated on a jail computer outside his cell, causing \$1,500 in damages. He has been charged with felony malicious mischief. When police released Hinchcliffe from the jail they gave him Dack's cell phone, wallet, t shirt and baseball cap. Hinchcliffe then used Dack's cell phone to call a 25 year old woman Dack had been chatting with at the bar to pick him up at the jail, when she showed up he tried to force his way into her car. She called police who then set up a sting to retrieve Dack's belongings. That was successful and he has been charged with theft. Both guards were probationary employees with the DOC. Shannon's mother Teresa Shannon was a guard

murdered in 1996 by her lover and fellow Shelton prison guard Cindy Boskofski. Willie and his brother had sued the DOC and city of Lacey for failing to protect their mother, those suits were dismissed. Boskofski was convicted and sentenced to 25 years in prison. In the past 25 years all prison guards killed in Washington State have been murdered by their co-workers,

**Washington:** On October 17, 2005, Floyd Drane, 53, a guard at the King County Regional Justice Center in Kent, was sentenced to 64 years and four months in prison for kidnapping, beating and raping two prostitutes while he was high on crack cocaine. One victim, now age 21, described how Drane burned her with a clothing iron scarring her legs, arm and torso and beat her with an electrical cord. The other victim, aged 47, said Drane held her against her will for 3 days, threatening, beating and choking her and shooting her 17 times with a bb gun while she lay bound on his laundry room floor. Drane was convicted after a bench trial and the court rejected the plea of his attorney, John Henry Browne, for a sentence of 51 years, despite Drane's 22 years of employment as a jail guard, by noting the severity and depravity of the injuries. ■■

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## \$95,000 in Attorney Fees Finally Paid in Massachusetts Jail Conditions Suit

After 12 years of disputing the amount to be paid to Massachusetts Correctional Legal Servicer (MCLS) for attorney fees relating to a class action suit, officials in Essex County agreed on July 8, 2004, to pay \$95,069.89 in such fees.

MCLS was entitled to reasonable attorney fees and cost under an October 27, 1992, settlement agreement in the civil action of *Greenlee v. Reardon*, which was filed in Massachusetts' Suffolk Superior Court.

That agreement required the sheriff of Essex County of the Massachusetts Department of Corrections (MDOC) to make improvements in four areas of operation at the Essex County Jail and House of Corrections in Salem. (Salem Jail) by October 1, 1994, the Defendants were required to: (1) receive accreditation of medical services by the National Commission on Correctional Health Care; (2) develop and implement a more extensive substance abuse program; (3) increase visi-

tation opportunities for prisoners; and (4) develop and implement a more extensive basic literacy program.

The agreement years later also carried an unusual provision for jail litigation. That provision speaks to the seriousness of the deficiencies in the jails services. Each plaintiff and class member were to be paid \$10.00 for each day they were incarcerated at the Salem Jail. On June 15, 1998 The Superior Court approved distribution of the "*Greenlee et al litigation fund*."

The July 8, 2004 "Settlement Agreement on Attorney's Fees" precludes all parties to *Greenlee* from seeking distribution of any remaining funds in the litigation fund once the attorney fees of \$95,000 are satisfied. Finally MCLS has its fees for prevailing in this class action suit, but it took 12 years after reaching settlement upon the action's merits. See: *Greenlee v. Reardon*, Suffolk Superior Court, Massachusetts, Case No. 84-69985. ■

## Other Resources

### ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

### Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

### Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

### CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

### Florida Prison Legal Perspectives

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about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

### Justice Denied

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### November Coalition

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### Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

### Western Prison Project

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**The Criminal Law Handbook: Know Your Rights, Survive the System**, Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$34.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

**Represent Yourself in Court: How to Prepare & Try a Winning Case**, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

**Law Dictionary**, Random House, 525 pages. \$17.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

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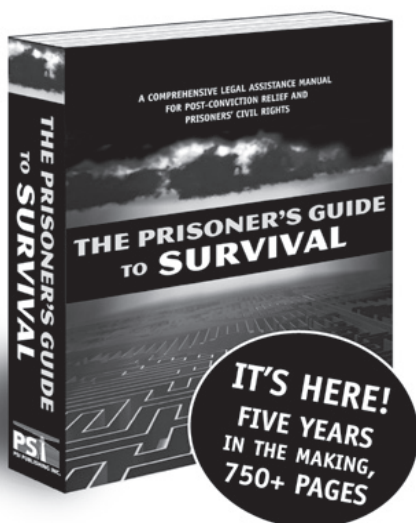
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# PRISON

## Legal News

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*Dedicated to Protecting Human Rights*

October 2005

### Modern Slavery In North Carolina: Another Peculiar Institution

*by Michael Rigby*

Jean Valjean went to prison for stealing a loaf of bread to feed his sister's seven hungry children. It was only the first of many injustices the protagonist in Victor Hugo's biting social commentary, *Les Miserables*, would endure. For the next 19 years he labored as a slave on a French chain gang. When he was released in 1815, Valjean had earned a grand total of 109 francs--then the equivalent of about 2 months' wages.

Two hundred years later, prisoners in North Carolina have it no better. Toiling in prison sewing plants, stamping out license plates, and assembling furniture, these modern slaves labor for a top pay of \$3 a day.

Correction Enterprises (CE), the division of the North Carolina Department of Corrections (DOC) that operates prison factories, farms and other prisoner work programs, employs 2,300 prisoners and about 375 staff. In 2004 CE had \$78.7 million in sales and reported \$4.5 million in profit. That year, sales to prisons accounted for 46% of CE revenue while sales to other state agencies made up another 40%. In 2003 and 2004, \$3 million of CE's net income went to the state's general fund and nearly \$600,000 to a victim's compensation fund.

Politicians and prison officials are quick to extol the virtue of prison work programs--taxpayer savings, enhanced security, rehabilitation, real-world work skills. But these goals are only practical on the surface. Upon closer examination, it becomes clear that prison slavery is a taxpayer funded boondoggle that cannot survive the open market so extolled by politicians and capitalist ideologues.

#### Savings Nonexistent

One tired argument for the continuing use of prison slave labor is that it saves taxpayer dollars. Taken at face value this seems logical. So much so that CE echoes this sentiment in its mission statement, which promises to "provide quality goods and services at a savings to the taxpayer." In reality, however, this is rarely the case.

This fact became clear in October 2004 when CE's four garment factories could no longer keep up with the demand for certain prisoner T-shirts. Prison officials were forced to locate an outside vendor. The DOC got three bids. The

lowest quote--\$1.70 each for size XXXX shirts manufactured in Bangladesh sweatshops--was 40% less than the \$2.76 CE spent on each prisoner-made shirt. Taxpayer savings on that order totaled \$22,878.

The reason prison slave labor in the US cannot compete with sweatshop labor overseas is that while the American prisoners are paid pennies an hour for their labor, a bloated bureaucracy of supervisors, managers and paper shufflers being paid very well ensures any "savings" are totally illusory. Another reason is sales volume where factories in foreign countries can, and do, operate continuously to fill large orders while prison industries typically have limited markets.

The discrepancy raised questions about why the DOC wasn't monitoring costs more closely. State law requires agencies, including the prison system, to buy at the lowest price for goods and services; there is no requirement to purchase American goods. The price difference also prompted CE to review its purchasing procedures. Officials concluded the garment factories could not competitively make some items, such as gym shorts, washcloths, t-shirts, and boxer shorts. On outside purchases of two other discontinued items, sheets and towels, prison officials were able to save about 33%. By May 2005, savings on those two items had already totaled nearly \$100,000. The garment factories will continue to make most of the prisoner and guard uniforms, at a cost of about \$8.5 million a year.

In March 2005, the *Charlotte Observer* concluded its own investigation of

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**PUBLISHER**  
**Rollin Wright**

**EDITOR**  
**Paul Wright**

**ASSOCIATE EDITOR**  
**Alex Friedmann**

**EXECUTIVE DIRECTOR**  
**Donald W. Miniken Jr.**

**COLUMNISTS**  
**Mumia Abu Jamal, Andrea Cavanaugh, Denise Johnston, Daniel E. Manville, Kent Russell**

**CONTRIBUTING WRITERS**  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams & Mark Wilson**

**LAYOUT**  
**Lance Scott/Catalytic Communications**

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### **Modern Slavery (cont.)**

CE's prison garment factories. The probe revealed that CE routinely violated state purchasing guidelines by splitting large orders to avoid bidding. Under state rules, the DOC is not required to seek competitive bids on orders under \$5,000. The *Observer's* investigation verified a pattern of multiple purchases for the same goods, many priced just below the \$5,000 limit.

The *Observer* reviewed CE's fabric purchases of under \$5,000 for 15 months ending March 31, 2005. Of the 167 small orders, which totaled \$688,675, more than half were between \$4,000 and \$5,000. In some instances, multiple purchases were made weeks, or even days apart. On July 13, 23, and 27, 2004, for example, CE received shipments of the same black pocket lining material. All three orders were within \$500 of the bidding cut off. In October, another four similarly valued shipments arrived.

All told, CE placed 15 small orders--valued at \$71,000--for the lining fabric in 2004. The material, supplied by Chicago-based QST Industries which have a textile mill near Charlotte, is used in guard uniforms and prisoner jackets. QST salesman Martin Tilley said the company has foreign mills that produce goods typically cheaper than those made in the U.S., but CE doesn't want them. "We do not sell them any foreign-made goods," said Tilley. "They wanted to source as much domestically as they could."

Following the *Observer's* review, prison officials asked the state auditor to investigate. "I have some concern about some noticeable trends," said DOC Secretary Theodis Beck in an April 1, 2005, letter. "While Correction Enterprises has provided me what appears to be a reasonable business-related explanation for those trends, I want to ensure that the division's purchasing practices are without question in compliance with the operating rules and procedures established by the state."

The current audit is similar to one that led to the resignation of a DOC secretary in 1992. That audit concluded the DOC wasted \$6.5 million, in part by improperly using no-bid contracts to purchase \$15.1 million of clothing. It also accused DOC employees involved with the contracts of receiving money and other benefits. Prison officials assert there's no evidence of malfeasance in this case. "We

have no indication that anyone received any personal gain," Beck said.

Misuse of small, no-bid contracts is a common focus of investigations into state purchasing practices, said Dennis Patterson, a spokesman for the State Auditor's Office. "They'll break the purchase up simply because you can do under-\$5,000 purchases with essentially phone calls."

About 5% of CE's \$38 million in annual materials spending is ordered using the no-bid exemption.

### **Jobs At Risk**

Despite the DOC's supposed inclination toward buying domestic goods, prior to the *Observer's* inquiry the DOC was not even asking where the goods came from. "It wasn't until we started looking at this data that we decided we better start asking for the origin," said DOC spokeswoman Pamela Walker.

What's more, buying foreign material presents its own problems, like putting tax dollars in the hands of overseas mill owners and putting domestic jobs at risk. During its review, the *Observer* examined recent textile and apparel orders worth \$4.6 million. Fifteen large materials orders comprised three-fourths of the total. No less than 60% of those orders, worth \$3.5 million, came from overseas plants, mostly in Asia. The balance of the textile and clothing purchases, worth \$1.1 million, were divided among 200 small contracts handled mostly by the DOC, which buys for itself on orders up to \$25,000.

With fabric from India, prisoners sew their own navy blankets and guards' blue pants. Prisoner jackets, a product of Mexico, are made with nylon from Taiwan. Prisoner caps are constructed in China, and their boxers in Bangladesh. Female prisoners have worn jeans made from denim produced in Pakistan and underwear from China.

The foreign orders mean a loss of revenue for Carolina mills, an irony in the heart of what used to be textile country. "It seems ironic that the state of North Carolina would be helping Asian mills undermine U.S. textile companies and their workers," said Cass Johnson, president of the Council of Textile Organizations, an industry trade group. "I would hope that the state legislature would see the folly in undermining both the North Carolina tax base and a major North Carolina manufacturing industry and change the rules."

Anxious to quell any potential



## Modern Slavery (cont.)

voter backlash, North Carolina politicians hurriedly introduced a bill to address the issue. It was a red herring. The bill would require state agencies to ask where work is performed on goods produced when soliciting bids but does not require domestic buying. Sponsored by State Representative Rick Glazier (D-Fayetteville), the bill passed in March 2005.

In 2003, one of the largest clothing fabric makers in the U.S., Galey & Lord, lost a bid to supply the DOC with light blue poplin--used to make guards' shirts and prisoner dresses--and the fabric used for prisoner boxer shorts. The material would have been spun in Gastonia, woven in Marion, then dyed and finished in Galey's big plant in Society Hill, South Carolina, said Ed Rumowicz, who is in charge of the company's prison sales.

Galey's bid of \$1.74 per yard for the boxer short fabric was nearly triple the winning bid of 65 cents for Pakistani material. For the poplin, Galey's bid of \$1.80 was 50 cents higher--or \$50,000 for the total order--than that quoted by New York-based Raytex Fabrics. Raytex uses fabric made in Pakistan and finished in New Jersey. Jay Hellegers, vice president of sales and marketing for Raytex said he's fortunate to have the contract with at least some U.S. production. Hellegers noted that Raytex recently lost an order for another prison system to a vendor bringing in fully finished Pakistani fabric. That material is about \$1.00 a yard cheaper. "It's price, price, price," said Hellegers. "It's harder and harder and harder to be competitive."

## Benefits Superficial

Prison officials and politicians who support prison slavery contend money is not the only issue. Work programs, they argue, serve as a rehabilitative tool, teach real-world work skills that can be used upon release, and enhance security by keeping prisoners busy and well-behaved. While there is some truth to these arguments, the problems created by prison work programs far outweigh the benefits.

Some proponents argue that it doesn't even matter what job the prisoners perform. Because most have little or no prior work experience, they assert, the rehabilitative effects are inherent. State Senator Robert Pittenger (R-Mecklenburg), who has called for more auditors to review state purchasing contracts, holds this view. "Part of what you're trying to accomplish inside the prison system is some sense of redeeming work ethic, something that develops their skills, their confidence," he said. "Work is a wonderful thing."

Many experts argue, however, that prison work programs have an overall adverse effect on rehabilitation. If a profit is being made from prison slavery, says Ian Urbina ( *PLN*, January 2004, p. 1), what incentive is there for more costly but potentially more beneficial rehabilitation initiatives such as counseling, drug treatment, and literacy programs.

"In California, for example, where prison for-profit work programs are increasingly popular," notes Urbina, "prisoner educational and vocational programs have been cut statewide by almost 20 percent, with a loss of roughly \$35 million for prison educational spending and 300 fewer prison teachers."

Other proponents of prison slavery contend the jobs replicate conditions on the outside to better prepare prisoners for release. But this too is a fallacy. In North Carolina, for instance, CE puts many prisoners to work sewing in the prison garment factories, but few sewing plants remain in the U.S., where about 95% of clothing is imported. One thing that is replicated is that prisoners are forbidden from unionizing or seeking collective wage or condition improvements. The proponents of prison slavery do not respond when asked if the goal is to instill pride in work, why prisoners are not paid, and allowed to keep, the prevailing market rate for their labor. The employers, supervisors, bureaucrats and guards supervising

the prisoner workers are all paid market rates for their labor, but not the prisoners actually manufacturing the goods.

Moreover, prison work takes place in an authoritarian environment, where guards and prison officials maintain rigid control of the workers. Security comes first; production is secondary. Many prisoners accept the jobs only because they offer one of the few legal ways to make money in prison--not because they're trying to gain real-world work experience. "If [prison officials] want to emulate conditions on the outside, observes *PLN* editor Paul Wright in an article by Zack Roth [*PLN*, March 2004, p. 18], "can prisoners unionize to collectively bargain for their wages and work conditions? If not, then how voluntary is it?"

Another selling point for prison work programs is that they purportedly create a safer environment within the prison. Not only do the jobs keep prisoners occupied, advocates argue, they also provide a disciplinary tool to keep them in line. North Carolina officials proudly note that when CE's Lincolnton garment factory reopened in the summer of 2004, disciplinary cases fell significantly. In the nine months before the plant began operating, guards wrote 310 disciplinary cases, says John Crow, superintendent of the 202-bed prison. In the next seven months the number of disciplinary cases reportedly dropped by more than 20%. "They say idle hands are the devil's workshop," Crow gushes.

But profit-driven prison slavery programs can create their own security problems--often worse than those they ostensibly cure. In Idaho, for example, a 22-month investigation of the prison system's Correctional Industries (CI) program by the state's attorney general's office found flagrant abuses and security violations. The attorney general's report detailed an "egregious lack of supervisory oversight and control over the activities of the prisoners assigned to CI," [*PLN*, March 2002, p. 1].

Prisoners on furniture delivery trips for CI were allowed to visit strip joints, have sex with wives and girlfriends, and drop off stolen furniture to family members. The prisoners also used the trips to buy drugs and tobacco for resale back at the prison. (Tobacco is banned in Idaho prisons.) What turned out to be the bigger scandal, however, is the degree to which prison officials turned a blind eye to the abuse for the sake of CI's profitability. For one thing, prisoners were not carefully searched upon their return from

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Prisoners employed by prison industries programs around the country have regularly escaped, or attempted to escape from industries areas and committed numerous murders and assaults with the tools inherent in a factory environment. Yet far from being a reason to eliminate prison industries, this is dutifully accepted as the "cost of doing business." So much for the mantra of "prison security" that is used to squelch rehabilitation programs, visiting and other practices that would enhance public safety.

### Issues In Other States

Many other states have also battled problems stemming from their use of prison slave labor. In Oregon, where prisoners earn a top pay of \$3 a day, there has been public outcry over concerns that the prison system is siphoning increasingly scarce jobs from the public (*PLN*, April 2003, p.6).

Most states and the federal government have laws designed to prevent prison industries, which pay significantly lower wages and are less regulated, from gaining an unfair advantage over the private sector. These "prevailing wage" statutes generally require the work programs to pay a wage comparable to that for similar work performed in the community. These regulations are rarely followed.

In California it took legal action to force CMT Blues, a private clothing man-

ufacturer, to pay the prevailing wage. The suit was filed by a citizen watchdog group contending that because 20% of prisoners' wages go toward the cost of incarceration, cheating them meant cheating the taxpayers [*PLN*, October 2003, p. 26].

Taxpayers in South Carolina have been similarly cheated--out of money and jobs. In October 2003, the Legislative Audit Council released a blistering report of the state's Prison Industries Program (PIP). The audit found, among other things, that PIP was improperly managed, probably displaced workers in the surrounding community, and created an unfair advantage in the marketplace. The audit further noted that PIP skirted both federal and state prevailing wage statutes [*PLN*, February 2005, p. 22).

"Ultimately," says Christian Parenti, author of *Lockdown America* (distributed by *PLN*), "prison labor just doesn't make economic sense." Nor is it morally defensible. Many countries, including the U.S., ban the importation of prison made goods because, in addition to stealing jobs from the private sector, prison slavery creates a fertile breeding ground for human rights abuses. It's inconceivable that the U.S., a country which supposedly deplores the use of slave labor in foreign sweatshops, would condone similarly unfair treatment of its own citizens. However, while banning the importation of prison made goods, the US exports its own prison made goods to other countries.

If prison officials and politicians truly wish to use these programs to benefit prisoners, they should ensure the work conditions really do mirror those

on the outside. Until then (with a nod to Victor Hugo), prisoners in the 21st century will continue to be degraded by the exploitation of their labor. *PLN* reports extensively on the issue of prison slavery. See indexes or visit online at [www.prison-legalnews.org](http://www.prison-legalnews.org) for more. 📖

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# Problems Mount In Maryland Prisons

by Michael Rigby

Even as the Maryland Department of Public Safety and Correctional Services (DPSCS) reels amid mounting criticism over pervasive violence, inadequate medical care, overcrowding, understaffing, and other systemic deficiencies, new tremors continue to rattle the division. Eight guards accused of beating a prisoner to death have been fired, and an investigator inexplicably reassigned. Another guard has been charged with plotting to kill a prisoner. At the same time, prison workers are complaining of unsafe work conditions, and a warden has resigned in protest.

On May 14, 2005, Raymond Smoot, 52, died after he was “beaten and stomped ... by a number of officers” at the Baltimore Central Booking and Intake Center, said Warren Brown, the family’s attorney. Smoot died the next day at a local hospital. The state medical examiner ruled his death a homicide.

“It’ll be clear that this institution is operating with an absence of rules and regulations on how to deal with these types of procedures,” Brown said. The beating—which reportedly involved 25 to 30 guards—apparently happened when Smoot refused to enter his cell.

Smoot’s niece, Delvonna Smoot, said his face was horribly deformed from the beating. “My uncle’s face was like, shifted,” she said. “The doctors said they’ve never seen another human being beat somebody as bad as they beat my uncle, never.” Smoot had been arrested 10 days earlier for felony theft and was being held on \$1,000 bail.

The booking center has been condemned by attorneys and prisoner advocates for unsanitary and unsafe conditions. Designed to process up to 45,000 people a year, the center processed more than 100,000 in 2004. In April 2005, overcrowding and processing delays led a judge to order the release of prisoners held more than 24 hours. Since 2002, 27 prisoners have died at the center, said State Senator Verna Jones, who has called for an investigation. On May 16, six of the guards involved in Smoot’s death were placed on administrative leave.

Two guards who witnessed the incident told investigators that Smoot was beaten, stomped, and kicked in retaliation for assaulting a guard. Smoot family

attorney A. Dwight Pettit says, however, that prisoner witnesses have said Smoot was merely seeking permission to make up missed recreation time and that he never struck a guard.

After the beating, at least one guard reportedly boasted about it. In a statement to investigators, a guard reported that a coworker had bragged, “Look at that [expletive]. That’s what happens when you [expletive] with officers.” Pettit said he has heard similar accounts. “It corroborates the fact that this is a murder,” he said. “It has all the aspects of a murder—intent, malice, and forethought.”

On June 10, 2005, the DPSCS announced that eight guards, including a lieutenant, had been fired. Their names were not released. As of that time no charges had been filed, though a criminal investigation was continuing. The FBI has also launched a civil rights investigation.

Soon after the firings, a lead internal affairs investigator who had been working the case was reassigned to a guard position. On June 13, 2005, shortly after he turned over the department’s findings to prosecutors, the investigator was notified in a letter that he had been reassigned, said Herbert Berry Jr., a labor representative for the Maryland Correctional Law Enforcement Union. The investigator had worked for the internal affairs unit for four years.

The same week, a second internal affairs investigator was also reassigned to a guard position. That investigator had been involved in the politically motivated 2004 investigation of state elections chief Linda H. Lamone. (Seeking to have Lamone ousted, others on the election board assigned a prison investigator to dig up information on her.)

The unidentified investigators were given no reason for their transfer, casting suspicion on the motives behind their reassignments. “I don’t have any idea what’s going on here,” said democratic State Senator Brian E. Frosh, who chairs the Judicial Proceedings committee. “The [investigators’ reassignments] are very unusual and very significant.”

Berry also expressed suspicion and said the investigators have voiced concerns that their reassignment as guards in prisons where they previously conducted investigations could jeopardize their

safety.

On August 19, 2005, three of the guards involved in Smoot’s death—Dameon Woods, 33, Nathan Colbert, 42, and James Hatcher, 43—surrendered to authorities after they were indicted on charges of second degree murder and assault. Bond was set at \$100,000 for all three.

Disturbingly, the killing of prisoners by guards isn’t limited to the Booking Center. Three days before Smoot was murdered, a prisoner at the adjacent Baltimore City Detention Center, which is also operated by the DPSCS, was attacked and stabbed by other prisoners who were apparently working with a guard. On May 11, 2005, guard Sherman Lawrence ordered prisoner Ronald Scott, 26, into a recreation area filled with other prisoners. Minutes later, Lawrence ordered everyone out of the area except for Scott and three others. Two of the prisoners then allegedly threw a sheet over Scott’s head and stabbed him in the head and body. At least one prisoner, Donte Smith, 24, has been charged with attempted murder.

After the attack Lawrence returned Scott to his cell where he remained, bleeding and in pain, until he was discovered by a jail captain. He was transported by ambulance to the Maryland Shock Trauma Center where he was treated for a collapsed lung and puncture wounds to his head, back, and side.

Lawrence, 21, was fired after the incident but soon returned to the jail—as a prisoner. On July 9, 2005, Lawrence was charged with conspiring to commit first-degree murder and other related charges. He was denied bail. Court records showed that he was also charged on May 22, 2005, with smuggling alcohol into an unspecified Baltimore prison.

Prison officials say the incidents involving Smoot and Scott are isolated and do not reflect the generally decent behavior of Maryland’s prison guards. Others, however, believe the incidents are indicative of wider problems within the prison system. “We’re trying to find out what’s going on, what’s wrong,” said State Senator Verna L. Jones, a democrat. “The secretary [of the DPSCS, Mary Ann Saar] and her subordinates, they say everything is going fine, and. I’m just not convinced. They keep sloughing it off and saying it’s individuals. When you have so many situ-



ations coming up, it's the system."

While DPSCS officials are obviously not concerned about the safety of prisoners, many guards—and even some wardens—argue that the department is not overly concerned with their safety, either. They contend that staff cutbacks have created an unsafe work environment and that prison officials have done little to address the problem.

As one example, critics point to the alleged attempted sexual assault of a female prison guard at the Roxbury Correctional Institution in Hagerstown. The lone guard was locking classrooms in the education building on July 7, 2005, when a prisoner on the trash crew reportedly grabbed her from behind, threw her to the ground, and climbed on top of her.

The area is normally staffed by two guards, according to representatives with the Maryland Classified Employees Association, but the other guard had been reassigned to work in another area of the prison. As a result, no one was around to hear the commotion or to intervene, said MCEA chapter president John R. Reamy.

The 31-year-old prisoner, who was serving time for the 1990 murder of a 13-year-old girl, was transferred to the supermax prison in Baltimore.

Just before the alleged attack at Roxbury, the warden at another Hagerstown prison, the Maryland Correctional Institution, resigned in protest accusing the DPSCS of "dictatorial leadership" and staff cuts that demonstrate a "disregard for public safety."

In a June 11, 2005, interview, Joseph Sacchet, a 30-year veteran employee of the prison system, complained of micro-management, verbal abuse, and job cuts under Corrections Commissioner Frank C. Sizer's administration. "It's clear to me they had an agenda," Sacchet said, referring to Sizer and Assistant Commissioner Michelle Elzie. "There's no doubt in my mind, they were going to force me out." Sacchet's resignation was effective June 30.

Union representatives say the warden's resignation confirms the danger created by staff cuts. "Here's a warden saying what we've been saying all along," said Ron Bailey, executive director of the

American Federation of State County and Municipal Employees Council 92. "The state is endangering our officers."

In the interview, Sacchet said he was prepared to lose 30 to 35 positions under a reorganization plan, but that the department had cut 82 jobs since September 2004. "This system is going to crumble. Somebody's going to get hurt," he said.

Plenty of prisoners already have. The deaths of Phillip E. Parker Jr. and Ifeanyi A. Iko are just two examples. On February 2, 2005, Parker, 20, was choked to death on a prison bus in plain sight of five guards. The murder wasn't discovered until the bus arrived at the Maryland Correctional Adjustment Center in Baltimore. Iko, 51, was killed by guards at the Western Correctional Institution during a violent cell extraction on April 30, 2004 after he refused to attend a psychiatric appointment. [For more on the deaths of Parker, Iko, and Smoot, see *PLN*, July, 2005, for details.] ■

Sources: *Baltimore Sun*, *Associated Press*, *WJZ 13: Baltimore News*

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# Bringing Down The Brotherhood

by Alan Prendergast

*Inside the feds' war on the deadliest prison gang: 16 murders. 21 death-penalty cases. Snitches galore.*

A wide red line runs across the floor of the visiting room like a clown's grin, separating the guard post and the civilian exit from the rest of the place. Prisoners are forbidden to cross that line.

Joseph Principe stays way, way clear of the line. The last thing he needs, today or any of the other days he has to spend behind bars, is trouble.

Maybe it's the olive-green uniform, maybe it's the way he stands for a frisk, but there is little to distinguish Principe from the other convicts in this medium-security lockup on Colorado's high plains. Only this: When the female guard who pats him down tells him to tuck in his shirt, he doesn't give her attitude—just a slight smile.

"Is this new?" he asks.

She shakes her head slowly. He turns away from her, for modesty's sake, and tucks. The whole exchange takes only a few seconds, but it's rich in ritual. Here are the rules, ancient and implacable, *thus it has always been and always shall be...* and over here is Joe Principe, a man in a unique position to understand both the absurdity and the necessity of what is being asked of him.

Until a few years ago, Principe was the one doing the frisking and making prisoners toe the line. He was a guard at the highest-security prison in the country, the U.S. Penitentiary Administrative Maximum. Better known as ADX, the federal pen outside of Florence is home

to many of the nation's most dangerous terrorists, gang leaders and murderers, and Principe was their keeper. But then the world turned upside down, and he found himself on the wrong side of the bars.

Disgraced cops who go to prison usually end up in some form of protective custody—"checking in," convicts call it. But that's not Principe's way. He walks the yard with the rest of the cons, takes his meals with them. Checking in is for rats, and Principe is no rat. His refusal to snitch is a point of pride with him. Depending on how you look at it, it's the one thing that has kept him alive, or the thing that got him in trouble in the first place.

News travels fast in prison, rumors even faster. Everybody knows a little bit about who Principe is and what he used to be. "Usually all they hear is that this guy used to be a fed," he says. "It gets passed around. So I put it out there: 'You got any questions? Bring them to me. I'll tell you what's up.' But I don't feel comfortable telling them the whole story."

The whole story, as Principe tells it, is about snitches and the games they play. One day you're a trusted employee of the United States Bureau of Prisons. Then the snitches go to work, and you're a pariah. Before you know it, you're a named defendant in the biggest, hairiest, high-stakes racketeering case the federal government has ever prosecuted. That's *your* name on the 110-page indictment, linked to a bunch of hardcore killers, dope dealers and bank robbers—lifers and career criminals with nicknames such as The Baron, The Hulk, Blinky, McKool, Tank, Turtle, Youngster and Lucifer.

Unveiled in 2002 by the U.S. Attorney's Office in Los Angeles, the sprawling indictment is the culmination of years of effort by federal and state agencies to smash the Aryan Brotherhood, the most notorious of all prison gangs. The case is stunning in scope, targeting forty defendants—virtually the entire upper management of the AB, as well as various "associates," wannabes and stooges—for their alleged roles in a criminal enterprise stretching over decades. It encompasses 16 murders, dating back to the 1979 near-beheading of a prisoner by AB leader Barry "The Baron" Mills, and 16 other plotted or attempted murders; numerous heroin deals, in and outside of prison; and other

acts of mayhem intended to enforce the gang's will on the toughest prisons in the California and federal systems.

The case has been long in coming—in part, prison officials say, because the fear created by the AB is so pervasive. Although bona fide members make up less than one-tenth of one percent of the federal prison population, the AB has been blamed for up to 25 percent of the killings in federal pens. It's also said to be responsible for at least six prisoner murders at California's Pelican Bay State Prison. Allied with the Mexican Mafia and no longer a white supremacist organization, the group has zero tolerance for informants, rival drug, gambling or pimping operations, or pain-in-the-ass innocent bystanders. AB loyalists have executed their own brethren for homosexual indiscretions. Outsiders desperate to impress the gang have been known to slaughter suspected snitches in hope of an invitation to join.

In one infamous 24-hour period in 1983, two AB lifers killed two guards in the most secure unit of the federal penitentiary in Marion, Illinois. Spurring the outcry for a federal supermax that eventually led to the construction of ADX, the "Alcatraz of the Rockies." Yet despite being housed in the bowels of ADX, Mills and Tyler Davis "The Hulk" Bingham have allegedly continued to direct AB activities in other prisons, including the killing of black prisoners in Illinois and Pennsylvania during a racially charged turf war in the late 1990s.

In recent months nearly half of the defendants in the racketeering case, many of whom are already serving long sentences for other crimes, have accepted plea deals—including Principe. All of the 21 who remain are eligible for the death penalty. Although the government has not yet declared in which instances it will seek death, the group is likely to include Mills and Bingham, who are expected to go to trial next year. The only way to deal with the AB, the feds have decided, is to do what Mills tried to do to a prisoner named John Marzloff back in '79—cut off its head.

But prison gangs are multiheaded beasts, and the feds have made some questionable deals in their effort to crush the AB. Much of the information and several

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key witnesses behind the racketeering case can be traced back to a single cellblock at ADX known as H Unit, a secret intelligence unit where six top defectors from the gang were assembled and debriefed. The existence of the operation was first disclosed in *Westword* five years ago, when a former resident of H unit charged that the group conned their handlers, smuggled out sensitive documents and embellished their stories in order to obtain special privileges and transfers to less austere prisons [PLN has reported extensively on the informant factory at the ADX as well].

Other former informants have since come forward with their own tales about H Unit, and attorneys for the death-eligible defendants are challenging the credibility of the state's top snitches. They contend that the defectors tailored their testimony to suit the government and that the whole debriefing process was fatally flawed.

"I think this case started with H Unit," says Dean Steward, Mills' attorney. "All of these guys were looking to find a way out of ADX. They had other agendas, but that was their top priority—getting out of there."

The murky case against Principe relied almost entirely on the snitches in H Unit. And if that case is any indication of the type of evidence the government hopes to present against Mills and the other AB leaders, putting them on death row may be harder than it sounds.

"There was no honor in my case, just a lot of lying and exaggerating," Principe says. "Add to that the dirty tricks they used on me—the dungeon housing, the delays, the manipulation of discovery. The court process has become a playground for egocentricity and snitch sniping. It's a disgrace to justice."

### The Road to Prison

Nobody sets out in life with a gnawing ambition to spend time in prison. Prisoners don't plan on ending up there, and neither do staff. Prison guards often come to their profession down a winding path that starts out with a hankering for the military or law enforcement, or possibly just for a uniform and the authority that goes with it.

For Joe Principe, the calling had nothing to do with uniforms or the scent of danger; it was all about a regular paycheck and good benefits and a pension. After trying on all sorts of jobs and lives, he found himself turning thirty and ready to

settle down and raise a family. Corrections looked like his ticket to suburbia, a way of repudiating what had gone before.

"I've mellowed out quite a bit," he says now, "but I used to have quite an itch to scratch."

Born and raised in the Bronx, Principe reinvented himself throughout his youth. He joined the Army right out of high school, went airborne with the First Ranger Battalion, jumped out of airplanes. Then he decided to chuck the Army and major in philosophy at Manhattan College. Then there was the whole Eighties greed-is-good thing; he was the guy up in the booth at the American Stock Exchange, frantically flashing hand signals to the options traders on the floor. The crash of '87 put an end to that one.

After that, there was a stream of other jobs, including a stint as a private investigator, working insurance and marital surveillance cases all over New Jersey, New York, Connecticut. Fun, hell yes, but his fiancée wanted him to find something more stable, and the Bureau of Prisons was hiring. "I never thought of it as a fighting crime thing," he says. "It was a job I could handle, I guess, that I didn't think would bother me too much."

Principe started at USP Lewisburg in central Pennsylvania in 1991. The hours were regular, the camaraderie among staff strong. Three years later the Bureau opened its new supermax in Florence. Never one to say no to a challenge, Principe decided to put in for the transfer.

ADX was a new kind of prison, designed to house the system's high-risk prisoners in isolation 22 hours a day. The place was a maze of control rooms, double doors, and cameras. When prisoners were taken out of their cells—to the recreation cages in the yard, for example, or to phone their lawyers—they were heavily shackled and escorted by three guards. For Principe, accustomed to the noise and action of Lewisburg, working inside ADX was like taking a moonwalk.

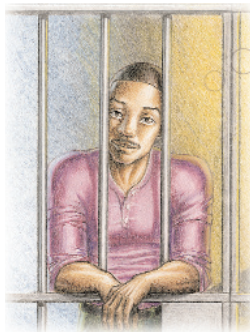
"It was kind of scary quiet," he says. "All the doors and grills, and it takes you forever to walk from one side to the other. It was supposed to be safer, but things can always happen. Those bars, they're an illusion. I used to tell the young officers, 'Make believe they're not there. Because when you start depending on them, you're going to start screwing up.'"

Crazies who assaulted staff at other prisons often wound up at ADX. Sure, they were behind double doors now, but that didn't make them any less crazy—quite the opposite. Now they had all day to try to figure out how they were going to nail you with one of their shit-piss cocktails. One prisoner was known for stripping and oiling his body for the anticipated tussles with the extraction team; you could put him in a four-point restraint on his bed, and he'd still bite off a chunk of his shoulder and spit it at you. Just how were you supposed to "manage" wack jobs like that?

The place was different, all right. With all the cameras and rules, Principe couldn't shake the feeling that staff were

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## The Brotherhood (cont.)

under the microscope just as much as the cons were. Lewisburg had been “old school”—guards had a fair amount of discretion about how they dealt with prisoners in certain situations, as long as they didn’t violate security or common sense. But ADX was a high-tech, button-down, by-the-book tomb, and its atmosphere became even more stifling to Principe after the arrival of Michael Pugh, its fourth warden in five years of operation.

Pugh was a veteran administrator who made no secret of his belief that he had some “dirty” staffers at ADX, people who were being co-opted, blackmailed or paid by prison gang leaders to look the other way. Principe was a union steward who saw merit in reaching an accommodation with prisoners to make life easier all around.

“I did little things,” Principe says. “If a guy needs some soap or toothpaste, I never had a problem helping him out with that. There are officers who do it, and there are officers who don’t. But I guess that made me appear vulnerable or something.

“The way I look at it, they’re already locked up. What are you going to do? If you make them miserable, they make you miserable. So there were little things, minor rules—like this issue of passing, okay? Bureau policy says you don’t pass anything from one inmate to the next. At Lewisburg, they didn’t trip on little things like that. They’re just happy if nobody dies on shift.”

Principe knew who Mills and Bingham were. There was a notebook full of prisoners’ pictures that guards were supposed to inspect on a regular basis, listing gang affiliations, escape attempts, history

of violence—the problem prisoners’ whole claim to fame. But he says he didn’t extend any special courtesies to Aryan Brotherhood prisoners, and he scarcely paid any attention to the notebook.

“A lot of guys sign it without really looking at it,” he says. “After a while, you don’t care. You do your eight, you hit the gate. It’s a job. They want you to get more involved, but the job is miserable enough without poking around and peeking at everybody’s deepest, darkest secrets.” As Pugh pursued his search for dirty staff, the relationship between the administration and the union quickly deteriorated. Principe posted an off-color limerick on the union website mocking the new warden. He and several other outspoken critics of the new regime soon found their loyalty under attack. “Federal agencies have no patience with First Amendment enthusiasts,” he notes.

On August 16, 1999, Principe was getting ready to leave on vacation when a lieutenant summoned him to his office. “He handed me this paperwork saying I was assigned to home duty,” he recalls. “No reason. To this day, I’ve never gotten a reason.”

There were no particular duties associated with his new assignment. He merely had to stay at his house, a living, breathing testament to others on the folly of being a renegade. For the next seven months, he sat tight, drawing his pay and wearing the stigma of being “under investigation” like a badge.

Even after he was arrested and thrown in the county jail, the checks kept coming.

### Birth of the Prosecution

The Aryan Brotherhood began in the California prison system in the early 1960s as a prison gang obsessed with race. It was, perhaps, a predictable response to the increasing presence of black gangs in Folsom, San Quentin, and other state abattoirs. Supposedly, in the early days you had to be part Irish to join; members sported shamrock tattoos as a sign of undying loyalty to their brothers.

But in time, prosecutors say, the

organization’s leadership became much more interested in power than race. They developed sophisticated gambling, extortion and dope operations, pimped out male prisoners of all persuasions (despite their loud contempt for homosexuality), ordered hits on their own weak links and forged uneasy truces with black and Hispanic factions. By the late 1970s several veterans of the California group, including Mills, had hit the streets and then moved into the federal prison system on new charges. Although never vast in numbers, the AB was now so far-flung, with hundreds of “associates” eager to align themselves with the group in exchange for protection and status, that it developed two “commissions,” consisting of three members each—one to oversee the California prisons, the other to run business in the federal pens.

For years few law enforcement officials paid much attention to the AB; as long as their principal victims were other prisoners, there was scarcely any public outcry about their activities. But the 1983 killing of the two Marion guards, as well as incidents of street violence from paroled members who were dealing drugs and expected to pay “taxes” to the gang, drew increasing scrutiny. In the mid-1980s the FBI tried to build a racketeering case against the AB, citing the extensive narcotics network in California prisons and the group’s apparent efforts to extort Mafia elements inside the walls. One report states, “Source information indicates that the AB has a stranglehold on some of the top LCN [La Cosa Nostra] members who are inside the prison system, so now it allows the AB access to the funding of organized crime.”

But in 1989 the U.S. Attorney’s Office in Los Angeles declined to prosecute the case, reportedly because of credibility problems with the snitches the FBI had developed. A scandal had just erupted at the Los Angeles county jail over a “snitch tank” full of informants who’d fabricated testimony in homicide cases in order to get their sentences reduced, and the FBI fretted that some so-called AB defectors might actually be double agents, seeking to infiltrate the witness protection program. “There are many witnesses in the WITSEC program who have testified against members of the AB and now have contracts on their lives,” one memo advised.

Over the next decade, the Bureau of Alcohol, Tobacco and Firearms (ATF)

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became the lead agency investigating the AB. A new crop of informants emerged, especially after a war erupted in federal pens between the gang and the DC Blacks in the late 1990s. In 1998 the probe landed what may have been its biggest fish. An ADX prisoner named Kevin Roach, who claimed to be a high-ranking AB "councilman" who'd served directly under federal commissioners Mills and Bingham, expressed an interest in cooperating with authorities.

Roach was placed in H Unit, an isolated area tucked near ADX's central control room. For several months he was the only occupant of the unit; guards took to calling it the Roach Motel. In 1999 he was joined by five other defectors, including a California state prisoner, Brian Healy, who'd come from Pelican Bay and had been talking to federal authorities for the past two years.

Only a few top administrators and staffers were allowed access to H Unit. Still, it didn't take long for other guards to notice the bags of food from the outside world—ribs, pizza, burgers from Carl's Jr.—vanishing into the Roach Motel. Rumors spread that Warden Pugh had assembled a bunch of low-lives to look at pictures of guards and tell tales about the "dirty" ones.

But investigating staff was only a small part of H Unit's mission. The group was given other prisoners' mail and asked to decode the secret messages AB members were known to conceal in what seemed like innocuous small talk. (One method of sending orders involved a disappearing "ink" made of urine that reappeared when

heated.) They made training videos that purported to show how gang members passed notes and drugs, compromised staff and made weapons out of ordinary commissary items. They were debriefed at length on their knowledge of various AB murder plots and contracts, even if much of what they knew was hand-me-down prison lore. And they were handed hush-hush files on everything from other AB rollovers to Latin American drug cartels, in the hopes they could fill in some gaps in pending investigations.

In return for their help, they got perks no ADX prisoner could have dreamed possible. Carl's Jr. A television and VCR. A laptop computer—and occasional, supervised access to the Internet. The ability to move freely throughout the unit. At least one softcore porn video, smuggled in by one of their chummier handlers. What would ultimately amount to thousands of dollars in cash payments, placed in their commissary accounts. And promises of transfers to less secure prisons or a spot in the witness protection program.

A few months into the operation, a former AB shot-caller named Danny Weeks had a falling out with Roach and was moved out of H Unit. Weeks began snitching on the snitches. He contacted *Westword* and declared that the debriefing was a fraud. Roach and another top informant, Eugene Bentley, had exaggerated their role in the AB, he wrote, and the group had compared stories and coached each other on what to tell the grand jury preparing the racketeering indictment. They had made up stories, taking their cues from the files provided to them.

"We would theorize what certain things meant and always embellish everything to make us look good," Weeks wrote. "Kevin would later confide in me that he was playing the biggest game he had ever played, and if he made a wrong move he was through. He told me that he had [a BOP intelligence officer] by the nuts and had told him so."

The game may have included passing on to others top-secret information their handlers gave them. Weeks smuggled sensitive data on a DEA investigation in Mexico out of ADX and into a public court file to show how easily it could be done.

After Weeks went public, Warden Pugh moved quickly to discredit him. He sent out a memo to staff declaring that Weeks had failed a polygraph test. But another H Unit graduate, Brian Healy, would later tell a very similar story to defense investigators about what went on in the unit. "After they've been fed the information," he said, "the informants know what to say."

According to Healy, Pugh had personally brought staff files to H Unit and shown the prisoners photos that included the officers' addresses and phone numbers. He would then ask them, "Which of these guys are dirty?"

One of the photos was of Joe Principe. Healy had spent months at ADX before moving to H Unit, but Principe had done nothing wrong, as far as he knew. The guard was "certainly no worse" than the chummy intelligence officer whose gonads Roach claimed to have in hand, he added.

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## The Brotherhood (cont.)

Weeks had made accusations about Principe when he first arrived in H Unit, accusations that may have prompted Principe's assignment to home duty. But Weeks would later claim that his fellow defectors had labeled several guards they didn't like as "AB facilitators" in hopes of getting them jammed up.

"I knew that Officer Principe had been placed on home leave, and I asked Kevin the details on that," Weeks wrote. "He told me Principe had been down here working the bubble when he first rolled over and had treated him so bad that he had told [investigators] the guy was hooked up with us. He was going to get indicted with all the AB as a co-conspirator for helping us conduct our business here at ADX."

"I told Kevin that's kinda hard on the guy. He replied, 'Fuck the puke. He's lucky I can't kill him.'"

Home duty, Principe soon realized, was a bit like being locked up. Nothing to do, weird thoughts, a deepening estrangement from what passes as normal society. A harbinger, maybe, of things to come.

His buddies from the union called with messages of solidarity. *Hang in there, Joe. They can't get away with this.* But as the months dragged on, the calls dried up. So much for the brotherhood of the badge.

His father had just passed away. He was going through a messy divorce and a custody battle over his kids, sitting on a mortgage and wondering how much longer he could keep his nonjob. If he was going to be branded an outlaw, he might as well live like one. He wrote poems, hung out in a tattoo shop, rode his Harley.

People who used to work with him thought he was losing it. He carried

guns and acted paranoid. According to one source, at a union meeting he put another guard in a headlock—which might explain why his union pals stopped calling.

His new friends were other people living on the margins. One of them was a bartender named Gino. In March of 2000 Gino came to him with a story about being in debt to "dangerous people." Principe loaned him \$1,500 and let him borrow his car for a few minutes to go make the payoff. Hours later, no Gino. No car.

"I probably should've let the police handle it, but I thought I was too street-suave for that," Principe would later write to a friend. "I still had my bike and truck to get around, and I wanted to handle it like a stand-up guy should."

Five days later, Gino showed up at Principe's house. He had the car but no cash, just a peace offering: a T-shirt from a Las Vegas casino. Principe blew up. "I slapped him around," he says. Then he told him to go get the money he owed.

Gino told a different story to the police. It was a lurid account of handcuffs, a beating, a haircut lopping off his long hair. An ex-girlfriend came forward with accusations of her own. Suddenly, Principe was facing a barrage of charges: kidnapping, sexual assault, menacing, stalking. Bail was set at a million bucks. The Cañon City paper had him down as some kind of alleged maniac rapist prison guard, with rumored ties to white supremacy prison gangs—all of which made him a very popular guy in the county jail.

The ex-girlfriend ultimately recanted her story. Gino did not.

Principe took the case to trial. He thought he could beat the rap, right up until the time another ADX employee, a martial-arts workout buddy, took the stand and claimed that Principe had bragged of doing exactly what the prosecution said he did. Principe insists his friend perjured himself. "I don't know why he did it," he says. "I assume he was in trouble, too. He got a promotion and a transfer shortly after that."

Somebody, Principe figured, wanted him in prison. How did a guy like Joe Principe suddenly get so important?

His lawyers told him the friend's testimony was damning. He was looking at 32 years. They cut a deal with the prosecution before the case could be handed to a jury. He pleaded guilty to

kidnapping and two counts of menacing. Sentence: eight years.

Officer Principe was no more. Felon Principe was shipped off to the Arkansas Valley Correctional Facility. He worked the weight pile, did his own time. In some ways, he made a better convict than a hack. But he was under no illusion about where he was.

"I've seen people in prison look out for each other," he says. "But that falls apart, too. All it takes is one rumor, and a guy can go from being on top of the pile to checking in."

He didn't check in—not even when he got an engraved invitation. A year into his sentence, he had a visit from Les Smith, an ADX intelligence officer, and Michael Halualani, the ATF agent heading the Aryan Brotherhood investigation. They handed him a copy of the racketeering indictment.

In the dozens of criminal acts described in the document, Principe's name came up in connection with only three obscure incidents. He was charged with having arranged to put Barry Mills and Kevin Roach next to each other during recreation so that they could discuss AB business; on another occasion, he was supposed to have placed Mills next to Eugene Bentley, another H Unit snitch. He was also accused of falsifying a report of a 1998 fight between T.D. Bingham and a black prisoner, Leroy Elmore, claiming that Elmore had a weapon and had started the fight.

Principe was stunned. Anybody who knew ADX knew that one guard couldn't move prisoners around; it took at least three. Even if Mills ended up on the yard next to Roach or Bentley, it could have been happenstance or a request to be put next to a workout partner, one of the small "accommodations" that were sometimes granted at ADX. It didn't mean Principe knew anything about their conversations—which, the indictment implied, had something to do with the war against the DC Blacks and a supposed \$500,000 contract mobster John Gotti wanted the AB to carry out against a black prisoner who'd beaten him up at Marion. (The contract, if it ever existed, was never carried out—but that didn't stop the New York newspapers from going wild with the story of Gotti, the AB, and Joe Principe, an Italian kid from the Bronx turned "rogue guard.")

The third charge was even more laughable. Principe insists that he filed a righteous report, stating that combatants

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Bingham and Elmore appeared to go at each other simultaneously. Defense investigators who've seen a videotape of the fight says that it backs up Principe's account, and that Elmore did have a pair of gloves in his hand that could have been mistaken for a weapon. There's also a strong suggestion in accounts of the incident that administrators arranged for the fight to occur, since only a glaring lapse in security could have placed the pair in a sallyport together, along with a member of the Mexican Mafia—and a SWAT team was standing by, apparently at the ready to break it up.

Yet the government was saying that these incidents made Principe part of the whole racketeering conspiracy; if convicted, he was looking at twenty years to life in prison. "Even if I was truly guilty of putting these guys next to each other intentionally, how could that be a life sentence?" Principe asks. "I don't get it."

After Principe had inspected the indictment, his visitors wasted no time explaining why they had come to see him. "This is easy," Halualani said. "You're either with the government, or you're with the Aryan Brotherhood. What's it going to be?"

Principe stared at him. "Say that again," he said.

The agent repeated himself.

"You're out of your mind," Principe said. "I got nothing to say to you."

"This is a life sentence, Joe," Smith added. "The AB or the Dirty White Boys are going to get you. We're trying to help you."

Help him? They were trying to flip him. Like they flipped Roach and Bentley, the fine pair who'd hung these charges on him.

"I already tried the government," he said. "You let me drown. I'm a convict now."

He declined their offer. Then he headed for the weight pile and had his best workout in a long time.

A month later, the feds took him out of Arkansas Valley and flew him to California. They put him in the special housing unit at Terminal Island. He'd spend most of the next two years in the hole awaiting trial, a life of isolation that would make home duty look like an endless party.

Shortly after he arrived, a guard cuffed him and took him to recreation. Principe recognized his escort. He was someone Principe had trained years ago,

one of the rookies he'd told not to rely too much on the bars to protect him.

## The Indictment

Using the racketeering laws, the government has scored several victories in its war against the Aryan Brotherhood. Numerous AB soldiers have been flipped or convicted on conspiracy charges, and two years ago Paul "Cornfed" Schneider, a prominent AB leader at Pelican Bay, got a life sentence for conspiracy in the 1995 murder of a sheriff's deputy.

But the most significant cases have tended to be marathon prosecutions, often with meager results. Tracing the carnage behind prison walls to its source can be a daunting task, especially when your chief witnesses are convicts with long histories of violence themselves—and you're asking a jury to believe that they took their orders from someone else who belongs on death row.

"If you take the informants in our case and do a body count, then compare it to the defendants, their body count is way higher," says Mills' attorney Dean Steward. "One of their witnesses has supposedly killed seven or eight guys."

It took three trials in Kansas to convict AB stalwart Michael "Big Mac" McElhiney of running a heroin ring in the Leavenworth federal pen. In the first trial, a female juror fell in love with the defendant. A guilty verdict in a second trial was reversed on appeal. The third time around, McElhiney caught 30 years on top of the 21-year sentence he was already serving.

Last year's prosecution in Illinois of David Sahakian, alleged to be one of the AB's federal commissioners, was an even greater debacle. Sahakian and two other Marion prisoners were charged with murder and conspiracy in the stabbing death of a black prisoner, Terry Walker. The trial lasted seven months, cost more than \$3 million just for the defense mounted by court-appointed lawyers, and resulted in a hung jury on most of the charges. Sahakian was convicted on a single charge of possession of a homemade knife—a tough charge to beat, since the shank was found

concealed in his rectum.

Interviews by defense attorneys with jurors after the trial indicated they were hung 7-5 in favor of acquittal on the homicide charges, says Steward. "The jurors found the informants—Kevin Roach and a bunch of others—to be lying weasels," he says. "They found the Bureau of Prisons personnel who testified to be incompetent and hiding things. They found the prisoner witnesses called by the defense to be charming and truthful. 'Charming and truthful'—those are their words."

The Los Angeles racketeering case gives the feds another shot at McElhiney, Sahakian and other top AB members. But first they'll have to overcome defense efforts to suppress the snitch testimony arising out of H Unit, which Steward calls "hopelessly tainted." A hearing on the matter was held in June.

Assistant U.S. attorney Gregory Jessner, who's been pursuing the case since the late 1990s, declines to comment on the H Unit operation. "That's something that's going to be decided at the hearing," he says. "It's not appropriate for me to say what happened [in H Unit] before the witnesses testify. The proof will be in the pudding."

Since Weeks first blew the lid off H Unit five years ago, several other disgruntled informants have told their stories to the defense, accusing the government of reneging on its promises to them. Some claim to have been fed information or offered incentives to lie; others say they've been threatened with being put in general population and labeled a rat if they don't

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## The Brotherhood (cont.)

play ball. Some appear to be playing both sides. One told defense investigators he should be considered “a double-edged sword that cuts both ways.”

Yet the snitch testimony is essential if Jessner is going to convince a jury that men such as Mills and Bingham, despite being locked down under the tightest conditions the Bureau of Prisons has ever devised, continued to send and receive messages, order murders and settle disputes across the federal prison system. Defense team veterans such as Terry Rearick, an investigator who’s known Mills and Bingham for decades, says the premise has problems.

“You got a bunch of dysfunctional dope fiends, and the government’s theory is that they became this well-oiled killing machine,” Rearick says. “These guys are a bunch of broke-dick convicts. Mills can’t tell them what to do. I mean, they get two 15-minute phone calls a month at best, all their mail gets copied and read—and they’re running the prison system? Come on.”

But if Mills and Bingham are as pow-

erful as the indictment claims, then what does that say about the effectiveness of supermax prisons such as ADX?

“In order for the government to prevail at trial, the Bureau of Prisons is going to have to concede that they were incompetent and screwed up,” Steward says. “That’s an enormous problem in the prosecution’s camp right now. They don’t want to admit that they couldn’t control the people they were supposed to be controlling.”

Among staff at ADX, the case presents other worries. The federal system reinstated the death penalty in 1988, after a 25-year moratorium, but it’s never been used as widely as it could be in the AB case. News of the indictment was met with trash talk from some AB loyalists. In many cases, the defendants were already serving time for some of the same crimes for which they’re now facing conspiracy charges; Mills, for example, is already doing life for the 1979 murder of prisoner Mazloff. Others, like Bingham, are up for parole in a few years. Now the government was making noises about killing them.

[Editor’s Note: The federal government has been extensively criticized over the racist application of the federal death penalty where a majority of federal death row prisoners are racial and ethnic minorities. Some see the government’s effort at seeking the death penalty against 21 white defendants as an attempt to quell criticism about the racist application of the death penalty, the most perverse of all affirmative action programs. Moreso when one considers that all of the murders at issue in the AB case have already resulted in convictions and sentences, often decades ago when the death penalty was either not an option or juries rejected the sentence.]

Principe scarcely slept during his first eight days in the hole. He’d seen hardened cons crack up in places like this. He was a rookie and knew it. How was he going to endure it?

He got busy. He grabbed stacks of paperbacks off the book cart. He read Melville, Tolstoy, Hesse, Emerson, Dumas, Voltaire, Dostoyevsky, Hemingway. He read *Don Quixote*, then tackled it again, this time in Spanish.

He studied books on writing and labored over his own letters. “These concrete cages can birth geniuses and madmen, monks and monsters, if strong wills prevail,” he wrote.

For exercise, there was just room enough in his cell to do burpees—a hybrid of jumping jack and push-up, popular among the military and convicts. When he started, he could barely do fifty of them at a time. Before long he could do five hundred. When he was taken out to the yard, he was often allowed a recreation cage next to another AB defendant who became his workout partner. The guards who escorted him were basically doing the same thing he was accused of doing at ADX, but no one nailed them with conspiracy charges.

He read through piles of reports, the discovery in his case. There was nothing anywhere to establish that he’d ever been paid to help the AB, that he had benefited in any way from this vast conspiracy.

He meditated. He prayed.

The feds came back to see him every few months. Was he ready to cooperate? Did he want to strike a deal, in exchange for a nicer cell? The case kept getting continued, delayed, dragged out.

“For the first year, I was focused,” Principe says. “I was intact. Then it started to change.”

There are stages a person goes through when suffering sensory deprivation — “SHU syndrome,” as it’s known in special housing units. At one point, everything the staff did seemed to annoy Principe. He began to believe they were going out of their way to mess with him. He became angry at the slightest provocation. The walls closed in.

The extraction teams were called. Principe took the pepper spray and shouted defiance. He did his best to wear them out. He was turning into one of the crazies he used to dread dealing with.

It is not a time he wants to talk about now. “You have no idea what it was like,” he says. “They break you down to the point where you’re ready to make a deal.”

He would not become a snitch. He was adamant about that; besides, what did he really know that could interest them? But the prosecutors were eager to deal anyway. They wanted to plead out the lesser charges, without exposing too much of their hand in the death-penalty cases. After two years in the hole, Principe was presented with a “global plea agreement,” designed to settle the charges against multiple defendants. The catch was they’d all have to sign off on it, or no deal—a neat way of getting the defendants to pressure each other to get on board.

Assistant U.S. attorney Jessner, Prin-

**“I know what a dump truck is, and I’m no dump truck! As an innocent man, I too have been to prison.”**

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cipe says, was handing out good deals. He was a regular Monte Hall. "I wanted to go to trial," Principe insists. "But my attorney explained to me that the jury would be listening to Bentley and Roach, and if the jury believed them, I'd be looking at a lot more time. I didn't know what I should do. It was one of the most grueling decisions of my life. I wanted to clear my name, but maybe the wise thing to do was to let it go." In February he pleaded guilty to one count of conspiracy to commit racketeering. He got fifteen months, to be served concurrent with the state time he was already doing for the assault on Gino. The prosecution wanted to close the hearing to reporters, but Principe insisted on it being open. He wanted everybody to know that his deal included no pledge of cooperation in other cases. He wasn't a witness for the prosecution or the defense. He was done.

He returned to Colorado to serve his time. The biggest capital case in the nation's history lurched on without him. He concentrated on learning to walk in regular strides again. All the time in the hole and in leg-irons had left his calf muscles atrophied, best suited for shuffling half-steps.

He was going to fix that. He was going to do his time standing up, walking the yard like a regular convict.

"The only thing I got going for me is I held my mud through this," he says. "This has been a humongous humble pie—a whole pie, being force-fed to me from day one—to go from that side to this side. Humility is, I guess, a good thing."

He looks around him, at the guards, the prisoners, the red line, as if seeing it all for the first time.

"I'm ready for a break," he says. ■

[Editor's Note: The AB prosecution is one of several racketeering cases recently mounted against prison based gangs. In California both Nuestra Familia and the Mexican Mafia have been prosecuted and convicted. In Puerto Rico La Neta has been indicted on similar charges and the Texas Syndicate has also been charged in Texas. These prosecutions have been largely ignored by the mainstream media. In some cases the indictments themselves belie the government's claims. A review of the AB indictment shows the government does not allege a single drug deal involving more than \$100 worth of heroin. The legions of informants belie the claims of power and ferocity of the gangs as well.]

## California County Jail Quietly Settles Substandard Healthcare Suit For \$1.75 Million

Santa Clara County, California has quietly paid a settlement of \$1.75 million to settle a federal claim by county jail healthcare workers about being retaliated against and demoted for having complained about substandard healthcare practices they observed in the jails. County officials and the plaintiffs' attorney, James McManis, said they were unable to discuss the case.

When the allegations were made, the county hired an outside expert for \$100,000 to review its jail healthcare practices. Not surprisingly, the report was that Santa Clara County's performance compared favorably to that of most other jail systems and to the outside community. County Executive Peter Kutas said that any alleged deficiencies had been fixed, or were deemed unfounded.

Relatives of prisoners who died in the jail understandably did not agree. Raina Benavidez, 49, doing a nine-month probation violation sentence, died on January 21, 2005 of an acute abdominal infection related to liver cirrhosis. Her December 30, 2004 grievance before her death included allegations of being denied visits to a doctor, her daughter, Bena Hatcher, reported. Gilbert Rael, 31, died in April of complications from an infected tooth while incarcerated at the Elmwood Jail.

The instant suit was brought by nurse Mary Ann Save, a former senior health care analyst for Santa Clara County's jails and juvenile detention facilities, and by Dr. Pinto, a jail doctor and formerly the medical director. They alleged that because of a shortage of jail doctors, jail nurses were giving out medication without proper supervision, possibly in violation of the state Nursing Practice Act; that county officials foreclosed a jail dialysis unit so as to set up outside trips that permitted an alleged scheme of illegally billing Medi-Cal for the procedure; that psychiatric ward services were untimely and deficient; and that medical records were in disarray knowingly so, to avoid possible litigation. The suit noted several prisoner deaths around the time of its 2003 filing.

Save, hired in 1999 and named senior health analyst in 2000, was demoted in March, 2003 and her security clearance was revoked. Pinto, hired in 2001, was fired as medical director. Both claimed

retaliation for whistle-blowing. County Department of Corrections officials, also named in the suit, called Save's and Pinto's allegations "outrageous" and "fictitious." But apparently Santa Clara County believed it was worth every penny of the \$1.75 million settlement, a record for such suits in the county, to bury the truth. See: *Mary Ann Save and Moneesha Pinto, M.D. v. The County of Santa Clara*, U.S.D.C. NDCA, Case No. C03-04391-JF. ■

Source: *San Jose Mercury News*.

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# From the Editor

by Paul Wright

This issue of *PLN* sees the addition of Andrea Cavanaugh as a quarterly columnist for the magazine. Andrea is the media coordinator of Stop Prisoner Rape, a non profit advocacy organization in Los Angeles which seeks to eliminate the sexual assault of prisoners. I have been on the advisory board of SPR for a number of years now and believe that sexual assault is an integral management tool for prison and jail officials in this country and as a practice it needs to be eliminated.

Two things that need to be done are raising public awareness of the problem and also organizing and educating prisoners to end the practice. In many respects, awareness of the sexual assaults of prisoners is, legally and politically, where the sexual assault of women was 40 years ago in terms of the treatment of rape victims and public attitudes towards it. In popular culture, on television and elsewhere, the topic of prison rape is still considered a joke, when obviously rape outside of the prison context is not.

We look forward to future columns from Andrea as well as joint projects with SPR.

On November 12, 2005, long time Texas prisoner David Ruiz died at the age of 63 in the prison hospital in Galveston, Texas. Ruiz spent all of his adult life, except for 4 years, in prisons or jails and died while serving a life sentence for a robbery he committed on parole in 1983. Ruiz is best known for filing the hand written, pro se complaint in 1972 that transformed the Texas prison system and eliminated prison guards, instituted medical care and a host of other issues. The case was dismissed in 2002.

I once read that Ruiz's suit had cost the state of Texas at least \$500 million in new prison construction alone. The suit that he filed, less than a year after the Attica massacre put prison reform on the political agenda, dramatically changed every aspect of the prison system in Texas, while at the same time many things changed little or not at all. Such is the history of prisons.

*PLN's* website is up and running and has a wealth of information on it with a lot more being added daily. By now all *PLN* subscribers should have received a mailing from us informing you of the website and how to subscribe.

This is also the time of year when *PLN* does its annual fund raiser. We rely on donations from our readers to fully cover our operating expenses and costs as subscription and advertising income only cover part of what it takes to put out *PLN* each month, do our advocacy work on behalf of prisoners, litigate for the free speech rights of prisoners and publishers and everything else that we do. If you can afford to make a donation to support an independent penal press please do so now. Every little bit helps so don't think for a minute that a small donation is unneeded, it is. All donations to *PLN* are tax deductible and can be made by mail, calling our office at 206-246-1022 or online at [www.prisonlegalnews.org](http://www.prisonlegalnews.org).

Our fundraiser this year also includes a survey asking for readers' feedback about the content of the print edition of *PLN* and switching some of our content to the online website which would free up more print space to issues directly affecting prisoners who generally cannot

access information on the internet. Please respond to the survey so we can see what information readers are most interested in. The topics we are planning to take out of the print edition of *PLN* and publish only online are: suicides, juveniles, immigration, employee litigation and crime victim litigation. Our thinking is that the people who have the greatest need or interest in these topics would still be able to read the articles on our website while the resulting space would allow us to run more prison and jail related articles. Give this some thought when you respond to the survey. We will still be covering these issues, just not in print unless readers prefer we continue the print coverage.

We hope to be on schedule with our February issue and again apologize for falling behind on our publishing schedule. This issue is being mailed in late November. Everyone at *PLN* would like to wish our readers and supporters a happy holiday season and best wishes for a more militant new year. 🍷

## \$500,000 CCA Escape/Hostage Damage Award Upheld

The Tennessee State Court of Appeals upheld a \$500,000 compensatory damage award against Corrections Corporation of America (CCA), to a woman who was taken hostage by an escaped CCA prisoner.

Mike Settle was a prisoner at Hardeman County Correctional Facility (HCCF), a CCA prison in Whiteville, Tennessee. On August 14, 1999, Settle was taken to the Jackson-Madison County General Hospital due to an apparent drug overdose.

Two days later, CCA guards Lee Vandiver and Shannon Crowder were assigned to provide security for Settle at the hospital. That morning, Crowder left Settle's room and "Settle informed Vandiver that he had to use the bathroom immediately. At that time, Settle was lying in bed with an IV in each arm and a catheter inserted. One of Settle's legs was locked in a leg iron and the other end of the leg iron was attached to the hospital bed... Vandiver unlocked the leg iron from the bed but did not reattach it to

Settle's other leg. With the leg iron dangling from one leg, Settle got out of bed and started toward the bathroom with an IV pole in each hand and the catheter bag also in his left hand. As Settle approach the bathroom, he dropped the catheter bag and bent over to pick it up. He then rammed Vandiver and hit him in the groin with his fist. Settle grabbed Vandiver's weapon, threatened [him] with physical harm, grabbed a pair of tennis shoes and ran from the hospital room... Settle removed the catheter bag in the leg irons, and put on his shoes."

"Security cameras photographed Settled during his escape from the hospital." When he reached the parking lot Settle approached hospital employee Rosetta Willis as she opened her car door. "Settle put Vandiver's gun to Willis' side and she screamed. Settle told her to shut up and then forced her into the car with him." Another hospital employee heard the scream and reported the incident to hospital security, getting a description and the

license plate number of Willis' car.

Settle ordered Willis to drive him away from the hospital but later forced her into the back seat so he could drive. They were headed westbound, toward Memphis, on Interstate 40, when police gave chase. While traveling at speeds in excess of 110 miles per hour, during the rush hour traffic, Settle was seen pushing Willis' head down for the floorboards and pointing Vandiver's gun at police.

Willis' vehicle started losing radiator fluid and slowing down, causing Settle to lose control and veer off the road, into some brush. He then jumped out of the car and ran into the nearby woods, leaving Willis in the vehicle.

With guns drawn, police approached the car and removed Willis from the vehicle. She was "shaking all over and crying" and "about to go into shock." Officers described her as being "really added" and "in bad shape."

Willis was taken "to the hospital, where she was treated and released the same day." The following day she began seeing a psychologist due to the emotional trauma she suffered. She was scheduled to see the doctor regularly for more than two years, due to nightmares, fear, withdrawal, partial Post Traumatic Stress Disorder (PTSD) and other emotional trauma.

August 14, 2000, Willis brought suit in state court against Settle and CCA, but Settle was later dismissed as a defendant. Willis alleged that CCA breached a duty it owed her in several respects related to the failure to prevent Settle's escape. She sought "compensatory... damages stemming from medical bills, lost earnings, and severe emotional and psychological injury."

Following a two-day trial, a jury found CCA liable and awarded \$500,000 in compensatory damages. CCA then moved for a "Directed Verdict or Alternatively for New Trial" which was denied.

The appellate court rejected CCA's argument that under the "Public Duty Doctrine" it, "as a private contractor assuming a state function," was free from liability to Willis. The court noted that "[i]n T.C.A. § 47-24-108(b), Tennessee clearly declines to extend sovereign immunity to private prison operators[.]" Therefore, "[i]n the absence of sovereign immunity," the court declined "to address the question of whether CCA is entitled to immunity under the Public Duty Doctrine." Additionally, the court explained that the "Public Duty Doctrine as an affir-

mative defense" which CCA waived when it failed to raise the defense "in its answer, at trial, or its post-trial motions[.]"

The court then held that the jury did not err in finding that CCA was negligent, because: "there is ample evidence from which the jury could have found that a duty was breached[.]" "it was foreseeable that Settle could escape, having escaped, it was foreseeable that he could take a hostage[.]" and "the record... supports the jury's finding that the actions of CCA's employees were both a cause impact in the proximate cause of Willis' injuries."

The court also rejected CCA's argument that it could not be held responsible for the acts and omissions of Vandiver and Crowder, under the doctrine of respondent superior. The court found that Vandiver did not act outside the scope of his employment when he negligently performed his duties, making "CCA answerable for Vandiver's actions under the doctrine of respondent superior."

Next, the court disagreed with CCA's assertion that the \$500,000 compensatory damage award was "above the range of reasonableness and, as such,... not supported by the evidence." The court found "that there is material evidence to support

the jury's award[.]" Additionally, "the award is not so excessive as to indicate that it was influenced by passion, prejudice, or caprice." Thus, the court declined "to set it aside or to grant a remittitur."

Finally, the court held that the trial court did not abuse its discretion when it denied CCA's motion for mistrial due to "Willis' [prejudicial] show of 'excessive emotion' at several points during the trial[.]" See: *Willis v. Settle*, 162 S.W.3d 169 (Tenn. Ct. App. 2004). ■

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# Guards Rape, Sexually Harass and Smuggle at Colorado Prisons

by Matthew T. Clarke

There are new troubles at several prisons in Colorado. At a 250-bed GRW-run private prison in Brush, a tiny town 91 miles northwest of Denver, the newly-resigned ex-warden and two guards have been indicted in relation to felony sexual contact with eight female prisoners. A guard lieutenant at a state prison has been arrested for sexually assaulting a male prisoner. Another nine people have been charged with smuggling contraband into the Brush Correctional Facility (BCF). Background checks also revealed that five of the guards at BCF had felony convictions and three others had questionable criminal backgrounds. The U. S. Equal Employment Opportunity Commission (EEOC) stated in federal court that a high-ranking employee of Dominion Correctional Services of Edmond, Oklahoma, forced a female subordinate to engage in sexual activities at Crowley County Correctional Facility (CCCCF) when that company was running that prison. The female guard filed suit in federal court alleging outrageous sexual conduct by the superior, retaliation and gender discrimination. Dominion settled the suit for an undisclosed sum. Meanwhile, a guard at the Arkansas Valley Correctional Facility (AVCF) has been arrested for allegedly raping a male state prisoner.

## GRW Doing Good and Doing Well at Brush?

In a November 27, 2001, article, *Fortune Small Business* (FSB) hailed Brush as a model private prison and GRW, which manages six other prisons in Texas, Missouri, and Illinois, and owns a youthful-offender program in Kansas, as a private prison company that really cares about its charges. The *FSB* article compares BCF to a college campus and lauded GRW's owner Gil Walker for his personal involvement with prisoners. Of course, the article glossed over the fact that no college campus really looks like a medium-security prison or locks its students into six-bunk cells every night. The article also missed the fact that, although Walker's personal business philosophy is doing good and doing well--which he explained as making a tidy profit for positively influencing people's lives--when dealing with a prison, you must screen potential employees carefully, train them

well and supervise them properly if you want the personal philosophy to become a corporate philosophy that trickles down to the individual prisoners.

## Guards Allegedly Sexually Assault Eight Prisoners at Brush

Just how good GRW is at running prisons is questionable. After two BCF prisoners complained of having been raped by a male guard, Walker used the oldest trick in the book to deflect heat from his company--he blamed the victims. He said that the "two female inmates wanted to get back to Hawaii and also an opportunity to sue our company." Walker doesn't seem to get it. It is a felony for guards to have sex with prisoners in Colorado. Consent is not an issue. Intent is not an issue. Like statutory rape, it is a felony--no excuses.

Former BCF guard Fredrick Henry Woller, 32, was indicted for the class-five felony of sexual assault in a penal institution on March 9, 2005. The same day, former BCF warden Richard "Rick" Soares, 57, was charged with the class-five felony of hindering the investigation into Woller's criminal conduct. The previous week, former BCF guard Russel Rollinson, 31, had been indicted on two counts of sexual assault in a penal institution. Those charges involved two Hawaiian prisoners. Allison Morgan, Colorado Department of Corrections (DOC) spokesperson, revealed that a total of three BCF guards had sex with a total of eight prisoners--two from Hawaii, two from Colorado, and four from Wyoming. Morgan said two of the guards had been fired and the other placed on administrative leave. Morgan also blamed the victims claiming that some Hawaiian and Wyoming prisoners had sex with the guards because they believed they would be returned to their home states and be close to their families.

The charges against Rollinson involved sexual activity in the prison law library that took place in January 2005 with the two Hawaiian prisoners ages 23 and 35. Rollinson admitted to the sexual contact, but claimed it was "consensual." The women alleged they were raped. Their lawyer, Myles Breiner of Honolulu, said Rollinson forced the women to perform a sex act. If convicted, Rollinson could be sentenced to up to three years in prison.

Woller allegedly had sex with a prisoner on October 1, 2004, and received help from Soares in covering it up on November 22, 2004. Soares delayed reporting the allegations against Woller to the DOC until January 11, 2005. The DOC then sent a team to Brush to investigate the allegations. Soares resigned at GRW's request on February 18, 2005. Soares was a 29-year DOC veteran who started as a guard and served as warden of Arkansas Valley Corrections Facility (AVCF), Limon Correctional Facility and Sterling Correctional Facility before retiring in 2003.

## Bad Employee Background Checks at Brush

Responding to the scandal, Walker said, that his company does extensive background checks prior to hiring guards and Rollison, who had been a police officer for many years, passed the check. Be that as it may, the investigation of BCF's guards that resulted from the sexual assault allegations revealed that several did not and could not have passed a background check. According to Morgan, five BCF guards were convicted felons and three had questionable criminal backgrounds requiring further investigation. All but one of the eight have been fired or resigned. In each case, the fingerprints submitted to the DOC for background checks were smudged or unreadable and returned to BCF for redoing. However, BCF never submitted new fingerprints. The eight include: Angela Gallegos, 28, who was arrested for a felony but pleaded guilty to misdemeanor harassment in 2002; Heather Henry, 24, whose arrest record included harassment, domestic violence-assault, violating protective orders, and child abuse; and Richard Fairchild, 42, who was convicted of domestic violence and violating a restraining order.

Walker's reaction was to admit that these are the type of people who should not be working at a prison.

"We don't hire questionable people, and that's the embarrassing part," said Walker.

To the contrary, GRW did hire questionable people. Left on its own, GRW would never have fired them because, as GRW admitted, none of the eight were involved in any known misconduct at the prison (other than presumably lying



on their job applications regarding their criminal histories).

"That was a failure of leadership," said. Morgan.

That should be the embarrassing part: that the Brush administration didn't perform the background checks properly and didn't report the allegations of sexual assault by a guard promptly. Had the alleged sexual assault by Woller been reported and investigated promptly, the sexual assault by Rollinson, which occurred over two months later, might never have occurred at all. Thus, GRW is in large part to blame for the subsequent sexual assaults by its guards.

### **Smuggling Ring at Brush**

Another problem uncovered by the investigation into the sexual assaults was a tobacco smuggling ring at Brush involving two guards, five Hawaiian prisoners and two Hawaiian visitors. Tobacco has been banned in Colorado prisons since 1999 and smuggling it into a prison is a felony. The seven were charged with the class-six felonies of introduction of contraband and conspiracy to introduce contraband. They include guards Gail Guerrero and Maria Ramirez, 46; prisoners Pamala Akopian, 31, Pisa Tuvala, 35, Annette Cummings, 38, Janice Crockett, 47, Jeanette Dillion, 38; and visitors Charmayne Kalama, 28, and Stannie T. Muramoto, 46.

### **Wyoming Withdraws Its Prisoners From BCF**

The multi-faceted scandal at BCF prompted Wyoming to remove its 38 prisoners from BCF.

"We just feel that it would be in the best interest of the inmates to move them out of Colorado," said Wyoming Department of Corrections spokesperson Melinda Brazzale. The prisoners will be moved back to Wyoming or to another private prison in Texas.

Hawaii has no plans to withdraw its 80 BCF prisoners at present, although the two who were sexually assaulted were returned to the islands and placed in protective custody.

"Incidents like this happen at facilities," said Richard Bissen, interim director of the Hawaii Department of Public Safety (DPS), speaking about the sexual assaults at Brush. "But that place is being more closely monitored than ever and the women themselves say they are safe."

Well, not all the women. Robin Darbyshire, a Brush prisoner who is on the board of the prisoners' rights group Stop Prison Rape, wrote the Denver newspaper *Westword* in February 2005. In her letter, she said that "there have been many women who have been sexually violated," and "many of them defend the man that sexually violates them for favors." The DOC refused media requests to interview Darbyshire. Instead, BCF trotted out hand-picked prisoner Carol Balderi Lopez, who claimed that the Hawaiian prisoners initiated the sexual encounter with the guard to retaliate against him and that they were prostitutes and drug addicts who were having a homosexual relationship who routinely manipulated guards. Wow! Not only did GRW blame the victims, it slandered them as well. It

also ignored the other victims and other misconduct by other guards.

Hawaiian legislators are not so dismissive. On April 6, 2005, the 21-member women's caucus sent a letter to Hawaii Governor Linda Lingle expressing deep concern about reports from the prisoners at BCF and requesting increased state monitoring of the prison. House Judiciary Chair Sylvia Luke, D-Pacific Heights-Punchbowl, expressed concern about the reports of guards retaliating against Hawaiian prisoners. Rep. Cynthia Thielen, R-Kailua-Mokapu, believes that Hawaii should follow Wyoming's lead and withdraw its prisoners from Brush. Kat Brady, coordinator of the Community Alliance on Prisons, said that the complaints from BCF prisoners include confiscation of legal materials and unfair disciplinary actions being used as a form of retaliation.

Hawaiian prison officials deny any knowledge of retaliation at BCF, according to DPS spokesperson Michael Gaede. He also said that the state had no plans to immediately withdraw its prisoners from BCF. However, alternative possibilities are being explored as the GRW contract expired on July 31, 2005. Hawaii currently pays \$30 million a year to incarcerate over 1,600 prisoners in private prisons on the mainland.

What's Walkers take on Wyoming (and possibly Hawaii) withdrawing their prisoners? He's convinced that Colorado will just send more of its prisoners to fill the void.

"I don't think it will hurt us at all,"

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## Colorado Guards (cont.)

said Walker.

Therein lies the evil of private prisons. The bottom line is the only concern. Women are raped at a prison that has lots of convicted felons working as guards and a guard-operated smuggling ring. This leads to a loss of confidence so that states withdraw their prisoners. And the reaction of the prison's owner: it won't hurt us at all because some other state will step in and provide us profits. Reputation be damned, prisoners be damned, profits are all that matter. Whatever happened to "doing good and doing well?"

### Dominion Settles Another Crowley Sexual Misconduct/Assault Suit

In 1997, Dominion Correctional Services, an Edmond, Oklahoma, company, built the private Crowley County Correctional Facility (CCCF) in Olney Springs, Colorado. It ran the prison until it left the private prison management business April 31, 2003, about three months after it sold CCCF to Corrections Corporation of America (CCA) for \$47 million.

In 2004, Dominion settled three lawsuits filed by three female former CCCF guards, alleging sexual misconduct and assault by the chief of prison security, Ronald McCall. Those lawsuits sought more than \$10 million. On September 29, 2004, the EEOC alleged that McCall had forced a female sergeant to engage in telephone sex and oral sex starting in 2002 by threatening her with firing and subjected another female sergeant to "offensive, gender-based harassment." Dominion failed to respond to an EEOC subpoena regarding sexual misconduct allegations by two other women. The EEOC also found that one of the women was subject to retaliatory termination.

After that settlement and EEOC ruling, former guard Mandy Bravo filed suit in federal court alleging that she suffered from "severe and pervasive" offensive sexual remarks by her superiors from June 2001 until October 2002. She sought hospital treatment because a company official who was supposed to be investigating the allegations, instead allegedly physically confronted her and injured her hand. She filed a police report on that incident. She also alleged wrongful retaliatory termination and sought over \$40,000 in back pay and other unspecified damages and benefit losses. Dominion settled the suit

in February, 2005. Denver lawyer Charlotte Sweeny, who represented Bravo, said she could not reveal details of the settlement due to a confidentiality agreement with Dominion. CCCF is well known to *PLN* readers due to the recent major riot caused by CCA's ineptitude. [*PLN*, Jan. 2005, pp. 26, 31].

### Even DOC Prisons Troubled

In March 2005, Craig Shepard, inspector general's investigator for the DOC arrested AVCF guard lieutenant and for-

mer Crowley County Sheriff Perfecto Hajar, 51, for felony sexual assault of a prisoner. AVCF houses male prisoners and Hajar allegedly used his supervisory position to coerce a prisoner into sexual contact. Hajar has worked for the DOC since leaving the sheriff's office in 1987. ■

Sources: *Pueblo Chieftain*, *newsok.com*, *Rocky Mountain News*, *Denver Post*, *Associated Press*, *Fortune Small Business*, *Honolulu Advertiser*, *Fort Morgan Times*, *krcc.org*, *thedenverchannel.com*.

## Oklahoma Civil Action Timely Under Mailbox Rule

The Oklahoma Court of Appeals held that the prison mailbox rule applies to prisoner filings of civil actions. It also held that the trial court violated District Court rule 13(f) when it ruled on a summary judgment motion without giving the prisoner time to file a response to defendants' pleadings.

While in jail, Oklahoma prisoner Philip Halliday was assaulted by other prisoners in May 1999, and then again in December 1999, while he was held in a "PC tank." He was moved from the tank on December 20, 1999.

Halliday filed a civil action against various County defendants, alleging that they violated his rights by failing to protect him from physical attack by other prisoners while he was in the jail. Although Halliday gave his complaint to prison officials for mailing on December 12, 2001, it was not ultimately file-stamped by the court clerk until January 24, 2002, outside the applicable two-year limitation period for filing an action.

Defendants filed a motion to dismiss, alleging the action was barred by the two year limitation period prescribed by 12 O.S. 2001 § 95(3). Halliday argued that under the "prison mailbox rule" his complaint was timely. The district court agreed, and denied the motion to dismiss.

Defendants then moved for summary judgment, "reurg[ing] somewhat halfheartedly, the statute of limitations as a basis for summary judgment because all of Plaintiff's deposition admissions that the first assault occurred in May, 1999, and the second assault no later than December 20th 1999." Halliday

"responded, appending a variety of materials to his pleading. Then, on August 11, 2003, the County Defendants filed a 'reply' which gave greater emphasis to the limitation defense, and included new evidentiary materials[.]" Seven days later the trial court granted summary judgment, solely on the base of the statute of limitations.

In deciding whether the "mailbox rule" should be considered the filing date of a civil action brought by an incarcerated pro se plaintiff, the appellate court found the rationale of *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379 (1988) and *Woody v. State ex. rel. Dept. of Corrections*, 1992 OK 45, 833 P.2d 257, equally applicable to Halliday's case. "It cannot be denied that the Plaintiff did not have control over the submission of his petition to the District Court... like the pro se inmate in *Houston*, no matter how far in advance he may have delivered his petition to the prison authorities, he could never be sure that it would ultimately get stamped 'filed' before the running of the statute of limitations."

The court found "an additional rationale favoring reversal of... summary judgment[ ] 'to be the fact' that in this instance the timing of the Trial Court's judgment did violate Rule B... the spirit of the rule requires that a party have the 15 days to respond to any affirmative summary judgment pleading which raises new issues or submits the new evidentiary materials. We find the grant of summary judgment only seven days after the filing of the County Defendants' 'reply' to be error." See: *Halliday v. Board of County Commissioners of the County of Okmulgee*, 90 P.3d 578 (Okla. Civ. App. 2004). ■

# Pennsylvania Control Unit Newspaper, Magazine and Photo Ban Invalidated; Supreme Court Grants Review

The Third Circuit Court of Appeals reversed a district court's decision upholding a Pennsylvania prison policy prohibiting a class of segregated prisoners from possessing newspapers, magazines and photographs. The U.S. supreme court granted review in the case on November 14, 2005.

In 2000, Pennsylvania Department of Corrections (DOC) created a Long Term Segregation Unit (LTSU) at the State Correctional Institution at Pittsburgh. The LTSU holds a maximum of forty prisoners who are deemed "too disruptive, violent, or problematic to [be] housed elsewhere." Upon admission to LTSU prisoners are classified at "Level 2," where they must remain at least 90 days, and where they may remain indefinitely. "The length of time a prisoner may spend in the LTSU is open-ended and subject to the discretion of prison personnel."

DOC "policy prohibits Level 2 prisoners from receiving newspapers or magazines... from any... source for the duration of their confinement at Level 2 status unless the publication is religious or legal in nature. Individual articles clipped from publications are prohibited, unless they relate to the [prisoner] or his family." The policy also prohibits receipt or possession "of photographs of spouses, other family members, or friends." Meanwhile, Level 1 prisoners "are permitted one subscription newspaper in their cells which can be exchanged on a one-for-one basis and are also permitted five subscription magazines at any given time." They also are prohibited, however, from receiving or possessing personal photographs. Other segregated prisoners are permitted to receive and possess newspapers, magazines and photographs.

DOC asserted that the policy's main purpose is "behavior modification and rehabilitation" by creating "an incentive to comply with prison rules." The security concerns DOC claimed to be advanced by the policy were that: (1) "the less material Level 2 prisoners have in their cells, the easier it is for [guards] to detect concealed contraband and provide security[:]" and (2) "newspapers and magazines can be rolled up and used as blow guns or spears, can fuel cell fires, or can be used as crude tools to catapult feces at the guards."

In 2001, LTSU Level 2 prisoner Ronald Banks brought suit in federal court, alleging that the policy violates prisoners' free speech rights under the First Amendment. The district court granted Brown's motion for class certification and, in September 2002, the parties filed cross-motions for summary judgement. Applying the "Reasonable Relationship Test" of *Turner v. Safley*, 482 U.S. 78 (1987), the district court granted summary judgement to DOC.

The Third Circuit also applied the *Turner* standard but reversed. Applying the first factor, the court first analyzed the DOC's advanced rehabilitation interest. Noting that "the rehabilitation objective has never been defined by the Supreme Court and its contours remain 'quite amorphous and ill-defined[:]" the court agreed that deterrence of future infractions of prison rules can be a legitimate penological interest, but DOC "offered no evidence that the rule achieves its stated rehabilitative purpose." Moreover, "[t]he District Court did not examine the fit between the policy and its rehabilitative goals, whether the ban was implemented in a way that could modify behavior, or inquire into whether the DOC's deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates."

Similarly, the court rejected the district court's conclusion that there was a rational connection between the policy and the stated security concerns. The court found that there was "no evidence in the record of the misuse of periodicals or photographs in any of the ways described by DOC." Rather, "given the materials Level 2 inmates are permitted in their cells," the court agreed with Banks that "prohibiting a single newspaper or magazine has no significant relationship to the stated security objectives. There are many other non-prohibited means for inmates to fuel fires, hurl waste, conceal contraband and create weapons."

Applying the second *Turner* factor, the court found "that the prohibition

is indeed a 'blanket' one, and...as long as an inmate is at Level 2 status and is subject to the policy in question, he has no alternative means to exercise his First Amendment right of access to a reasonable amount of newspapers, magazines and photographs."

Finally, applying the third and fourth factors, the court "fail[ed] to see how the mere addition of non-legal and non-religious periodicals to the materials already available to the inmates...would create the 'ripple effect' cited by the DOC. In short, DOC has not shown that a change in the publication ban would mean 'significantly less liberty and safety for everyone else, guards and other prisoners alike.' Therefore, the court reversed, concluding "that the DOC's policy...cannot be supported as a matter of law by the record in this case." See: *Banks v. Beard*, 399 F.3d 134 (3rd Cir. 2005).

The supreme court has agreed to review the ruling. *PLN* will file an amicus brief on behalf of the prisoners in this case. We will report the ruling when it is issued. ■

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# Grand Jury Finds Criminal Conduct In Chicago Jail Prisoner Abuse Scandal

by Matthew T. Clarke

As previously reported in *PLN*, the Cook County Jail has been the scene of controversy involving the wanton beating of prisoners by an elite squad of guards known as the SORT team. [*PLN* Feb. 2004, May 2005, p. 39]. An investigatory Grand Jury in Chicago has found felony criminal conduct related to the beatings of prisoners by Cook County jail personnel in 1999.

## Two Beatings

The two main incidents involving the SORT team beating prisoners occurred on February 24, 1999 and July 29, 2000. In early 2003, media attention, spurred by the filing of several lawsuits by prisoners who were beaten, focused on the beatings and coverup of the 1999 beating. The March 2003 Grand Jury was extended to investigate the beatings. On August 30, 2004, the Grand Jury released a 149-page report of the beatings and subsequent coverup by Sheriff's Office personnel.

## Grand Jury Findings On 1999 Beatings

The Grand Jury found that, on February 24, 1999, at 6:25 a.m., the SORT team, led by Superintendent Richard Remus, entered Wings 3E and 3F of Division 9 at the maximum security facility. At that time, the wings were locked down and quiet. They had been quiet throughout the shift, according to the wing officer.

Remus entered the wing first and ordered the wing officer to wait outside after opening all the cell doors. The SORT team, which was accompanied by unmuzzled attack dogs, brought compliant prisoners into the dayroom and beat them with batons, open hands and fists. Any prisoner who attempted to look at a SORT officer's face was beaten even harder. Sergeant James Tylka attempted to cover up the unprovoked mass beating by writing a false report stating that the SORT team had been called in to handle a hostile situation and had discovered weapons in the form of wooden sticks with bed sheet handles. The prisoners complained of having been beaten by the SORT team immediately upon the return of the wing officer.

At 8:30 p.m., the SORT team again

entered Division 9 and conducted a shakedown of the twelve wings in the south tower. Remus had the wing officers leave, leaving their keys behind. The wing officers testified that the wings had been quiet and locked down.

The second SORT sortie was similar to the first and many prisoners complained of having been beaten by SORT. Known gang members and prisoners with tattoos were forced to walk a gauntlet of SORT guards who beat them mercilessly. Prisoners were also forced to lie on the floor while SORT officers stomped on their backs and legs. One testified to being choked with his rosary by SORT Lt. Tyrone Everhart.

Only a few of the prisoners were allowed medical treatment. Apparently the denial of medical treatment was done in collusion with the paramedic supervisor, Steve Fullilove. The Grand Jury concluded that much of Fullilove's testimony was incredible (for instance, he claimed to have never been told by a prisoner or guard that a prisoner had been beaten by a guard).

In April 1999, Internal Affairs Division Investigator Charles Holman was assigned to investigate the 1999 incident. By all accounts he did a good job. So good, that the investigation was taken from him and buried for years.

Holman described having made photographs of prisoner Bert Berrios on March 3, 1999, pursuant to a court order obtained by Berrios's family. The photos showed Berrios still had two black eyes and a burn around his neck (from having been choked with his rosary) eight or nine days after the beating. However, the photos and Holman's memorandum of his interview with Berrios disappeared from the file before Holman was formally assigned to the case.

Holman's investigation was proceeding well and it had become apparent to him that criminal charges against the SORT team might be appropriate when he reported his preliminary findings to Chief Henry Barsch on June 20, 1999. Barsch's reaction was to tell Holman to make a preliminary report based upon his preliminary findings and forward them to the Inspector General's office for further in-

vestigation per the Sheriff's Legal Advisor James Ryan. On June 23, 1999, Holman gave Barsch the report which Barsch claims to have forwarded to Inspector General (IG) Joseph Shaughnessy.

What really happened was that the report was buried until May 2001; when Barsch, who had by then been appointed Deputy IG, contacted Holman and re-assigned him the case. The file contained a memo from Barsch to Shaughnessy indicating that Ryan had ordered the investigation halted. Ryan denied having ordered the investigation transferred to the IG or halted.

Holman completed his investigation believing that the statute of limitations had run on all possible criminal charges. Nonetheless, he issued numerous sustained findings against Remus and other SORT members for the beatings, making false reports and failing to turn in contraband they allegedly seized. Sustained finds were also made against the K-9 unit for bringing unmuzzled dogs into the jail's living areas and against Superintendent James Edwards for making a false report of Berrios's physical condition after he was beaten and for failing to report the misconduct of the SORT team. There were sustained findings against Fullilove for denying prisoners medical treatment. Except Remus, most of the people against whom sustained findings were made were promoted.

The Holman report was approved by Deputy Chief Samuel Mosley and IG Investigator Frank Podolsky. However IAD Chief Investigator Saul Weinstein delayed signing off on the report until late 2002, when it could not be immediately reviewed by Command Channel, which gives out disciplinary sanctions. Reacting to a mid-February 2003 *Chicago Tribune* article on the 1999 beating, Sheriff Sheahan ordered IG Shaughnessy to review the Holman report and make a supplemental report. Shaughnessy assigned IG Investigators James Cleary and Rodney Pavilionis to the case. They produced a supplemental report dated February 26, 2003, that eviscerated the Holman report, altering or vacating all of the serious sustained findings of misconduct without justification or explanation.

The Sheriff's Department retaliated

against Holman, removing him from IAD. He was even disciplined, by one of the former SORT officers (by then promoted to Chief of IAD) that he made a sustained finding of misconduct against, and given a three-day suspension for allegedly leaking information to the *Tribune* (a charge he denies).

The Grand jury concluded that the SORT team engaged in gross, if not criminal misconduct in the 1999 beatings, the altered findings were made in the face of substantial and persuasive evidence, the SORT incident reports were falsified, and there was a conspiracy to derail the investigation. These involve both misdemeanor and felony crimes. Although the statute of limitations has run on many of the individual crimes, when taken as individual actions in a conspiracy, the statute of limitations has not yet run.

### State Criminal Laws Violated

The Grand Jury noted the following criminal laws were implicated: obstruction of justice, a Class 4 felony carrying up to three years in prison and a \$25,000 fine; official misconduct, a Class 3 felony carrying up to five years in prison and a \$25,000 fine; conspiracy to obstruct justice and commit official misconduct; and perjury, a Class 3 felony. The statute of limitations for official misconduct and obstruction of justice may be extended so as not to have run out. The statute of limitations for conspiracy allows prosecution up to three years after the last act in furtherance of the conspiracy (the filing of the supplemental report on March 4, 2003). Thus, the state statute of limitations problem for prosecution can be surmounted providing the district attorney acts promptly.

### Federal Criminal Laws Violated

The Grand Jury also found that the following federal laws were implicated: obstruction of justice under 18 U.S.C. § 1512(b), a felony which carries up to ten years in prison and a fine; criminal civil rights violations under 18 U.S.C. § 242; and conspiracy under 18 U.S.C. § 371, a felony that carries up to five years in prison and a fine. The federal charges have a five-year statute of limitations that begins with the last act furthering the crime or conspiracy.

### The July 19, 2000 SORTie

The Grand Jury found much conflicting testimony regarding the beating of prisoners by the SORT team on July 19,

2000. Specifically, some prisoners testified that other prisoners conspired to provoke the SORT team and fake a beating in the pump room while some ex-guards testified that they witnessed unprovoked beatings in the pump room. Because of the large quantity of conflicting testimony, the Grand Jury was unable to find probable cause of criminal wrongdoing in the 2000 beatings.

### Conclusions

The Grand Jury found that “the record keeping of the Sheriff’s Office concerning grievances and complaint investigations were abominable” at the time of the beatings. It also found that the “extraordinary proof required for a finding sustaining a claim of excessive force provided a convenient way to ignore the truth and protect unfit individuals, allowing them further interaction with detainees.” The extraordinary level of proof disregarded witnesses who heard the beating and later saw the beaten prisoner and labeled as “inconclusive” any alleged beatings that the officer denied or in which the prisoner could not positively identify his assailant, or in which the prisoner was beaten by more than one guard, even if medical reports supported the prisoner’s claim.

The Grand Jury blamed the multimillion-dollar prisoner-beating lawsuits lost by the County on “poor training, poor administration, and poor handling of investigations of excessive force claims.” It also noted a chronic understaffing problem with the ratio of prisoners to guards at 11 to 1 (compared with 4 to one at New York’s Rikers Island). This, coupled with “an acute overcrowding situation” cause great difficulty in efficient jail administration. Also causing problems is the practice of appointing personnel without corrections experience into Sheriff’s Department executive positions overseeing jail operations. Remus, for instance, had been a plumber before being appointed a superintendent at the jail. He never received the training required for his

Illinois State Law Enforcement Certification, but had it waived at the request of Sheahan. Likewise, the Undersheriff over the jail, Zelda Whittler, had no corrections experience, having had a background in court advocacy for battered women before becoming undersheriff.

The Grand Jury noted that cooperation, by the Sheriff was excellent until he was asked to give sworn testimony before the Grand Jury. Then he attempted to block a subpoena for his testimony and, after having been forced to testify, ceased all cooperation with the Grand Jury. Barsch, Shaughnessy, Weinstein, and Remus all refused to testify.

Because the Grand Jury was an investigative grand jury, it could not indict even though it found criminal wrongdoing. Instead, it forwarded its findings to the appropriate prosecuting authorities and made recommendations for the improvement of the Cook County Jail. Among the recommendations were the following: that the Cook County Board of Corrections be beefed up legislatively to include a monitoring function over the grievance and investigative processes of the Sheriff’s Department; that the extraordinary proof required for a finding sustaining a claim by a prisoner of excessive force be replaced with fairer and more objective criteria; that the grievance system be investigated and reformed. It left to the electorate to make final comment on the conduct of the Sheriff and many of his staff regarding their reactions to the investigation of the 1999 incident---conduct some would say was and still is “HEAR NO EVIL, SEE NO EVIL, SPEAK NO EVIL.” ■

Source: Report of the Extended March, 2003 Cook County, Illinois Grand Jury dated August 30, 2004.

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# Rape Behind Bars: Bureau of Justice Statistics Issues First Report

*by Andrea Cavanaugh*

**T**he numbers only begin to tell the story.

In July, 2005, the U.S. Bureau of Justice Statistics released its first-ever report on the prevalence of prisoner rape. A survey of U.S. prisons, jails, and youth facilities found that there were 8,210 allegations of sexual violence against prisoners last year. Nearly 2,100 of those allegations were substantiated by detention facility officials.

With more than 2.1 million Americans behind bars, nearly everyone acknowledges the BJS statistics offer only a glimpse of the truth. Even the study's authors, BJS statisticians Allen J. Beck and Timothy A. Hughes, wrote that the numbers represent only the tip of the iceberg. The factors that prevent prisoners from reporting rape are just too powerful, they concluded.

"Administrative records alone cannot provide reliable estimates of sexual violence," Beck and Hughes wrote. "Due to fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff, victims are often reluctant to report incidents to correctional authorities.

"At present there are no reliable estimates of the extent of unreported sexual victimization among prison and jail inmates and youth held in residential facilities."

Although statistics are often the best tool we have to measure a problem, they are just numbers on a page. Talking to prisoner rape survivors gives a much better picture of the pervasive sexual violence they face. I work for Stop Prisoner Rape (SPR), the only organization in the country dedicated to ending sexual abuse behind bars. Over the past six months, I have interviewed many current and former prisoners about being sexually abused in custody. The stories they tell are chilling.

One former Michigan prisoner told me about traveling to an outside work assignment with a dozen other female prisoners. The guard dropped the other women off at their work sites and drove her to a remote location. There, he told her he was prepared to push her out of the van and report her as an escapee unless she performed oral sex. Thinking about the infant son she had left in the care of a friend, and the two years or so an escape charge would add to her sentence,

she felt she had no choice but to drop to her knees.

Sadly, the guard probably had his eye on her long before she got into that van. Several former Michigan prisoners told me the guards at their facilities regularly ogled naked prisoners while strolling through showers and dormitories. They told me that some guards reviewed prisoners' files to learn which ones had been sexually abused as children or been in abusive relationships as adults, because they knew that those women were much more likely to submit to abuse without complaint.

The authors of the BJS report cautioned against using the numbers to rank states or individual facilities, but it's hard not to draw conclusions. More than 44 percent of prisoner-on-prisoner sexual assaults were reported in Texas. This figure was hardly surprising – more than a quarter of the letters SPR receives from prisoner rape survivors are written by Texas prisoners. Texas prisoners tell SPR that smaller, weaker prisoners are routinely placed in cells with known sexual predators. Prison officials there often tell prisoners suffering sexual abuse to "suck it up" or "fight or fuck." Grievances are systematically ignored.

That's what happened to Rodney Hulin. The 17-year-old Texas teen was sentenced to eight years in an adult prison for setting fire to a dumpster as a prank. Almost immediately after entering prison, he was repeatedly beaten and raped by older, bigger prisoners. Prison officials ignored pleas for help from Rodney and his family. An assistant warden told Rodney's mother that her son needed to "grow up." Finally, the despondent teen hung himself in his cell rather than face further abuse. He languished in a coma for four months before he died.

Although stories like these are far from uncommon, many prison and jail officials claim that little or no sexual abuse takes place inside their facilities. They are able to maintain this charade because very little reliable research has been done on the prevalence of rape behind bars.

However, one pioneering study of Midwestern prisons conducted by social scientist Cindy Struckman-Johnson found that sexual abuse in prisons and jails is rampant – one in five male prisoners had been sexually pressured, and one in 10

had been raped. At one women's facility studied by Struckman-Johnson, more than a quarter of the prisoners said that they had been sexually abused.

Even though few researchers have tackled the issue of prisoner rape, the climate is slowly changing. The BJS study was the first annual report mandated by the Prison Rape Elimination Act (PREA) of 2003, the first-ever federal law to address prison rape. PREA calls for states to adopt a zero-tolerance policy toward prisoner rape and to take measures to prevent sexual violence behind bars. It also calls for the development of tools to learn the true prevalence of prisoner rape, not only through the annual BJS report, but also through a comprehensive survey that will be administered to selected prisoners next year.

SPR has been working with officials to make the survey the best tool it can possibly be – by fighting to remove questions inserted by detention facility officials about false reporting, and ensuring that the language used is understandable by all. Still, we worry that prisoners will be wary of answering the survey questions honestly. The same factors cited in the BJS report that prevent prisoners from reporting assaults – fear, shame, lack of trust – may affect responses to the survey.

However, it's vitally important that every prisoner answer the survey questions honestly and openly. Doing so will give us the tools we need to promote desperately needed changes SPR is working to ensure that the survey will be truly anonymous.

Prisoners who answer the survey questions honestly will not only be helping themselves. They'll be improving living conditions for countless others who may fall victim to prisoner rape, particularly vulnerable prisoners – such as young first-timers, mentally ill or developmentally disabled prisoners, and gay and transgender prisoners. No one should have to go through the physical and mental agony that survivors suffer.

The physical consequences of being raped in prison are manifold. Many survivors suffer horrific injuries during their assaults, ranging from torn tissue to broken bones. HIV rates are three times higher in prisons than on the outside, and other sexually transmitted diseases, such as Hepatitis C, also are common.

The emotional consequences can be



even worse. Many former prisoners are still struggling with the aftermath of their abuse three or four decades after they were raped. Survivors suffer from depression, post traumatic stress disorder, drug and alcohol addiction, and other maladies.

It's critical that prisoners participate in the survey. By compiling accurate data on the prevalence of prisoner rape, SPR and other advocacy groups can continue to push for reforms that will allow all prisoners to live in safety and dignity, secure in their right to be free from sexual

violence. The BJS report is titled *Sexual Violence Reported by Correctional Authorities, 2004*. It is available on PLN's website at [www.prisonlegalnews.org](http://www.prisonlegalnews.org) or can be ordered at no charge from: National Criminal Justice Reference Service (NCJRS), P.O. Box 6000, Rockville, MD 20849-6000. 800-851-3420. 📄

*For more information about SPR or to obtain a resource guide for survivors of prisoner rape, write to SPR at 3325 Wilshire Blvd, Ste. 340, Los Angeles, CA 90010.*

## Massachusetts DOC Denies Two, Approves One, Same-Sex Marriages

by Matthew T. Clarke

The Massachusetts Department of Corrections (DOC) has denied the request of two civilly-committed sex offenders to marry. It also denied a similar request by two other male prisoners, but approved a request by a female prisoner and a female non-prisoner.

Essie Billingslea and Bruce Hatt, civilly-committed state prisoners at the Massachusetts Treatment Center (MTC), requested permission to marry from the DOC following a November 2003 ruling by the Massachusetts Supreme Judicial Court allowing same-sex marriages. DOC Superintendent Robert Murphy denied the request citing "very serious security concerns." Governor Mitt Romney endorsed the decision.

A March 23, 2005, letter from Murphy to Billingslea stated, "A wedding/marriage between you and resident Bruce Hatt would present a significant security risk to the" MTC and DOC. "A marriage between two residents . . . would have a direct impact on the orderly running of the facility."

"There is the potential for you to be harassed, up to the point of assault, by other residents and/or inmates," wrote Murphy. "There is also the potential for you to be exploited both personally and financially as a result of this relationship. I am concerned for your safety and for the safety of Mr. Hatt."

Murphy also expressed concern that Billingslea, who had previously claimed he was not gay, might be being coerced into the relationship.

Sarah Wunsch, a lawyer for the ACLU, expressed concern that the public release of the letter might endanger

Billingslea and Hatt.

Meanwhile, supporters of same-sex marriage attacked the timing of the letter's release to the public on April 12, 2005, as bills regarding same-sex marriage were being debated in the legislature.

"They are trying to change the image of the gay couples who have married or plan to, from the very traditional and conservative people they are, to the image of sexual predators. It's clever, very clever. It's an old trick that used to be used against the gay community all the time," said co-chair of the Massachusetts Gay and Lesbian Political Caucus Arline Isaacson.

The DOC also revealed that it had turned down a similar request from two other male prisoners, but approved a marriage request by a female prisoner and a female non-prisoner.

"The distinction is . . . between a request for an inmate to marry someone who is also incarcerated, versus someone who is not incarcerated," according to DOC spokesperson Kelly Nantel. "We would review each request on its own merits."

In *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2251 (1987), the Supreme Court held that prisoners had a constitutional right to marry, subject to reasonable restrictions. Nonetheless, the DOC's approval of a woman prisoner to marry another (free-world) woman is unprecedented, representing the first same-sex marriage to be approved by prison officials in the U.S. Interestingly, it has received little in the way of corporate media attention. 📄

Source: *Boston Globe*.

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# U.S. Finally Outlaws Execution of Children

by Marjorie Cohn

*Today, the Court repudiated the misguided idea that the United States can pledge to leave no child behind while simultaneously exiling children to the death chamber.*  
—Dr. William F. Schulz, Executive Director, Amnesty International

Until March 1, 2005, the United States was the only nation in the world that permitted the execution of children under age 18. Only seven countries besides the U.S. have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then, each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. With the Supreme Court's monumental ruling in *Roper v. Simmons*, 125 S.Ct. 1183 (2005), the United States has finally joined the community of nations that says the state-sanctioned execution of children is wrong.

Christopher Simmons was a 17-year-old junior in high school when he and a friend burglarized Shirley Crook's home. When Simmons realized Mrs. Crook had recognized him, he and his friend tied her up, and threw her off a bridge to her death. Simmons, who had never even been arrested before, was described by clinical psychologists who evaluated him as "very immature," "very impulsive," and "very susceptible to being manipulated or influenced." Nevertheless, a Missouri jury sentenced Simmons to death.

The Supreme Court concluded in a 5-4 decision that executing children who were not yet 18 at the time of their crimes constitutes cruel and unusual punishment. "By protecting even those convicted of heinous crimes," Justice Anthony Kennedy wrote for the majority, "the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."

In determining which punishments are so disproportionate as to be cruel and unusual, the Court considers "the evolving standards of decency that mark the progress of a maturing society," a test set forth in the 1958 case of *Trop v. Dulles*, 78 S.Ct. 590 (1958).

The Court had prohibited the execution of 15-year-old offenders in *Thompson*

*v. Oklahoma*, 108 S.Ct. 2687 (1988) in 1988, but the following year, it upheld the execution of 16- and 17-year-olds in *Stanford v. Kentucky*, 109 S.Ct. 2969 (1989). The same day it decided *Stanford*, the Court also refused to mandate a categorical exemption from the death penalty for the mentally retarded in *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989).

Three years ago, the Court overruled *Penry*, and held in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002) that the standards of decency that had evolved in the intervening 13 years demonstrated the execution of the mentally retarded is cruel and unusual punishment. In so ruling, the Court found a national consensus against capital punishment for the mentally retarded because by 2002, 30 States prohibited it. The *Atkins* Court also resolved that the impairments of the retarded make it less defensible to impose the death penalty as retribution for past crimes, and less likely that the death penalty will have a real deterrent effect.

Kennedy used the same reasoning in *Simmons* to find a national consensus against the execution of juveniles under 18. Thirty states now prohibit the juvenile death penalty. That number includes the 12 states that have rejected the death penalty altogether, and 18 that maintain it but expressly exclude juveniles from its reach. The consistent trend, wrote Kennedy, has been toward abolition of the juvenile death penalty.

The International Covenant on Civil and Political Rights (ICCPR) is a treaty ratified by the United States and part of our domestic law under the Supremacy Clause of the Constitution. When the Senate ratified the ICCPR in 1992, it did so subject to a reservation to Article 6(5) of that treaty, which prohibits capital punishment for juveniles.

When Congress enacted the Federal Death Penalty Act in 1994, however, it determined that the death penalty should not extend to juveniles. Kennedy cited that law, as well as the infrequency of the use of capital punishment for juveniles, as further evidence that a national consensus has developed against the juvenile death penalty, notwithstanding the reservation to the ICCPR two years earlier.

Kennedy also took notice of scientific and sociological studies that confirm

three general differences between juveniles under 18 and adults, demonstrating that juvenile offenders cannot with reliability be classified among the worst offenders, deserving of the death penalty.

First, youths display a "lack of maturity and an underdeveloped sense of responsibility" that "often result in impetuous and ill-considered actions and decisions." For that reason, wrote Kennedy, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

Second, juveniles are more vulnerable or susceptible to negative influences and peer pressure, and, "lack the freedom that adults have to extricate themselves from a criminogenic setting."

Third, the character of a juvenile is not as well-formed as that of an adult.

"From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed," wrote Kennedy.

Thus, the Court held: "When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."

One of the most notable aspects of its decision in *Simmons* is the Court's reference to the law of nations. "Our determination that the death penalty is disproportionate punishment for offenders under 18," Kennedy wrote, "finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."

The Court cited the United Nations Convention on the Rights of the Child, which every country in the world except the United States and Somalia has ratified. Article 37 contains an express prohibition on capital punishment for crimes committed by juveniles under 18. What Kennedy failed to mention, however, is that the United States has signed that treaty. Under the Vienna Convention on the Law of Treaties, a country that signs a treaty is forbidden from taking action

inconsistent with the object and purpose of the treaty.

Justice Antonin Scalia wrote a dissenting opinion joined by former Chief Justice William Rehnquist and Justice Clarence Thomas. Scalia, who fashions himself an "originalist," interprets the Constitution the way he thinks it would have been interpreted in 1791, when the Bill of Rights was adopted.

In his *Simmons* dissent, Scalia, still stuck in 1791, characteristically mocked the well-settled doctrine that the ban on cruel and unusual punishment should be analyzed in light of "the evolving standards of decency that reflect a maturing society." Yet, Scalia noted: "At the time the Eighth Amendment was adopted, the death penalty could theoretically be imposed for the crime of a 7-year-old."

As a result of *Roper v. Simmons*, the lives of 72 people who had not attained age 18 when they committed their crimes will be saved. Forty percent of them were sentenced to death in Bush's home state. A study in Texas found that the current capital punishment system is an outgrowth of the "legacy of slavery."

The Supreme Court fortuitously issued its landmark juvenile death penalty decision on the National Day for the Abolition of the Death Penalty, which falls each year on March 1. By outlawing the death penalty for the mentally retarded, and now for juveniles under 18, the Court may be taking small steps toward the eventual abolition of capital punishment.

With ever-increasing numbers of death row prisoners being exonerated, public sentiment favoring the death penalty is waning. The Marquis de Lafayette said nearly 200 years ago, "I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me."

We can hope that one day soon, the United States, which remains the only Western democracy that still sanctions capital punishment, will abolish it. As Supreme Court Justice Arthur J. Goldberg wrote in 1976: "The deliberate institutionalized taking of human life by the state is the greatest conceivable degradation to the dignity of the human personality." ■

*Marjorie Cohn is a professor at Thomas Jefferson School of Law, president-elect of the National Lawyers Guild, and the US representative to the executive committee of the American Association of Jurists.*

## Raped New York Prisoner Awarded \$25,000

On August 17, 2004, a New York court of claims awarded \$25,000 to a state prisoner who was raped in the shower.

While imprisoned at the Sullivan Correctional Facility in Fallsburg, Donald Ramos received a series of letters from another prisoner who was known to be a sexual predator. Ramos showed the letters to a sergeant, who advised him to write the Deputy Superintendent for Security. Ramos took the advice and requested that either he or the other prisoner be moved. No action was taken.

About a month later, on March 12, 1998, Ramos was raped in the shower. Ramos claimed the other prisoner held a knife to his neck and that he heard a sound like that of a condom being put on before he was anally raped. After notifying a guard, Ramos was transported to an outside hospital. A rape kit was taken, but no semen was found. Ramos made no complaint of physical pain or bleeding, although he had a 3.5 inch abrasion on his neck.

Ramos sued the state of New York, pro se, alleging the prison was negligent in its security. He claimed the incident caused him emotional distress and that he is afraid he will be raped again due to widespread knowledge of the assault.

The state denied the rape occurred, arguing instead that Ramos fabricated the incident in hopes of being placed in protective custody to avoid repaying debts. The state further contended that the letters

he received were not threatening.

With regard to the letters, Judge Alan Marin observed that not even a cursory investigation had been performed even though prison officials knew the other prisoner was a sexual predator. Marin further noted that the Investigative Report of the Inspector General described the letters as sexually oriented and coercive. Consequently, Marin held that Ramos letter to the deputy superintendent served to put the state on notice. In addition, Judge Marin reasoned that Ramos's suggestion that he and the other prisoner be separated would not have provided him a way out of paying his debts.

After concluding that Ramos had probably been raped and that the state had not exercised reasonable care, Marin awarded Ramos \$25,000 for past pain and suffering. As to future damages, Marin found them speculative and noted that Ramos failed to present expert testimony. See: *Ramos v. State of New York*, Court of Claims, Case No. 98349. ■

Source: *VerdictSearch New York*

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## NY DOC Agrees to Comply with A.D.A.

The New York City Department of Corrections (NYDOC) on Rikers Island has entered into a voluntary compliance agreement that requires it to comply with the American with Disabilities Act (ADA). A NYDOC prisoner filed a complaint with the United States Attorney for the Southern District of New York, causing that office to investigate whether the NYDOC was violating the ADA.

The prisoner's complaint alleged, among other things, that NYDOC had not designated a responsible employee to coordinate its efforts to comply with its obligations under the ADA with respect to prisoners, and refused to provide the complainant with the name, address and telephone number of that employee.

Under the ADA, "no qualified individual with a disability: shall be excluded from participation in or be denied the benefits of the services, program or activities of a public entity." NYDOC is a public entity under 42 U.S.C. § 12132, and the implementing regulations, 28 C.F.R. § 35.104.

A public entity with fifty or more employees is obligated under the ADA to "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under (the ADA), including investigation of any complaint communicated to alleging its non-compliance with (the ADA) or alleging any actions that would be prohibited by the ADA." Additionally, the ADA requires NYDOC to "make available to all interested individuals the name, office address and telephone number of the employee or employees designated," to review the public entities ADA compliance.

Under the agreement, NYDOC is required to create a full-time position for a "Disability Rights Coordinator for Inmates." The coordinator is responsible for ensuring there are procedures for the prompt and equitable resolution of ADA complaints or for reasonable accommodations by disabled prisoners. Staff that interact with disabled prisoners must also receive adequate and appropriate information and training on ADA issues.

NYDOC must modify its existing directives, rules, policies, and procedures concerning the screening and classification of prisoners upon their entry to NYDOC. The coordinator must be notified within 24 hours, or the next day

after a holiday or weekend of the name of a prisoner who claims a disability, the nature of the disability, and any request for accommodation made by the prisoner upon receipt.

In addition to the coordinator, NYDOC must permanently assign one civilian administrative employee to each facility within NYDOC. Upon request, prisoners will receive the name, office address and telephone number of the coordinator and each facilities contact. NYDOC is also required to implement a grievance process to handle ADA complaints.

On an annual basis, NYDOC must provide the United States Attorney a report of actions taken by the coordinator during the preceding year and any plans for action concerning ADA compliance

in the coming year. If violations of the ADA cannot be resolved within 90 days, the United States can commence a civil action in federal district court.

The agreement went into effect on August 5, 2004, and is binding for three years. It is certain the agreement will affect many of the 120,000 to 130,000 prisoners NYDOC admits into custody on a daily basis.

"The comprehensive measures required by today's settlement agreement are designed to ensure that disabled inmates in New York City's Jails are afforded the civil rights guaranteed them by federal law," said David N. Kelley, the U.S. Attorney for the Southern District of New York. The complete agreement is posted on *PLN's* website. ■

## California Lifer Claims Parole Chair Fisher Is Biased

While most of California's lifers face a mere 99% chance of being denied parole, murderer Linda Ricchio's odds appear far worse. Her victim, Ronald Ruse, was the brother of newly appointed (and confirmed) Board of Prison Terms (BPT) Commissioner Susan Fisher. Fisher, it turns out, is more than a grieving next-of kin, she is also an active member and leader of victims' rights/revenge groups. Fisher has most recently (since 1999) been Director of the Doris Tate Crime Victims Bureau, including being a board member for seven years. She belonged to two other victims groups, and was President of Citizens for Law and Order since 2000. The Doris Tate Crime Victim's Bureau receives the bulk of its funding from the California Correctional Peace Officers Association, the union that represents prison guards in California.

Ricchio's attorney, Rich Pfeiffer, has filed papers to remove Ricchio's hearing to superior court. While, of course, Fisher could never sit on Ricchio's parole panel, the concern remains that her influence may pervade the whole BPT. Pfeiffer believes that Fisher's appointment to the BPT is simply a mission to avenge her brother's murder. Pfeiffer notes that the Doris Tate Crime Victims Bureau website features a lengthy summary of Ricchio's crime and urges members to contact the BPT and demand she be kept behind bars.

Indeed, the Doris Tate Crime Victims Bureau often sends its members to BPT lifer hearings to plead the case of victims not in attendance. Ricchio's initial parole hearing was postponed and is now awaiting a court hearing. Although Fisher could technically appear in the role of victim's family, it is expected that other family members will assume that task.

BPT attorney Deborah Bain stated "there is no evidence that Ms. Fisher has previously advocated her position" on the Ricchio case, and no evidence that the BPT "will not discharge its duties ... in a fair manner."

Prison Law Office attorney Donald Specter opined, "Often, I think people in victims' rights organizations tend to make judgments based upon a particular offense, rather than assessing each case on its individual merits as the law requires .... That's the concern."

On November 1, 2005, governor Schwarzenegger appointed Fisher chair of the Board of Parole Hearings despite having served on the Board as a commissioner only since July, 2005. The position pays \$99,693 per year and Fisher is a Republican. ■

Source: *Los Angeles Times*.

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# Prisoners Faced Violent Hazing In Troubled Pennsylvania Jail

by Michael Rigby

At least 50 prisoners entering Pennsylvania's Somerset County Jail over a 2-year period were beaten as part of a violent hazing ritual that went unchecked by jail authorities. This combined with serious overcrowding and a history of poor performance has placed the jail in danger of decertification.

The beatings, delivered to new prisoners by more senior ones, came in the form of a "shower shoeing," said Somerset Borough Police Chief Randy Cox. These attacks consisted of 10 to 20 "whacks" with a heavy, rubber-soled shower shoe from a prisoner "swinging with two hands with all his energy." Prisoners who refused the shower shoeing received a more conventional beating of kicks and punches that often resulted in serious injury.

Cox said the attackers preyed on vulnerable prisoners, some of whom were in the jail only briefly. "The inmates who were victimized tended to be smaller and, obviously, not prepared for what they were facing," he said. "Some ... were brought in for an appearance that day. One was there for five hours and walked away with a beating."

A list released by county commissioners on April 5, 2005, showed that 46 prisoners were hospitalized for injuries in 2003 and 2004. "Most of these we felt would be a result of inmate (against) inmate action, but we're not sure that they all were," said Commissioner Brad Cober. So far, seven current and former prisoners have been charged with crimes ranging from aggravated assault to coercion, and more indictments are possible, said investigators. Jail officials seem to be avoiding responsibility for allowing the assaults to occur over such an extended period of time.

Overcrowding likely contributed to the jail's violent atmosphere. Built to house 45 prisoners in 1981, the jail held a daily average of 118 in 2004. To ease the numbers, county officials are considering awarding good-time credits to prisoners who stay out of trouble. A committee formed to examine the issue made a recommendation on July 5, 2005.

Another concern is why something wasn't done sooner to quell the violence. SCJ Warden Tim Mapes warned county officials of rising violence in October 2004, saying the trend would continue unless those responsible were prosecuted. However, Somerset County Sheriff

Carl Brown and District Attorney Jerry Spangler both failed to act. Mapes ultimately went to Cox for help, resulting in the March 2005 indictments.

At a special meeting of the prison board on March 21, 2005, Brown and Spangler said they weren't aware of the situation at the jail. Brown specifically noted that his office hasn't investigated incidents at SCJ since April 2004 when the county conducted a drug raid at the jail without involving the sheriff's department. The commissioners didn't buy it.

"That's a public statement on October 5 that there were issues in that facility that we could not get prosecuted by the chief law enforcement officer in the county or the highest ranking law enforcement officer in the county," said Cober. Commissioner Pamela Tokar-Ickes also railed against the pair in an earlier statement saying the sheriff and district attorney were aware of the situation at the jail but failed to act because of "turf issues, personality clashes, political motivations, and perceived conflicts of interest."

If conditions at the jail haven't improved by May 31, 2005—when the state Department of Corrections plans to conduct its annual inspection—SCJ could be decertified, said deputy DOC press secretary Sheila Moore. Decertification means that the jail could no longer house prisoners with sentences of more than six months. "It's unprecedented," said Moore. "We've never had to do it before." During its last inspection in April 2004, SCJ failed to meet nearly half of the state's 25 minimum standards.


Other Pennsylvania jails are similarly troubled. In March 2005, staph infections killed three female prisoners—1 at the Burlington County Minimum Security Facility and 2 at the Allegheny County Jail (ACJ). Other problems also abound at ACJ. On May 3, 2005, a prisoner used a shoelace to hang himself in his cell; it was the jail's second suicide of the year. A week earlier, a prisoner was caught trying to escape down the side of the jail on a rope made of bed linens. (Another prisoner attempting the same feat in 1997 fell 150 feet to his death.)

In addition, a federal grand jury recently indicted Allegheny County Sheriff Pete Defazio. Two of the sheriff's high-ranking deputies—Frank Scharelli

and Richard Stewart—have already been indicted. They were charged in May 2005 with lying to the grand jury about fund raising efforts on Defazio's behalf.

Another stewpot of controversy is the Westmoreland County prison. On April 27, 2005, a female prisoner at the jail set the contents of her cell on fire, injuring two guards. The incident rekindled complaints about Warden John Walton, known for his tyrannical management style. During his despotic reign, Walton has banned visitors who park in the wrong spot from visiting for 90 days; crammed enough extra bunks into the jail to nearly double capacity; and caused chaos by releasing a prisoner in his florescent orange jail jumper with the word "prison" emblazoned across the back. (The man was promptly rearrested.) *PLN* reports extensively on Pennsylvania jails and prisons. See indexes for more. ■

Sources: *Pittsburgh Post-Gazette*, *AP*, *timesleader.com*, *officer.com*, *dailyamerican.com*, *PittsburghLIVE.com*, *Pittsburgh Tribune Review*, *lexis.com*, *WJACTV.com*



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# Suit Implicates Washington DOC In Near-Fatal Collision, Drug Use Suspected

by Michael Rigby

A woman critically injured in a collision caused by an employee of the Washington prison system--reassigned to his home because of suspected drug use--has sued the state Department of Corrections (DOC) for endangering the public.

Barbara Starkel was returning home from work on November 21, 2003, when an oncoming car crossed the centerline, sideswiped another car, and slammed head-on into her Chevy pickup. As firefighters pried her from the crumpled cab, Starkel, 55, was still alive--but barely. Her neck had a torn artery and was broken in 2 places, her right heel was shattered, and a severe head injury left her in a coma for 10 days. At the hospital, Starkel suffered multiple strokes.

Mark Aldrich, a Washington DOC community corrections officer (what parole officers are called in Washington) assigned to oversee state prisoners released to community supervision, was driving the car that hit Starkel. According to the police report, Aldrich, 50, had been driving 63 mph in a 50-mph zone. Aldrich also admitted he'd had two 16-ounce beers, though his blood alcohol level tested about half the legal limit of .08. He refused to be evaluated by a drug-recognition expert or to provide a blood sample.

At the time of the accident, Aldrich had been assigned to home duty for suspected drug use. Documents obtained from the DOC by Starkel's Seattle attorney, Tony Shapiro, reveal that two unnamed sources reported in September 2003 that Aldrich was using drugs and that he got them from someone he had supervised.

Others also reported Aldrich's erratic behavior. One supervisor noted that Aldrich had been observed carrying a small black satchel out to his car or to the restroom, where he'd stay for an hour at a time. Another expressed concern after learning that Aldrich had called one offender 93 times in a single month, including 18 times on a Saturday. A co-worker reported seeing Aldrich slumped at his desk with a syringe cap in his mouth.

On September 29, 2003, Aldrich was notified in a letter that he had been reas-

signed. "You are reassigned to your home, pending an investigation, with full pay and entitlements until further notice," the letter stated. He was told to consider himself "on duty" and to stay at home and reachable weekdays from 8 a.m. to 5 p.m. (The accident occurred on a Friday 4:42 p.m.)

In March 2005, Starkel sued the DOC and Aldrich in Kitsap County Superior Court. DOC officials knew--or at least strongly suspected--that Aldrich had abused drugs on the job, especially after a drug dog suggested narcotics had once been present at his desk, said Shapiro. "The reason they removed him from the workplace is they believed he was a potential hazard. If his conduct is a risk in the workplace, it's certainly a risk to the unsuspecting public."

Aldrich has been charged with vehicular assault for the November accident. Prosecutors also plan to charge him with

driving under the influence of drugs for an unrelated incident in April 2004. During that traffic stop, a state trooper noted "massive intravenous track marks" on Aldrich's arms and said he nodded off as a paramedic searched for a suitable vein to draw blood. A blood test revealed the tranquilizer diazepam and a trace of morphine.

Aldrich was fired in June 2004, but that's little consolation to Starkel, who has been unable to work since the accident and still suffers from the aftereffects, including loss of balance, stabbing pains in her head, and speech and memory problems. She even had to relearn how to multiply and spell. "The accident took a lot away from her--and us," said her husband, Rick Starkel. "When an event like this happens, it changes everything." ■

Source: *Seattle Post-Intelligencer*

## Titan Pays \$28.5 Million After Pleading Guilty to Three Felonies

by Matthew T. Clarke

On March 1, 2005, Titan Corp., the largest private supplier of translators for the U.S. military, pleaded guilty to three felony charges and agreed to pay \$13 million in criminal fines and settle a Security and Exchange Commission civil suit for \$15.5 million without admitting or denying guilt in that suit. The felony charges arose from Titan's attempt to influence elections in Benin, a country in West Africa. The guilty plea was to one charge under the Foreign Corrupt Practices Act, one charge of falsifying accounting records, and one charge of filing a falsified income tax return.

The corruption came to light when Lockheed Martin Corp., a large military contractor, was reviewing Titan's books in preparation for a planned corporate takeover of Titan in early 2004. Titan had paid \$2 million to the 2001 presidential election campaign of Mathieu Kerekou, who won the election. The bribery was covered up as consulting fees. At that time, Titan was involved in development of a cellular telephone network in Benin. In exchange for the bribery, Titan's management fees

were quadrupled from 5% to 20%. Titan received \$9.1 million in management fees. Thus, the \$2 million bribe earned Titan a net profit of \$4.8 million. It is believed that Kerekou was unaware of the bribery.

The \$28.5 million settlement eclipses the previous largest settlement ironically paid by Lockheed in 1995 after it admitted to bribing an Egyptian politician to get a transport plane order. The large settlement "demonstrates both the severity and scope of the misconduct in this case," according to U.S. Attorney Carol C. Lann.

Wall Street promptly rewarded Titan for copping out to the felonies by raising the price of its stocks. The rising valuation of Titan stock is driven by the military's need for translators. Titan employees have been implicated in the torture and abuse of prisoners in Iraq. [PLN, Nov. 2004, p.36]. Apparently, the U.S. Army doesn't mind employing felon corporations, it extended Titan's contracts for translators through September, bringing another \$400 million into Titan's coffers. ■

Source: *Los Angeles Times*.



# Report Details General Decline In Death Penalty Statistics For 2003

by Michael Rigby

For most of the nation, 2003 was a year of declining death penalty statistics. That year, according to a Bureau of Justice Statistics (BJS) report, the number of death sentences imposed fell to a 30-year low, while the number of completed executions also declined slightly.

During 2003, 144 prisoners were sentenced to death—24 fewer than in 2002 and lowest number since 44 prisoners received death sentences in 1973. By contrast, between 1994 and 2000 the average was 297 per year.

Twenty-five states and the federal government accounted for all 144 death sentences in 2003. Five states—Texas (29), California (19), Florida (11), and Arizona and Oklahoma (both 9)—accounted for more than half of there.

At yearend 2003, 3,374 prisoners were on death row in 37 states and the federal prison system, 188 fewer than at yearend 2002. It was the third consecutive year to show a decline. Much of the reduction (91%), however, was accounted for by a single act: Illinois governor George Ryan's decision to commute 167 death sentences to life in prison [See *PLN*, July 2003, p. 24].

The number of women on death row also declined slightly. On December 31, 2003, 47 women were under sentence of death, down from 51 the year before. Although 17 states held women on death row, two-thirds were imprisoned in just 4 states: California (14), Texas (8), Pennsylvania (5), and North Carolina (4).

When broken down by race, 55.7% of the total death row population at yearend 2003 was white, 42.0% black, and 2.3% other races. Hispanics, which can be of any race, accounted for 12.5% of those with known ethnicity.

During 2003, 267 prisoners were removed from death row. The majority—257—received other dispositions (again, Illinois accounted for the majority) while 10 died before being executed (6 from natural causes, 4 from suicide).

Much of the country's condemned population (43%) resided in just three states, according to the report. California led with 629, followed by Texas (453), and Florida (364). The BOP held 23.

In 2003, 11 states and the federal government executed 65 prisoners, 6 fewer

than the year before. Some statistics: All of the executed were male; 41 were white, 20 were black, 3 were Hispanic (all white), and 1 was American Indian; 64 received lethal injection, one was electrocuted; and the average time on death row before execution was 10 years and 11 months.

In keeping with prosecutorial efforts to promote a kinder, gentler death penalty through faux medicalization of the process [See *PLN*, February 2005, p. 23], lethal injection was used to carry out 98% of the executions performed in 2003, up from 68% in 1993.

Texas carried out the most executions (24), followed by Oklahoma (14), and North Carolina (7). Notably, the Texas anomaly is not new—the state has long been the nation's execution capital. Of the 885 executions carried out from January 1, 1977 through 2003, two-thirds occurred in just 5 states. Of those, Texas led with 339—more than the next 4 combined. Virginia was second with 89, followed by Oklahoma (68), Missouri (61), and Florida (57).

Currently, Texas accounts for more than one in five death sentences nationwide, and Texas juries impose an average of 34 death sentences a year, the *Houston Chronicle* reported in November 2004. Some legal experts blame the state's sentencing laws. With life without parole as a sentencing option, those numbers may decline.

As for the rest of the nation, death penalty opponents contend the declining numbers show waning public support for capital punishment in the wake of publicity surrounding wrongful convictions and growing concern over whether the penalty is administered fairly.

The report also contained a number of other notable statistics. Among them:

Of the 38 states with capital punishment statutes, all but one (South Carolina) provided for some sort of automatic review, regardless of the

defendant's wishes.

During the year, 11 states revised their death penalty laws. Most of the changes dealt with exempting mentally retarded and youthful offenders from death, expanding the death penalty to include homicides related to acts of terrorism, and post-conviction proceedings.

Between 1977 and 2003, 7,061 prisoners were sentenced to death. Of those, 12% were executed, 4% died from something other than execution, and 36% received other dispositions. The executed included 501 white non-Hispanic men, 300 black non-Hispanic men, 61 Hispanic men, 8 American Indian men, 5 Asian men, 9 white non-Hispanic women, and 1 black non-Hispanic woman.

A copy of the November 2004 report, *Capital Punishment, 2003*, is available online at [www.ojp.usdoj.gov/bjs/](http://www.ojp.usdoj.gov/bjs/) or by writing NCJRS, P.O. Box 6000, Rockville, Maryland 20849-6000. ■

Additional sources: *Houston Chronicle*, *The New York Times*

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See Page 45 for more information.

## Reliance Solely On Guard's Version of Incident Improper

In an unpublished decision, the U.S. Sixth Circuit Court of Appeals reversed the summary judgment dismissal of a prisoner's civil rights action against Michigan prison guards holding that the district court had erroneously relied on the guards' version of disputed facts.

Robert L. Johnson, a Michigan state prisoner, claimed that he was assaulted by prison guards as he walked down a hall in leg irons and handcuffs. Johnson's account follows. As he passed guards Paul Perry, Mark Panasiewicz, and James Lachance, the guards told him to hurry up and called him an "old bastard." Johnson tried to continue walking but was pushed into a stairwell by Perry and Panasiewicz. Halfway down the stairs Perry stepped on the chain between Johnson's legs and then, with Panasiewicz's help, pushed him down the stairs and onto the concrete floor. Perry then stepped on Johnson's handcuffs and put him in a choke hold while Panasiewicz and Danny Loosemore helped carry him to his cell, where they threw him violently to the floor. Perry then told the other guards not to remove Johnson's restraints and to ignore his requests for medical attention.

Johnson was later examined by a nurse who noted "abrasions of various sizes on his neck, left shoulder and chest and that he had a broken fingernail with some dried blood underneath."

Perry subsequently issued Johnson a misconduct citation for refusing to obey an order and for insolence, stating that Johnson cursed him and refused to move when he was being returned to his cell. Perry further claimed that Johnson was not knocked to the floor. The other guards gen-

erally agreed with Perry's account. Johnson was ultimately found guilty of the misconduct charges.

After Johnson's grievance and internal appeals were denied he filed a pro se action pursuant to 42 U.S.C. § 1983 and state tort law in the Western District of Michigan alleging the guards violated his Eighth and Fourteenth Amendment rights by using excessive force, being deliberately indifferent to his serious medical needs, and writing a false misconduct report. Johnson's deliberate indifference and false report claims were dismissed for failure to state a claim. Later, the district court granted summary judgment to the guards holding that there was no genuine issue of material fact and that the defendants were entitled to qualified immunity. Johnson appealed, pursuing only his claim of excessive use of force.

The Sixth Circuit affirmed in part, reversed in part, and remanded. Summary judgment in favor of John Perry and Lachance was proper, the Court held, because John Perry's only involvement

related to the deliberate indifference claim and Johnson neither alleged nor presented evidence showing that "Lachance was involved in causing his injuries beyond merely being seen with the co-defendants before the alleged assault...."

However, the Court reversed as to Panasiewicz, Loosemore, and Paul Perry. Summary judgment against these defendants was improper, the Court ruled, because the guards' version of what happened differed from each others' and from Johnson's. As such, a factual dispute existed as to certain facts integral to proving Johnson's claim of excessive force, i.e., "whether the defendants had sufficiently culpable states of mind and 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" Moreover, the factual dispute--specifically, Johnson's claim that the excessive use of force was unprovoked and the discrepancy between the guards' statements--rendered qualified immunity inappropriate. See: *Johnson v. Perry*, 106 Fed. Appx. 467 (6th Cir. 2004). ■

## Illinois Jail Conditions Suit Nets \$150,000 Attorney Fee Award

An Illinois Federal District Court has awarded attorneys representing prisoners at the Winnebago County Jail (WCJ) \$150,000 in attorney fees and costs. This class action suit alleged the conditions at WCJ were unconstitutionally deficient in numerous respects.

The suit alleged system-wide problems of overcrowding, double and triple bunking of prisoner's, mixing prisoners of different classifications, lack of ventilation and recreation facilities, and not separating prisoner's suffering from communicable diseases. The suit sought class certification, alleging the conditions at WCJ endangered the "health, safety, and welfare" of the class members. In March 2002, the District Court certified for prospective relief a class consisting of "all persons who were, as of March 15, 2000, currently are, or may in the future be incarcerated at the Winnebago County Jail as convicted misdemeanants or felons."

In September 2003, the parties reached a settlement agreement, which requires Winnebago County to build a new main

jail that will house between 900 and 1,200 prisoners. While that jail is being built, WCJ is to implement interim programs and objectives that would alleviate the overcrowding at WCJ. The new jail was to be completed by September 1, 2005, any violation of the agreement allows the prisoners to proceed with a hearing before the District Court.

Subsequent to the District Court approving the agreement, the prisoner's counsel moved for Attorney fees and costs. The District Court found the prisoners were entitled to such an award for the prisoner's receiving specific representations and timetable and Winnebago County delays further litigation to rectify the situation. As such, the class is a prevailing party entitled to an award of fee's and costs under 42 U.S.C. § 1988 and § 1997E(d)(3).

The court held counsel was entitled to 150 percent of the prevailing rate of \$90 per hour or \$135 an hour for work performed in this case. Attorney fees were awarded as follows: for 304 hours, Mr. Thomas E. Greenwald received

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\$41,053.50; Debra Delia was granted \$165 for 1.2 hours; and for 734 hours J.F. Hacking was awarded \$99,630. In ad-

dition, the attorneys were awarded \$8,882 in costs. The rulings are unpublished. See: *Chatmon v. Winnebago County*, 2003

U.S. Dist. LEXIS 22070 and *Chatmon v. Winnebago County*, 2004 U.S. Dist. LEXIS 108. ■

## ***An Expensive Way to Make Bad People Worse: An Essay On Prison Reform from an Insider's Perspective*, by Jens Soering, Lantern Books, 2004, \$12, 113 pages**

*reviewed by Stephen Healy and Peter Wagner*

When Virginia lifer Jens Soering released his second book, *An Expensive Way to Make Bad People Worse: An Essay On Prison Reform from an Insider's Perspective* he fired a warning shot across the bow of the prison industrial complex. *An Expensive Way to Make Bad People Worse* is the best short, readable, fact-drive summation of why prisons don't work, but what makes the book so powerful is that it is written by a conservative Christian addressed to other fiscal conservatives.

Fiscal conservatives define "good government" as "small government", so by using a simple cost-benefit analysis, Soering shows that locking up 2 million people fails to justify the \$57 billion cost. While progressives may oppose the current criminal and penal systems for social and ethical reasons, Soering's arguments have the potential to split the Republican party's fiscally conservative base from its "get tough on crime" leadership.

Using fresh analysis and groundbreaking arguments to bring sometimes dry statistics to life, Soering's book is organized around six myth-busting chapters:

- There is no problem
- They may be expensive, but at least prisons prevent crime
- Crime prevention does not work
- Rehabilitation behind bars does not work
- There are no alternatives to prison, and
- Criminal justice issues are so important that no one would dare mislead the public about them

Soering, a German citizen serving two life terms, brings a unique perspective that allows him to challenge common ideologically derived assumptions from both the right and the left. Soering places the US prison in an international context to show precisely how US prison policy fails us. While all modern societies have a "crime" problem, the United States stands virtually alone in relying *solely* on expanding its punitive incarceration system to address the problem. Soering

explains that the prison population has grown not because of a growth in crime, but because of a complete systemic failure to prevent people already in the system from re-offending. The majority of prisoners who are released either fail to successfully complete parole or are shortly returned to prison after committing a new crime. Judged by any standard used in the marketplace, "corrections" is an abysmal failure.

One good conservative solution? Fiscal incentives.

Reducing poverty has proven results in reducing crime, because people with something to lose are less likely to commit a crime. But reducing poverty has been anathema to neo-conservatives like Bush. "The poor do not deserve it, and we can not afford it anyway," they say. But from a fiscal conservative perspective, it makes good economic sense to end poverty. After all, the poverty line in the U.S. for a family of three is \$13.22 a day per person. That's supposed to pay for everything. By contrast, incarceration costs on average, \$55.18 a day. Soering asks whether reducing poverty would be both cheaper and more effective at reducing crime. And of course, in some places incarceration costs far more than the average. In the Fairfax County, Virginia, jail, incarceration costs \$130.00 a day. That's quite a decadent expenditure by society, particularly considering that a night's stay in a Walt Disney World no-frills resort can be had for only \$119.33.

In an age where conventional "liberals" have adopted the neo-liberal "welfare reform" program, it is ironic that one of the clearest defenders of the social safety net is a writer with an ideological tie to the people who opposed Johnson's War on Poverty. But as Soering points out, spending on education and other social services for the poor—not mass incarceration—is *more* in line with fiscally conservative social principles because social services *do* lower criminality and its associated costs. This is simply that the stitch in time saves nine.

Beyond the title, drawn from that

of a white paper issued in the 1980s by Margaret Thatcher's conservative English government, the book contains very little moralizing about "bad" people. That title will no doubt make some progressives wince, but it's also a reflection of the genius of the book. It's a fact of reality that conservatives believe some people are "good" and some are "bad". While progressive might not agree with the fiscal conservatives about why crime exists, we can certainly agree that that the \$57 billion a year spent on corrections isn't improving public safety.

This isn't a radical book that questions how we define crime or one that imagines a new world where prisons don't exist. Instead, the book is a highly effective indictment of the prison industrial complex as a massive failed experiment whose time has come and gone.

Smart capitalists everywhere should read this book and cut their losses. Copies are available from: Lantern Books, P.O. Box 960 Herndon, VA 20172-0960, 1-800-856-8664. ■

*[Editor's Note: Some authors, most notably Jeffrey Reiman in The Rich Get Richer and the Poor Get Prison and Christian Parenti in Lock Down America persuasively argue that prisons work perfectly well as intended and are tools of social control and have nothing to do with public safety or crime reduction.]*

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# Accounting Errors Plagued California Criminal Justice Agency

A defunct California agency charged with distributing grant money for crime prevention and victim aid may have cost the state millions in federal funds due to poor accounting practices, state auditors said on February 2, 2005.

Lawmakers knew something was wrong at the Office of Criminal Justice Planning (OCJP) two years ago when they couldn't get information from the agency to prepare the state budget. After abolishing the office, auditors were called in to review the books. What they found was criminal.

Cash receipts, payments, and accounts receivable weren't recorded. Funds intended for some programs were spent on others. Files the agency did keep were incomplete and filled with errors.

In fact, accounting records were in such poor shape that forensic accountants had to reconstruct the agency's files before auditors could do their job. To complete the review, it took 46 employees 16,000 hours and cost over \$1 million.

"In my 30 years experience, this is the worst thing I've ever seen," said Samuel Hull, chief of state audits. "When we got into there and started looking at things ... the problems just kept ballooning."

A copy of the report has been forwarded to the attorney general's office, and a state legislator said prosecutors would investigate whether fraud was committed.

From July 1999 to December 2003, the OCJP received \$425 million in federal grant money to be dispersed among local governments for crime prevention and

community programs that assist victims of domestic violence, child abuse, rape, and homicide. Because of the agency's shoddy accounting practices, however, it's unknown how much of the money was actually distributed.

About \$10 million in funds have been frozen pending the report, and millions more could be lost permanently. The federal departments of Justice and Health and Human Services, which issued the grants, could penalize the state, seek reim-

bursement, or deny future funding.

In a supposedly unrelated case, the OCJP's former director has admitted illegally using his position in the agency to help Sun Law Energy Corporation beat out a rival in its bid to build a Stockton power plant. In January 2005, N. Allen Sawyer, 36, pleaded guilty to mail fraud in a Sacramento court. Prison time is expected. ■

Source: *officer.com*, *Associated Press*

## Parole Officers Not Absolutely Immune For Conduct Distinct From Parole Decisions

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals ruled that California Department of Corrections (CDC) parole officers were not absolutely immune from suit by a former prisoner who alleged he was re-incarcerated because the officers falsified his records in a conspiracy to cause his wrongful detention.

Michael Swift completed his sixteen month term for uttering a bad \$114 check in California and then transferred to out-of-state parole in Iowa. While in Iowa, he was arrested for domestic violence, for which a parolee-at-large warrant was issued. However, he was acquitted of the domestic violence charge. Later, the Interstate Parole Supervision Unit (IPSU) held a *Morrissey* hearing as to parole violations, only to again acquit him. In January, 1998, Swift was released from parole supervision by Iowa. His successful completion of parole was reported to IPSU, but IPSU failed to notify the California Board of Prison Terms (BPT) or the National Crime Information Center (NCIC). As a result, the earlier warrant was never recalled.

When Swift became aware of the warrant in 2001, he contacted IPSU to request its recall. He was told to report to CDC's parole unit in Chula Vista, California on April 18, 2001. There, the agent released Swift on his own recognizance pending review of the continuing validity of the warrant. But on April 23, 2001, parole officers

Maritza Rodriguez and Steve Christian, who had "investigated" his situation, arrested him and sent him to state prison where he remained until June 7, 2001. Swift's complaint was that Rodriguez and Christian conspired to effectuate his arrest by falsifying records, deliberately suppressing all exculpatory evidence related to the domestic evidence trial and *Morrissey* hearing and even suppressed the record of the continuance of his parole in Iowa and his discharge of parole there.

Based upon Christian's recommendation, the BPT held a parole revocation hearing. The hearing officer discharged Swift's parole and parole hold, recalled the warrant, and ordered Swift's immediate release from custody. In so ordering, the hearing officer noted that Swift's parole was discharged by operation of law on November 16, 1997.

After exhausting administrative remedies, Swift sued for damages. His first action, in state court, was dismissed by the California Court of Appeals because the state is immune from tort liability regarding supervision of parole. See: *Swift v. Department of Corrections*, 116 Cal. App. 4th 1365 (2004).

In his subsequent federal 42 U.S.C. § 1983 complaint, Swift alleged four causes of action. But the U.S. District Court (S.D. Cal.) held that Christian and Rodriguez were entitled to absolute immunity because the functions they performed were "associated with [Swift's] parole revocation hearing," and dismissed both Swift's federal and supplemental state law claims. Swift appealed. The Ninth Circuit reversed. The court noted

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that while judges are absolutely immune in the performance of their judicial functions, and parole board officials are absolutely immune when performing the quasi-judicial duties of granting, denying or revoking parole, parole officers do not enjoy absolute immunity "for conduct not requiring the exercise of quasi-judicial discretion."

The court observed that Swift's complaint was grounded in Christian's and Rodriguez's conduct arising solely from their duty to supervise parolees a non-quasi-judicial function. Relying on *Anderson v. Boyd*, 714 F.2d 906, 910 (9th

Cir. 1983), the court held that the officials were only entitled to qualified immunity for conduct that "does not relate to a parole official's duties in deciding to grant, deny or revoke parole."

The question remained as to just what conduct the term "relate to" encompassed. Following precedent, the court drew a bright line functional test between the exercise of quasi-judicial powers, on the one hand, and Christian's and Rodriguez's challenged misconduct while (1) investigating parole violations, (2) ordering issuance of a parole hold, and (3) recommending initiation of revo-

cation proceedings. The court concluded that these duties amounted to no more than normal law enforcement functions, for which only qualified immunity was available.

Accordingly, the Ninth Circuit remanded the action to the district court to first determine if Christian and Rodriguez were entitled to qualified immunity. The court also reinstated Swift's supplemental state law claims because they had been swept out with the dismissal of the now revitalized federal claim. See: *Swift v. State of California*, 384 F.3d 1184 (9th Cir. 2004). ■

## Nevada Supreme Court Clarifies Personal Injury Exhaustion Requirements

The Nevada Supreme Court held that state prisoners seeking compensation for personal injuries are not required to allege exhaustion of their administrative remedies, nor does the failure to exhaust administrative remedies deprive the trial court of subject matter jurisdiction.

Thomas Cotton, Wilbur Lewis Jr., and Aries Mosby, prisoners at the High Desert Correctional Center, were injured when the tractor-type cart they were riding in overturned. The prisoners claimed that after the accident they filed grievances requesting, among other things, medical care, but the grievances either went unanswered or were denied.

The prisoners subsequently filed a claim in the Eighth Judicial District Court of Clark County against the Nevada Department of Prisons (DOP) seeking damages and injunctive relief regarding medical care and work time credits. On the DOP's motion, the district court dismissed holding that pursuant to NRS 41.0322(1)

(which governs personal injury actions brought by prisoners in the DOP) "prior to filing their complaint, appellants must have first exhausted their administrative remedies and have pleaded exhaustion as part of their claim for relief." The prisoners appealed.

On appeal, the Nevada Supreme Court first noted that nothing in NRS 41.0322(1) specifically requires that exhaustion be pleaded. The Court then went on to hold that, although failure to exhaust administrative remedies generally deprives the trial court of subject matter jurisdiction, in this case, NRS 41.0322(3) "gives the district court the authority to stay the proceeding until administrative remedies are exhausted...." Therefore, the

Court concluded, "the district court was not required to dismiss the complaint on the grounds that it lacked subject matter jurisdiction, as appellants' action could have remained pending until fulfillment of the administrative requirement."

Accordingly, the Court reversed and remanded with orders for the district court to reinstate the prisoner's claim "and to conduct an evidentiary hearing to determine if appellants have exhausted their administrative remedies and if not, to allow exhaustion of their administrative remedies if appropriate." The prisoners were represented by Cal Potter of Las Vegas. See: *Cotton v. State of Nevada*, Supreme Court of Nevada, Case No. 39359. ■

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# Denial of New Jersey Work Credits Violates Equal Protection

A New Jersey appellate court held that denying work credits to prisoners serving concurrent New Jersey sentences in other states violates the equal protection clause of the New Jersey Constitution.

On February 11, 1978, Charles VanWinkle "began serving a seventeen and one-half to thirty-five year sentence in Pennsylvania. Pursuant to the Interstate Agreement on Detainers (IAD), [he] was temporarily transferred from Pennsylvania to New Jersey to stand trial for pending charges."

In October 1978, VanWinkle was sentenced in three New Jersey cases to an aggregate minimum sentence of twenty-two years and a maximum sentence of fifty-five years. All sentences were imposed concurrently to VanWinkle's Pennsylvania sentence.

Following sentencing in New Jersey, VanWinkle was returned to Pennsylvania pursuant to the provisions of the IAD, where he continued serving his Pennsylvania sentence and concurrent New Jersey sentences[,] until paroled to his New Jersey detainer on June 14, 1994.

In April 2001, VanWinkle sent a letter "to the Pennsylvania Department of Corrections requesting his work record so that New Jersey could use this information to award him additional work credits." Pennsylvania authorities notified the New Jersey Department of Corrections of VanWinkle's request. New Jersey officials then notified VanWinkle "that work credits he may have earned in Pennsylvania are not credited against his" New Jersey sentences.

On appeal, the Superior Court rejected VanWinkle's claim that N.J.S.A. 30:4-92 entitled him to receive credit

for work performed while confined in Pennsylvania, concluding that out-of-state institutions are not included within N.J.S.A. 30:18-B.

The court also rejected VanWinkle's claim that his right to equal protection of the law was violated because "he would have been entitled to the work credits had he been transferred to Pennsylvania pursuant to the Interstate Corrections Compact (ICC), N.J.S.A. 30:7C-1 to -12." The court noted that VanWinkle was transferred under the IAD not the ICC and he was not treated differently from similarly situated prisoners "because he was not even eligible to be transferred to Pennsylvania under the ICC."

The court agreed, however, with VanWinkle's equal protection claim on another basis. The court concluded "that there is no conceivable, much less rational, basis to distinguish, for purpose of work time credits, between prisoners serving a sentence in State and those serving concurrent time out-of-state such as" VanWinkle. The court noted that the New Jersey DOC offered no reasoned basis for distinguishing between the two classes of offenders, held that N.J.S.A. 20:4-92 was unconstitutional as applied to VanWinkle and remanded for a determination of the amount of work credits he was entitled to receive. See: *VanWinkle v. New Jersey Department of Corrections*, 850 A. 2d 548 (NJ App. Div. 2004). ■

## PLRA Attorney Fee-Award Criteria "Directly Incurred" and "Degree Of Success" Explained

by John E. Dannenberg

After a successful jailhouse lawyer retaliation suit (see: *PLN*, March 2003, p.20, \$90,169 *Plus Injunction In California Retaliation Suit*), California prison official defendants appealed the award of post-Prison Litigation Reform Act (PLRA) attorney fees. The Ninth Circuit U.S. Court of Appeals rejected defendants' fee cap argument, holding that there is no overall PLRA fee cap when injunctive relief is obtained but remanded for recalculation of plaintiff's fees consistent with the degree of success achieved. (*Dannenberg v. Valadez*, 338 F.3d 1070 (9th Cir. 2003); see *PLN*, July 2004, p.20.) On September 24, 2004, the U.S. District Court (E.D. Cal.) issued an Order on fees, which offers useful guidance on how this task should be approached.

Defendants had requested an across-the-board fee reduction in proportion to the "degree of success" of just the damages award, that is, based upon the ratio of the actual monetary award to the amount suggested to the jury. The court disagreed. The proper test was to pro-rate the damages-related fee allowance to just those hours billed for efforts directed at proving damages. But since no hours were billed here for this effort and thus no fees charged for it, no reduction was due (*Dannenberg*, 338 F.3d, *supra*, at 1075).

Next, defendants argued that because there were five claims, but plaintiff only prevailed on two, all fees should be reduced by 3/5, or 60%. This, too, was rejected. The court instead disallowed the actual hours billed in pursuit of the unsuccessful claims (which were very minor), allowing recovery of fees expended on the two major and successful claims.

But the court did parse the remaining fees to disallow those involved in deposing witnesses whose testimony was not introduced at trial. *PLN* readers should note that arguably, such disallowance might obtain even where a plaintiff succeeded on all claims, because if one didn't use the deposition at trial but won, then plainly those fees/depositions were not related to the degree of success achieved. The court also disallowed fees associated with deposing the four of the eight defendants who were exonerated by the jury of any violation of plaintiff's constitutional rights.

Finally, the court reduced fees incurred during the trial phase by 20% to reflect plaintiff's degree of success in winning both claims, albeit against only four of eight defendants. Dannenberg had argued that he was entitled to all fees because they were ultimately "proportionately related to the court-ordered relief" (42 U.S.C. § 1997e(d)(1)(B)(i)) of expungement of his prison records, and

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that because he needed to prove only that one defendant violated his rights to so prevail, the fraction of liable to non-labile defendants was irrelevant. The court disagreed, and, overall, reduced the attorney fee award from \$70,722 to \$55,900. (Pre-PLRA fees, damages, punitive damages, costs and expenses were not appealed and thus remained unchanged.)

From the history of the case, several valuable strategies to avoid pitfalls of the PLRA emerge for attorneys representing prisoner § 1983 litigants to consider.

(1) Do not shrink from vigorously

pursuing injunctive relief just because concurrent damages available might be dwarfed by the attorney fees incurred to gain the injunctive relief.

(2) Where multiple constitutional violations are alleged (e.g., retaliation and equal protection), ask that the jury verdict forms permit a “general” (i.e., “either-or”) verdict. This means that each juror may determine whether any one of the violations was proven, as to each named defendant thereby increasing your odds of winning.

(3) If multiple defendants are named, but some have only minor roles, delete

them from the suit to maximize your percentage of fee recovery.

(4) If you depose witnesses, put their statements into evidence to prevent disallowance of fee recovery for the depositions.

(5) Devote the maximum percentage of effort to the most promising claims, when multiple claims are presented. Additionally, delete weaker claims to prevent dilution of the fee recovery. See: *Dannenberg v. Valadez*, U.S.D.C. (E.D. Cal.) No. CIV S-96-0027 JFM P. (Order, September 24, 2004). ■

## Tennessee Pretrial Jail Credit Mandatory, Not Waivable

The Tennessee Court of Criminal Appeals reversed a defendant's convictions, holding “that the trial court should not have accepted [his] plea agreement waiving pretrial Jail credit and that the trial court erred in denying the defendant's motion to withdraw his guilty pleas.”

On May 10, 2002, Richard Filauro pled guilty to two counts of rape of a child, for conduct toward his eight-year-old granddaughter. “At the guilty plea hearing, the trial court imposed two concurrent twenty-five year sentences, as provided in the plea agreement. In addition, the agreement stipulated that the defendant would not receive pretrial Jail credit for the eighteen months he spent in jail before agreeing to plead guilty.”

On May 31, 2002, Filauro moved “to withdraw his guilty pleas, contending that his pleas were both illegal and manifestly unjust.” After a hearing, “[t]he trial court denied the defendant's motion to withdraw, finding that a defendant could waive pretrial jail credit and that his sentence of 26.5 years was not illegal.”

Citing *McConnell v. State*, 12 S.W.3d 795, 798 (Tenn. 2000), the appellate court agreed with Filauro that the trial “court was without jurisdiction to accept his pleas because jail credits cannot be waived.” The court held that his “sentence, allowing him to waive pretrial jail credits, is in ‘direct contravention’ of T.C.A. § 40-23-101's ‘express statutory provision’ it requires a court to award a defendant pretrial jail credit.” Thus, the court felt it was “required to hold that the defendant's sentence is illegal.”

The court also agreed with Filauro “that it has the effect of 26.5 year sentence exceeds the maximum for a

Range I offender convicted of a Class A felony and therefore, is illegal[,]” holding “that the defendants effect of 26.5 year sentence is in ‘direct contravention’ of the ‘express statutory provision’ in T.C.A. §40-35-112(a)(1) that states that a Range I Offender convicted of a Class A felony is to receive a sentence of not less than fifteen no more than twenty-five years. See: *McConnell*, 12 S.W.3d at 798.”

With respect to withdrawal of Filauro's guilty pleas, the court acknowledged “that at the time of the court's ruling, this court had held that when the guilty plea, the waiver of the right to appeal, and the sentence are all entered on the same day, the judgment of conviction becomes final on that day, rendering the trial court without jurisdiction to rule upon any subsequent motion to withdraw. See: *State v. Hall*, 983 S.W.2d 710, 711 (Tenn. Crim. App. 1998). However, [the Tennessee] Supreme Court has since overruled *Hall*, holding that ‘a judgment of conviction entered upon a guilty plea becomes final thirty days after acceptance of the plea agreement and imposition of sentence.’ *State v. Green*, 106 S.W.3d 646, 650 (Tenn. 2003). Thus,

the trial court had jurisdiction to allow the defendant to withdraw his plea.”

Finally, the court found that the erroneous information Filauro received before entering his pleas “renders any attempted waiver of pretrial credit necessarily unknowing because a defendant would not realize it was illegal to waive his credit. Under these circumstances, the defendant could not have understood his rights regarding his pretrial jail credit when he pled guilty to a rape of a child.” See: *State of Tennessee v. Filauro*, 2004 Tenn. Crim. App. LEXIS 374 (Tenn. Crim. App. 2004). ■

### U.S. Torture Information Needed

Because the United States has signed the United Nations Convention Against Torture, they are required to submit reports on the status of US compliance to the Treaty every five years. In May of this year, the US submitted their “Second Periodic Report of the United States of America to the Committee Against Torture”. Several national prisoner advocacy groups are planning to issue what is called a “Shadow Report” to supply the Committee with credible evidence of US violations of the Convention which are ignored in the official report. The Convention not only prohibits torture but also “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture” committed by a government official. We are seeking testimonies from prisoners on torture and abuse, including isolation and use of devices of torture (stun guns, stun belts, restraint beds, restraint chairs and other restraint devices, spit hoods, black boxes, etc.). Please send testimonies of your experiences and how the authorities dealt with any complaints you made to: Bonnie Kerness, AFSC Prison Watch Project, 89 Market Street, Newark, NJ 07102. We very much appreciate your help.

# Damages Denied To Bilingual Iowa Prisoner Prohibited From Writing Family In Spanish

by John E. Dannenberg

The Eighth Circuit U.S. Court of Appeals held that an Iowa prisoner was not entitled to damages when he challenged a policy requiring prisoners to correspond only in English because he had not identified cost free alternatives to the policy. A prison mail policy prohibited a Mexican national prisoner incarcerated in Iowa's Fort Dodge Correctional Facility (FCDF) from writing to his Spanish-only speaking family in Mexico. The prisoner was fluent in English, however his family in Mexico could read and write only in Spanish. Although FCDF dropped this policy three months later, Ortiz sued his Unit Manager Tom Conley and FCDF in U.S. District Court, N.D. Iowa under 42 U.S.C. § 1983 for damages and punitive damages for violation of his First Amendment rights during the restricted months. The district court had held that the earlier regulation was "reasonably related to legitimate penological interests" and denied Ortiz relief.

On appeal, Ortiz cited the Eighth Circuit's precedent favoring a Laotian Iowa prisoner who won damages in 1993 in a similar English-only complaint (*Thongvanh v. Thalacker*, 17 F.3d 256 (8th Cir. 1994)). Thongvanh had won when he demonstrated that the prison discriminatorily provided free translators for German and Spanish speaking prisoners, but not for those speaking Lao.

The court conducted a four-part balancing test under the standard of *Turner v. Safley*, 482 U.S. 78, 89 (1987). Under the first part, the court found the prison had a legitimate security reason for monitoring all mail. Under the second *Turner* factor, the court found that Ortiz did have alternative ways of communicating with his Mexican family via phone calls or personal visits, and, citing *Smith v. Delo*, 995 F.2d, 827, 830 (8th Cir. 1993), that these were constitutionally sufficient. As to the third factor, a de minimis cost alternative, Ortiz tried to rely on *Thongvanh*. But Thongvanh had gained free translation services from the Iowa Refugee Service Center.

Thus, while Thongvanh had provided the prison free translation but was still denied his letters, "Ortiz did not identify a cost-free way for the prison to accommodate him." He did not offer at trial

what such costs might be, whether FCDF had any (no-cost) Spanish-speaking employees, whether other prisons could have provided the services or whether a social service agency was willing to furnish translators. Without this proof of a ready de minimis cost alternative,

Ortiz failed to satisfy the third *Turner* factor and thus did not present the same compelling case as did *Thongvanh*. The Eighth Circuit accordingly affirmed the district court's denial of relief. See: *Ortiz v. Fort Dodge Correctional Facility*, 368 F.3d 1024 (2004). ■

## Sexual Predator Civil Commitment Detainee May Not Be Housed In Punitive Segregation

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals held that a California sexual predator civil commitment detainee, while awaiting commitment proceedings, is entitled to conditions of confinement that are not punitive.

Oscar Jones was a California parole violator whose original commitment offenses made him a candidate for civil commitment as a sexually violent predator under California's Sexually Violent Predator Act (SVPA) [Welfare and Institutions Code § 6600 et seq.].

When he was originally paroled, the 1996 SVPA had not yet been enacted. However, when he violated parole in June 1997, he became subject to SVPA civil commitment proceedings before being re-paroled in six months, and in December, 1997, was transferred to the Sacramento County Jail and detained pending such proceedings (due by law in 45 days). Per California Penal Code (PC) § 4002(a), such persons shall not be housed in the same room as criminal-detainees. Additionally, per § 4002(b), civil SVPA detainees must be kept in administrative segregation, which is defined as not involving deprivation of privileges other than that necessary to protect prisoners and staff.

But Jones' complaint was that he was housed (for what became two years) in County Jail administrative segregation area "T-sep," where he was subject to more restrictive procedures than the general jail population (GP). Specifically, he complained that his recreational activities were completely taken away (he got only one hour of exercise every other day), that his out-of-cell time was one tenth that of GP prisoners, that his phone calls and visits were more limited, that his law

library access was curtailed to only paging of case copies not longer than 20 pages, that he was denied participation in communal religious practice, and that he was subjected to numerous strip searches in front of female staff (some of which were outdoors in the middle of the night and/or at gunpoint or upon being prodded with large weapons).

Jones sued Sacramento Sheriff Lou Blanas and the County of Sacramento under 42 U.S.C. § 1983 for damages for his twenty-five months of suffering. [Jones was meanwhile committed to Atascadero State Hospital (ASH).] With limited law library access, his discovery requests were delayed beyond the sixty day limit and/or ignored by the defendants. The U.S. District Court (E.D. Cal., Case No. CV-00-02811 WBS(JFM)) granted the defendants' motion for summary judgment, and Jones appealed.

The Ninth Circuit considered as evidence all of Jones' contentions offered in motions and pleadings, where it had been attested under penalty of perjury, and reviewed it in the light most favorable to Jones. The court first reviewed de novo Jones' tardiness in filing the notice of appeal. The district court had held it was two days late, but Jones argued that under the "mailbox" rule, he was entitled to filing as of the date he delivered it to ASH authorities for mailing. Although ASH is a Department of Mental Health facility, and not technically a prison, the court ruled that in these circumstances as a civil commitment, he was entitled to no less protection than that afforded a prisoner.


The district court also failed to accord Jones equitable tolling per the applicable California statute (one year) when

it ruled Jones had exceeded the statute of limitations. The Ninth Circuit held that the touchstone of such tolling for prisoners ("actual, uninterrupted incarceration") applied with equal force to the case of one continuously detained under civil process who had pursued his claim in good faith.

Next, the Ninth Circuit reversed the district court's refusal to give Jones more time to conduct discovery on documentation of jail strip search records, which it deemed relevant to Jones' Fourth Amendment claim. The denial of Jones' free exercise claim as to isolation from communal religious services was reversed because he had provided clear evidence that his Christian faith must be practiced in a group forum. But his access-to-the-court claim was denied because he could not prove "actual injury" as required by *Lewis v. Casey*, 518 U.S. 343(1996). The questions of Eleventh Amendment immunity and supervisory liability were remanded to the district court which, by having found no constitutional violations below, had not reached them.

On Jones' substantive due process claim (overly restrictive conditions of confinement), the district court had denied relief by requiring Jones to prove he was denied the "minimal civilized measure of life's necessities." The Ninth Circuit rejected this standard because it was based upon the Eighth Amendment, whereas detainees are always accorded the more deferential Fourteenth Amendment protections, because detainees are not convicted. The court held that this protection held with even more force to civil detainees, as here. "The conditions of confinement for an individual detained under civil process but not yet committed must be tested by a standard at least as solicitous to the rights of the detainee as the standards applied to a civilly committed individual and to an individual accused but not convicted of a crime."

In sum, the court concluded that civil detainees awaiting adjudication are entitled to conditions of confinement that are not punitive, and certainly not worse than those they would suffer post commitment. Or, as it rephrased colorfully, "purgatory cannot be worse than hell." Accordingly, the Ninth Circuit reversed the summary judgment and remanded to the district court to permit the case to proceed. The court also instructed the district court to appoint counsel to represent Jones on remand. See: *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004). ■




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# First Circuit Upholds Order Privatizing Prison Health Care In Puerto Rico

by Michael Rigby

The U.S. First Circuit Court of Appeals held that an order governing the privatization of health care in Puerto Rican prisons was valid and did not violate the Prison Litigation Reform Act (PLRA).

This case is the latest iteration in a Byzantine class action lawsuit that has dragged on for more than 20 years. In 1979, a group of prisoners sued the Puerto Rican prison system alleging "dire shortcomings in virtually every aspect of prisoner confinement." The district court granted injunctive relief. Little progress was made, however, and years of legal wrangling followed. Some conditions eventually improved, but medical care was not one of them.

In 1997, a court-appointed expert concluded that the prison system's existing health care programs could never be brought up to constitutional standards and proposed the appointment of a receiver. The parties unanimously opposed this recommendation and instead suggested privatizing prison health care services through the creation of a non-profit corporation. On September 26, 1997, with both sides pledging their full support, the parties "drafted, executed, and filed a stipulation embodying this agreement." The district court endorsed the stipulation in 1998 and the Correctional Health Services Corporation (CHSC) was born. [See *PLN*, December 2003, p. 28 for more background.]

Unfortunately, CHSC has been plagued with problems despite a cash infusion of more than \$55,000,000. In fact, though "CHSC has made substantial progress toward reaching its stated goals," as of Au-

gust 2004 it had yet to treat a single patient. Noting the protracted delay and the mounting costs of establishing the program, the Secretary of the Puerto Rico Department of Health moved to vacate or terminate the privatization component pursuant to the PLRA. Following an evidentiary hearing, the district court denied the Secretary's motion holding that health care in Puerto Rico's prisons remained unconstitutional and that the privatization initiative satisfied the requirements of the PLRA. See: *Feliciano v. Serra*, 300 F.Supp.2d 321 (USDC D PR 2004). The Secretary appealed.

Of the Secretary's myriad claims on appeal, the First Circuit held that only four "are worthy of extended discussion." They were: 1) the district court "lacked general equitable power to grant a privatization remedy"; 2) the 1998 order was void under the PLRA; 3) with no progress in five years, the PLRA required termination of the prospective relief; and 4) the district court committed reversible error in the way it conducted the evidentiary hearing.

In short order, the First Circuit eviscerated each of these claims.

On the Secretary's first claim, the Court held that the underlying question was whether the general manner of relief sought--in this case privatization--was available at equity in 1789 (when Congress passed the First Judiciary Act). Obviously, privatization was unavailable at that time. However, "the nature of the remedy is no different than that of a garden-variety mandatory injunction." Thus, the district court did not err in approving the jointly agreed to privatization remedy.

Continuing, the Court held that the

procedure set out in 18 U.S.C. § 3626(b) of the PLRA "applies to any existing prospective relief, regardless of when that relief was first ordered." Although this clause allows the Secretary to seek termination of the prospective relief, the Court recognized, it does not "confer any right to argue, five years after the fact, that an order should be deemed void ab initio for lack of contemporaneous findings."

The Court next noted that upon a motion to terminate under § 3626(b), a court may continue prospective relief only if it makes a supportable finding of ongoing constitutional violations. In the instant case, "the district court found substantial deficiencies attendant to virtually every aspect of the inmate health care system." Additionally, the Court held that the privatization remedy was narrowly tailored, necessary, and the least intrusive means available as required by the PLRA. The appellate court therefore concluded that the privatization order met the PLRA's requirements.

Finally, the Court addressed the Secretary's claim that the district court made multiple errors during the evidentiary hearing. Initially, the Court noted that the district court had not impermissibly shifted the burden of proof simply because it directed the Secretary, rather than the prisoner class, to present his evidence first. The Court then observed that under the PLRA a "private side" agreement may not be used as a vehicle for prospective relief. In the case at hand, however, the agreement became a judicially enforceable decree once it was adopted by the district court.

Moreover, the Court held that the district court correctly entered judgment pursuant to Federal Rule of Civil Procedure 52(c). Under Rule 52(c), a court conducting a bench trial may issue a judgment on partial findings. Here, "even after taking the Secretary's case into account, the court determined that the plaintiffs had sustained their burden of proof showing pervasive and persistent constitutional violations"; therefore, the court's judgment was valid.

Based on the above findings, the First Circuit affirmed the district court. *PLN* has reported other rulings in this case. See also *PLN*, March 2002, p. 8. See: *Feliciano v. Rullan*, 378 F.3d 42 (1st Cir. 2004). The supreme court denied review in this case. ■

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## News in Brief:

**Arizona:** On October 4, 2005, three prisoners escaped from the tent city jail in Phoenix. Two of the three escapees were recaptured a day later driving a stolen car. The third escapee was captured two days after escaping. The men climbed over electric fences and razor wire to escape.

**Arizona:** On September 8, 2005, Maricopa county police shot and killed probationer Darnell Clement, 26, when he showed up at a probation office in Scottsdale where he had been told to report to have his probation revoked. Clement was on probation for beating his wife and was having his probation revoked for a similar domestic violence incident.

**Arkansas:** On October 7, 2005, Glen Andis, 30, a prisoner at the Cummins Unit in Varner fell into a corn filled silo and suffocated. Andis had been repairing a hole in the side of the bin when he fell into the corn and could not get out.

**California:** On September 22, 2005, over 200 prisoners at the Reception Center-East facility in Chino rioted in a cell block and smashed windows, destroyed cell doors, light fixtures and toilets in their cells. Guards abandoned the unit during the uprising. Guards eventually subdued the prisoners using tear gas and pepper spray, eight prisoners were hospitalized afterwards. Several dozen of the rebellious prisoners were then shipped to the Kern Valley State Prison in Delano where 19 began an uprising in a holding cell. The unit in Chino required a week of repair. Media reports gave no reason for the rebellion.

**Colorado:** In early September, 2005, Solomon Mikael, 34, a guard at the Denver jail, was arrested and charged with three counts of bribery and three counts of selling contraband. Prosecutors allege Mikael sold marijuana and cigarettes to jail prisoners.

**Florida:** On September 28, 2005, Sarasota county jail prisoner George Dupree was pat searched before entering county judge Judith Goldman's courtroom and a sheriff's deputy discovered a .38 caliber snub nosed revolver loaded with hollow point bullets concealed in his underwear. Police were investigating to determine how Dupree got the gun and how it was missed when he was pat searched upon leaving the jail for court. Dupree has been charged with assorted felonies related to the gun incident. He had originally been arrested on outstanding warrants from

another county for resisting arrest and heroin possession.

**Florida:** On September 30, 2005, Hernando county jail guard Nathaniel Pullings, 33, was fired after he entered a female housing unit in the jail and ordered the prisoners to strip naked. Pullings was working in the jail laundry when he entered the women's unit and announced "You bitches strip and wrap a towel

around you." Ostensibly so he could wash their laundry. The comment was heard by the husband of a prisoner who was speaking on the phone at the time. Corrections Corporation of America runs the jail.

**Georgia:** After 30 years on death row, Jack Potts, succumbed to liver cancer and died on September 2, 2005. Potts was convicted of murder in 1975 and sentenced to death for kidnapping and killing an auto

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## News In Brief (cont.)

mechanic. He was retried on the charges in 1988 and again sentenced to death.

**Hawaii:** On October 3, 2005, three prisoners escaped from the Hawaii Community Correctional Center by removing a screen and louver from a restroom window and climbing down 30 feet of bed sheets.

**Illinois:** On September 9, 2005, the Jacksonville Correctional Facility was locked down for four days after an unnamed assistant warden at the prison lost his set of master keys to the cells and prison wings of the facility.

**Indiana:** On September 6, 2005, James Pridmore, 36, and Delbert Tompkins, 30, escaped from the Porter county jail in Valparaiso by climbing into the ceiling of their jail cell and leaving through the roof. It was the first escape since the jail opened three years ago. Sheriff Dave Reynolds said the escape was the result of "an architectural flaw." "What they did wasn't supposed to happen," Reynolds said. Both men were recaptured a few hours later and have been charged with escape.

**Japan:** The Japan Federation of Bar Associations has asked the Justice Ministry to investigate the deaths of seven mentally ill prisoners who died after being placed in solitary confinement between 1999 and 2003 and being denied medical treatment.

**Kansas:** On October 7, 2005, the Kansas Supreme Court ordered the removal of Saline county district judge George Robertson, 56, for viewing adult web sites on his courthouse computer. Robertson had been a judge for ten years.

**Massachusetts:** On October 5, 2005, Suffolk county jail guard Paul Davis, 38, was sentenced to 30 months in prison after pleading guilty to bringing heroin, cocaine, marijuana and Oxycontin into the jail to sell to prisoners.

**New York:** In October, 2005, the New York court of appeals, 2<sup>nd</sup> Department, suspended Queens prosecutor Claude Stuart for three years after he lied to the trial judge in the 2002 murder trial of Tyrone Johnson by claiming he did not know the whereabouts of a witness whose testimony contradicted the story of a key prosecution witness to the alleged murder. This appears to be the first time in memory that a New York prosecutor has been suspended or disbarred for lying or other misconduct carried out in the course of

their duties. Stuart now works, or worked, at the law firm of Brand, Glick and Brand in Garden City, NY. Johnson was granted a new trial, convicted and sentenced to 20 years in prison.

**New York:** On August 30, 2005, Nassau District judge David Gross, 43, was arrested by FBI agents after telling undercover police, on tape, that he would gladly launder money and sell their stolen diamonds. Which he apparently did. 14 others were also arrested on charges related to illegal gambling operations allegedly run by the Genovese crime family. Gross has been a judge since 1999 and was suspended when the arrest was announced.

**New York:** On October 2, 2005, Kimberly Dwyer, 16, was arrested by state police on charges she was smuggling heroin into the Gouverneur Correctional Facility.

**New York:** On September 15, 2005, criminal defense attorney Dawn Florio, 42, was arrested by guards at the 100 Centre Street jail in Manhattan after they saw her attempt to give her client, Jose Marrero, an accordion folder containing 300 assorted unidentified pills, a turkey sandwich, two sticks of deodorant, three bars of soap, cigarette rolling papers and a copy of the magazine *Felon*. She was arraigned and allowed to continue practicing law and representing clients, including Marrero, while her case is pending. She is charged with two counts of promoting prison contraband. While a district attorney in the Bronx, Florio was fired when she provided a fake alibi for a boyfriend being investigated on burglary charges. Marrero is awaiting trial on drug charges.

**North Carolina:** On September 16, 2005, Dennis Toole, a guard at the Johnston county jail was arrested after he sold an ounce of marijuana to an undercover police officer. Police claimed Toole was going to sell drugs to jail prisoners which seems a leap given he was selling drugs to police.

**North Carolina:** The Department of Corrections announced that on January 1, 2006, it would ban indoor smoking in all of its facilities by staff and prisoners alike.

**Ohio:** On September 1, 2005, Jamey Vincent, 29, a guard at the Lebanon Correctional Facility was arrested on charges he was smuggling marijuana into the prison to sell to prisoners.

**Ohio:** On September 8, 2005, jail prisoner Shawn Booker, 24, hanged himself in the Warren county jail. On September 11, 2005, Larry Spurlock, 35, hanged

himself as well.

**Oklahoma:** On September 6, 2005, Juston Cox and his brother Jayson escaped from the McIntosh County jail by chiseling through the jail's ceiling and leaving through an air vent. Jayson was recaptured 20 minutes after the escape, Juston was captured on September 22, 2005, after crashing a stolen pick up truck near a golf course.

**Pennsylvania:** On October 4, 2005, Allegheny county prosecutors dropped criminal solicitation charges against Jason Korey, 23, Keilan Walls, 29, and Shawn Davis when Rayco Saunders, the man the three defendants were accused of conspiring to kill, showed up at the courthouse wearing a t shirt that said "Stop Snitching." Saunders had refused to cooperate with police during their investigation. The murder plot stemmed from a fight over a girlfriend. Korey is already serving a 33 year sentence for murder. District attorney spokesman Mike Manko stated: "As part of our community outreach efforts, this office frequently lets both adults and young people alike know that the 'Stop Snitching' message is counter productive to the work that law enforcement on all levels does each and every day." How true.

**Pennsylvania:** On September 22, 2005, Bonita Kirby, a guard at the Lebanon County jail, was sentenced to five years probation for allowing jail prisoner Tina Proudfoot Myerhoffer escape while Kirby was transporting her back to the jail in a van. Myerhoffer claimed Kirby gave her the van keys after she told Kirby she was concerned about her health and wanted to see her husband. Myerhoffer was recaptured two days later.

**Pennsylvania:** On September 23, 2005, James Brown, 49, was sentenced to 12 to 36 months in state prison for possessing a cell phone in the Northampton county jail. Brown had pleaded guilty to the charge of possession of a telecommunications device by an inmate.

**Pennsylvania:** On September 26, 2005, Thomas Gildard, 43, was charged with resisting arrest and disorderly conduct when he refused to leave a bar in Jeannette and harassed patrons. Gildard, a Westmoreland county jail guard, had called in sick to work at the time he was at the bar drinking. Jail warden John Walton ordered Gildard to reimburse the county for the day of sick leave and took two days of pay from him.

**Pennsylvania:** On September 28, 2005, Jose Orejuela and Jorge Figueroa, prison-



ers at the Federal Correctional Center in Allenwood were arrested along with 20 other people and charged with conspiring to import cocaine into the United States. Both men are already serving sentenced related to drug importation. They are accused of supervising a drug smuggling operation that brought cocaine into the US via ports from their prison cells.

**Sri Lanka:** On October 4, 2005, guerrillas from the Tamil Tigers of Tamil Elam ambushed a prison van, wounding one guard and allowing four prisoners to escape. The Tamil Tigers seek an independent nation for the Tamil minority.

**Tanzania:** On September 21, 2005, nine Ukonga prison guards were charged in the Kisutu Resident Magistrate's Court with beating two journalists who had been detained.

**Tennessee:** On August 25, 2005, Joseph Krist, 34, a prisoner in the Wilson county jail locked himself in a cell with 8 female prisoners for 11 hours while getting cleaning supplies. Chief deputy Johnnie Deagen said "Everyone says nothing happened, they only talked."

**Texas:** On September 7, 2005, protestors gathered outside the home of attorney Ron Mock to confront him over the botched

defense of death row prisoner Frances Newton, who was executed later that day. Mock has the unique distinction of having represented the largest number of defendants convicted and executed in the United States. The state bar of Texas has suspended Mock from practicing law for 35 months for disciplinary issues in a different case.

**Venezuela:** The nation continues with its unenviable record of the deadliest prisons in the Americas. As of October 4, 2005, 314 prisoners had been murdered in the nation's 32 prisons which hold 20,000 prisoners and 517 had been seriously injured. In 2004 327 prisoners were killed and 655 seriously injured.

**Vermont:** On September 7, 2005, Windham County court clerk Christine Murray, 37, was charged with fraudulently converting court funds by stealing \$17,925 from the court's bail fund over a two year period. The theft was discovered when two defendants sought the return of their bail money on a day that Murray was not at work and co-workers could find no record of the defendant's bail. When confronted by a supervisor Murray confessed.

**Virginia:** Seeking to conserve water, officials at the Wallens Ridge State Prison, a 1,200 bed maximum security prison,

have limited prisoners to three showers a week, four toilet flushes per day and is providing prisoners with bottled drinking water. The restrictions were imposed when the town of Big Stone Gap declared a water emergency and prohibited all non essential water use such as car washing and lawn watering due to low water levels in Big Cherry lake, the water supply for the town and prison. Human Rights Watch has complained to Virginia prison officials that the conservation efforts endanger prisoners' health and exposes them to the risk of dehydration. The prison responded it was ordered by the town to reduce water use by 50 percent.

**Wisconsin:** On October 3, 2005, Lucas Gardner, 20, was sentenced to four years in prison after pleading guilty to reckless homicide after he provided Anthony Ray, 27, with heroin and cocaine which Ray ingested and overdosed on. Both men were prisoners in Rock County jail. Frank Perez, 20, another prisoner who pleaded guilty to smuggling the drugs Ray overdosed on was sentenced to six years in prison. Gardner and Perez were on work release where Perez obtained the drugs which Gardner brought into the jail concealed in his rectum. 🖐

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## California Family Visiting Appeal Denied

The California Court of Appeal affirmed the denial of a state prisoner's quest for injunctive and declaratory relief that would have invalidated the 1996 amendments to the Department of Corrections' (CDC) family [overnight] visiting rules excluding him from participation. The case had received much publicity in prisoner newsletters and publications.

Bernard Gordon, sentenced to life without parole (LWOP) in 1987, was denied family visiting by virtue of the 1996 amendments to prison regulation Title 15, § 3177(b)(2) [formerly § 3174(e)], which expressly excluded LWOPs. He had attacked the regulation as being procedurally defective under the Administrative Procedures Act (APA) (Government Code §§ 11340 et seq.) and countered CDC's argument that the regulation was

"reasonably necessary."

In an unpublished opinion, the appellate court affirmed the San Francisco Superior Court's ruling that the APA claim was moot because CDC had reenacted the challenged regulation in 2003, which had the effect of curing any prior defects in the earlier enactment. As to the second claim, the court concluded that CDC's determination was not "arbitrary and capricious" because it satisfied Government Code §§ 11340(c) and 11350(b)(1)'s requirement for substantial evidence to support exclusion of certain prisoners from the family visiting program on the grounds of "reasonable necessity." See: *Gordon v. California Department Corrections*, California Court of Appeals, First Appellate District, Case No. A103737, 10/28/04; San Francisco County Superior Court, Case No. 322862. ■

## Other Resources

### ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

### Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

### Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

### CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP; PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

### Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rulings, administrative developments and news

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### Justice Denied

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### November Coalition

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### Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

### Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.



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**Represent Yourself in Court: How to Prepare & Try a Winning Case**, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

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# PRISON

## Legal News

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November 2005

### Prison Design Boycott—a Challenge to the Professional Business of Incarceration

*by Raphael Sperry, ADPSR National President, and the Prison Design Boycott organizing group: Ariel Bierbaum, Juan Calaf, Karen Kearney, and Kathleen Monroe*

#### Saying “No” to Prisons

In September 2004 the non-profit organization Architects / Designers / Planners for Social Responsibility (ADPSR) issued a call for architects and design industry professionals to quit working on prisons. ADPSR's Prison Design Boycott campaign challenges the role of design professionals (a term that encompasses architects, engineers and planners) within the prison-industrial complex and society at large. The boycott's immediate issues would

seem to be how necessary designers are to prisons, and conversely how much prisons mean to designers, especially in economic terms. But the professional, ethical social issues raised by the boycott go far beyond the boundaries of those who draw up the blueprints, CAD files and specifications that outline state power. The boycott also creates a collective voice for social justice and a shared platform for organizing and advocacy among design professionals, potentially signaling a departure from our established social role of implementing the will of the wealthy and powerful on the built environment. In ADPSR's experience, many design professionals—ironically even those engaged in prison work—understand the need for community development as a holistic method of improving social conditions, including improving public safety and reducing crime. And indeed, design professionals have a special role to play in envisioning the physical infrastructure that would accompany renewed investments in affordable housing, schools, community centers, and other public needs. As a result, the Prison Design Boycott carries both a strong negative message, “No More Prisons,” and a positive counterpart, “Yes to Community Development.”

In ADPSR's analysis, the political and economic factors behind the current lack of community development in the United States are related to the prison-industrial complex in multiple ways. The

contrast between the two is particularly sharp in public spending, where one can actually chart the transfer of funds from education (especially higher education) to imprisonment. The role of planning professionals in this decision involves more than just commenting on states' annual budget process, however, as the cost of planning new prisons must be justified by planning on a future population of criminals to incarcerate. Such population forecasts are the stock in trade of planning as a profession; they are in fact central to the field's definition and claim to exclusive expertise. While never explicit, the expectation inherent in planning for a larger prison population is that crime reduction will not succeed—that today's children will be tomorrow's prisoners. De-funding education, and community development more generally, ensures that this expectation will be realized.

At a deeper level, ADPSR also believes that the lack of social development programs—and especially the lack of political will to fund them through government—stem from the negative social values that support incarceration as a general-purpose response to crime and push for harsh prison conditions. Examining the connection between right-wing Christian conservative fundamentalists and the forces of elitism and corporate power is beyond our scope, but it is our contention that the ability of these groups to control policy is dependent upon the apathy and/or consent of the majority of our fellow Americans. Undermining the

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**Rollin Wright**

**EDITOR**  
**Paul Wright**

**ASSOCIATE EDITOR**  
**Alex Friedmann**

**EXECUTIVE DIRECTOR**  
**Donald W. Miniken Jr.**

**COLUMNISTS**  
**Mumia Abu Jamal, Andrea Cavanaugh, Denise Johnston, Daniel E. Manville, Kent Russell**

**CONTRIBUTING WRITERS**  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams & Mark Wilson**

**LAYOUT**  
**Lance Scott/Catalytic Communications**

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## **Prison Design Boycott (cont.)**

currency of these values in mainstream culture, and ultimately transforming them into more positive values of cooperation, tolerance, and social justice, is an important strategy for achieving a broad range of changes to prisons (as well as other systems of coercive power). ADPSR's Prison Design Boycott is an attempt to initiate this transformation among the group of Americans within our constituent professions, and also to inject a new voice into society at large that can work to effect this transformation. Some have suggested that given widespread public fear of crime, challenges to these negative social values should start with more "approachable" topics, such as protecting social security. In contrast, ADPSR believes that prisons, as the most concrete example of authoritarian control, are *the* most appropriate place in which to begin a transformation of how power functions in our society. For design professionals, this debate engages those of us entrusted with the shaping of our built environment in trying to shape a more just society.

Despite ADPSR's focus on organizing our own professional—and largely white and middle- to upper-class—group, we recognize the importance of organizing across racial and class lines, not only for the ultimate success of our social goals but also for the integrity of our own organizing project. A major goal of the Boycott is to create opportunities for privileged, high-status professionals to form partnerships with less-privileged groups more directly impacted by the prison-industrial complex at the individual and structural levels. As a related point, the Boycott has already brought ADPSR into contact with professional groups of people of color, who have a diversity of views on prison issues. Most productive so far has been our work with the Planning and the Black Community Division of the American Planning Association (a group of 250 or so African-American planners within the 35,000-member APA). ADPSR is encouraging and supporting PBCD to raise resistance to the prison-industrial complex as a policy item for APA as a whole—a move that would create debate about the PIC and offer educational opportunities among hundreds of APA members, regardless of the outcome at the organizational level.

## **Some Numbers: Architecture Firms and Prison Design**

Many professionals play a role in the design of prisons, including many types of designers and planners. ADPSR focused our quantitative investigation on architects both to draw boundaries around a cohesive study group, but also because architects traditionally play a leadership role within the design team on construction projects. In addition, public licensing of architects provides architects with a particular status in regards to new construction: in general, buildings intended for human habitation are required to be designed by a licensed professional. The nominal social return for rewarding architects with this monopoly is that architects agree to act in the public interest and accept the requirement to safeguard public "health, safety, and well-being." Given the glaring (to some) contrast being between mass incarceration and public well-being, architects would seem to be fertile ground for the boycott. In addition, full participation by architects could indeed have the effect of halting prison construction (at least in theory—see below). Lastly, we recognize—with real consternation—that among the general public the title of "architect" carries the highest status connotations among the allied professions, and hence is most likely to get the most attention. At least rhetorically, architects are at the centerpiece of the design process, including prison design.

ADPSR would like to make it very clear that we are not trying to shame, embarrass, or single-out the design firms that do prisons as "bad" architects. We have multiple reasons for saying this. First, we understand from personal conversations that many people engaged in prison design are attempting to improve conditions for people in prison, who often otherwise have few advocates. This intention is worthy of respect, and while other prison designers may be more interested in earning money, we know that they do not feel that they are deserving of special scorn as compared to, say, designers of shopping centers or subdivisions that promote urban sprawl or have other negative social consequences. Second, we have benefited from, and continue to deeply appreciate, dialogue with prison designers. In many ways, they know more about prison design than we do, especially when looking at the level of individual institutions, although they see it in a different context. Prisons are multi-



## Prison Design Boycott (cont.)

faceted institutions that have surprising corners, and we have learned much and gained a much stronger understanding of them thanks to our conversations with their architects. Finally, just as we recognize that the line between those in prison and those inside is not a simple division of the “good” from the “bad,” we also recognize that all-too-easy error of judging designers by the type of work they do. We make no personal evaluations because of the type of work these fellow professionals of ours are engaged in, and we welcome their continued engagement with ADPSR.

### Sources and Overview

*Reed Construction Data's 2002 ProFile* is a construction industry resource that lists a large percentage of all architects in the United States and gives their self-reported answers to a range of survey questions including the types of work they perform and the percentage of work that falls into each category. The *ProFile* is partly sponsored by the American Institute of Architects (AIA), the largest professional organization of architects in the U.S. (similar to what the AMA is for doctors). The *ProFile* has listed “corrections” as a distinct field within architecture since the early 1990s, which is in itself an indication of the growth of the field within the profession. While the *ProFile* is a highly imperfect source (for instance, because many participants do not report all information, or use the same field for different data), the list of “corrections” designers suggests some revealing trends about the architecture firms that design prisons. To put the *ProFile* data in context, we used aggregate data about the

architectural profession from the AIA fact sheet *Facts, Figures, and the Profession*, [http://www.aia.org/press\\_facts](http://www.aia.org/press_facts), the AIA's 2003 *Firm Survey*, and *Building Design & Construction* magazine's “Giants 300” listing of 2005.

Overall, prison design is a small fraction of the design business as a whole. The AIA's breakdown of total professional revenue for 2003 gives “Justice” as 2.3%; in this context, “Justice Architecture” refers to the design of prisons, courthouses, and police stations. A rough estimate then is that prisons are about one-third of this 2.3%, or maybe a little more, since they are bigger and more expensive than police stations. We would estimate that prison work is 1% of all revenues for the architecture profession—hardly a bread-and-butter issue. Given that the total gross revenue for the architectural profession was \$25.5 billion (also in 2003), prison design would seem to be worth around \$250 million per year (40% of which is for renovations or additions, rather than new buildings). By comparison, according to the American Correctional Association's *Directory* for 1998-99, annual prison construction expenditures were over \$4.3 billion (including \$1.3 billion in maintenance and repair projects).

### The Prison-Design Workforce

673 architecture firms reported designing prisons in 2002. While there is probably some under-reporting, given the 16,500 architecture firms in the US, this is about 4% of architecture firms. These 673 firms together employ 37,000 workers, or almost 20% of the total design workforce. How can 4% of firms employ 20% of the workers? Prison design is weighted towards larger firms. Counted as full-time workers, we would estimate that between 2,000 and 7,000 people are actively engaged in prison design in the United States, approximately half of whom are architects (many firms in the *ProFile* did not report some of the information for calculating this, requiring us to extrapolate). We can estimate that the average gross revenue per designer is between \$35,000 and \$125,000; given the typical earnings of architecture firms, the higher numbers are more likely, making a lower number of total workers more likely.<sup>1</sup>

By comparison, as of this writing (November 2005), ADPSR's Boycott campaign has over 400 signatures, including over 100 licensed architects. While this is less than 1% of the profession over all,

this is between 4-20% (probably more than 10%) of the number of total prison designers. It is quite conceivable that within another few years of work, the number of designers pledging not to work on prisons will be larger than the number of designers actively doing prison design. To our knowledge, only one signer was previously engaged in prison design (see below), but given the small numbers involved, each individual counts. Our student signers are also significant because they represent the next generation of sought-after talent. To quote Art Gensler, chair of the largest design firm in the U.S., “getting key people is a big issue for us, and for our [engineering] consultants ... young people don't wake up in the morning and say, ‘Gee, I want to do ductwork for the rest of my life.’”<sup>2</sup> The threat to the prison design business from a generation of designers who don't want to do prisons either could be substantial.

### Specialists And Generalists

Of the 673 firms involved in prison design, only a tiny handful of firms (probably 10 or so) get 50% or more of their revenue from prison design. These are small to mid-size firms, with some sole practitioners (i.e. one-person businesses). We suspect that the lone individuals tend to do consulting and planning to prison agencies rather than direct design work. The largest firm in this group, Shremshock Architects, Inc. of Ohio, has 31 architects and reported that 85% of their work was in corrections.

What does the existence of these specialist firms mean? For one, it confirms the influence of the PIC by showing private industry's adaptation to it. But they stand out more by counter-example: most firms that design prisons do not over-specialize in it. Over 90% of the firms reporting corrections work report that it accounts for less than 20% of their billings, and for over 60% of firms doing corrections it is less than 10% of their billings. On the other hand, larger firms tend to have specialized teams for handling different areas of work—prisons, airports, apartments, etc.—that are comparable to separate design firms. So a large firm like HDR Architecture, with 689 staff people and 22% of their work in prisons, probably contains an internal group of 100-150 people dedicated to prison design—much larger than the team at Shremshock.

Prison projects are reputed to be especially lucrative. A peculiarity of the architectural world is how this lucrative

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business element is used—not necessarily for greater take-home bonuses, but to subsidize design efforts. In other words, prison work is said to give design firms the extra staff time to make other projects better—maybe even projects that serve public needs such as affordable housing. Of course, the idea that the needs of disadvantaged groups can only be met with compromises that involve losses in other areas is a staple of staving off real progress for social justice.

### The Big Firms

Some of the largest architecture and engineering firms in the world participate in prison design, including HOK (the #1 largest Architecture-Engineering firm in the country, with \$223 million total revenue in 2004) and URS Corp. (the U.S.'s #1 largest Engineer-Architect, a frequent military and "homeland security" contractor, with \$1.9 billion in 2004 revenue). A brief look at the prison-industry trade magazine *Corrections Today* found ads from 6 design firms, including DLR Group (16 offices, which range from 5%-65% corrections work), the Durrant Group (30% prisons work), HOK, HDR (8 offices averaging 22% prisons work), Heery International (816 total staff), and STV Architects. Of course only the biggest advertise in this fashion: all 6 are among the top 100 largest firms in architecture and engineering.

It is sensible business practice for firms of virtually all sizes, and especially for large businesses, to diversify in order to be prepared to resist downturns in any one market area. If prison construction dries up (as we intend for it to), specialized units within larger firms can be re-assigned to other project types. One critique we have frequently heard of this phenomenon is that a common area of re-specialization is public school design, which shares features with prison design such as dealing with complex and bureaucratic public agency clients, additional specialized building codes, and increasingly complicated mechanical and security requirements. The fear that a wholesale move from prison design to school design will produce schools that are more like prisons seems realistic in the context of a society employing more and more authoritarian approaches to education such as "zero-tolerance," high-stakes testing and dress codes, not to mention an increased police presence in respond to hysteria over school shootings.




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### On The Other Hand

We would like to note that prison design is by no means essential to success. Prison design is 1% of the total earnings of the profession, and over 95% of architecture firms and architectural workers do not perform prison work. Of course, prison design is highly specialized and hard to break into, but on the other hand it is less competitive than many sectors and highly lucrative. In this context it is significant that the # 1 largest architecture firm in the country, Gensler, does not engage in prison design at all (anecdotally, likely for liability reasons). Similarly, Arup, one of the world's largest engineering companies, will reportedly not work on prisons or nuclear power plants, although ADPSR has not succeeded in confirming the company policy or the reasons behind it. Other very successful medium-sized architecture firms avoid prison design as a matter of policy (rather than simply because of alternate specializations); we hope that ongoing work on the boycott will produce conditions in which more of the profession will feel comfortable in making a public commitment to social justice.

### Prison Design and Individual Designers—Responses to the Prison Design Boycott

The Prison Design Boycott has succeeded in generating a significant amount of discussion about the ethics of prison design—and, by extension, of prison in general. The design press—*Architectural Record* and *Architecture* magazines, architecture websites and blogs, etc.—have published pieces about the campaign and various responses to it. We have also

received many individual responses from those signing our pledge, and a small number from those angry at our campaign. Some responses have come from people in prison or formerly incarcerated, including one licensed architect. In so far as ADPSR hopes to effect transformation of ethics about prisons (and violence and militarism more broadly), reaching individuals is an important part of our work.

### Positive Responses

One of the early major successes of the boycott campaign was the decision by Matthew Smith, an employee at prison design powerhouse DLR Group, to quit his job in favor of boycotting prison work. Matthew (now an ADPSR board member and active boycott organizer) wrote:

“I was hired a few months ago by the Seattle office of DLR Group, a national architecture/engineering firm that promotes itself as the largest justice architecture firm in the US (they also have corporate, retail, & education departments). And, after a brief stint in their retail studio, I was placed in the justice studio where I have been involved with several large-scale prison projects.

“For weeks, I’ve been troubled by the work that I was assigned to. While there are many fine individuals here, the firm’s ‘bottom line’ has fed my worst fears about a profession that sells itself out to the highest bidder without regard to social consequences. The whole company eagerly embraces new prison jobs, as the fees eclipse all other design fees—especially those for schools. Our principal architect—an old modernist himself—boasts of the efficiency with which these jobs can be accomplished on account of the repetition involved in the plans. But, as a rather idealistic young professional, I have been increasingly depressed listening to conversations about suicide-resistant materials, mechanical systems that can handle pepper-spraying (gassing!), and the all-new razor-fencing...

“The psychological hold on the office staff as to the ‘correctness’ of our job is dubious. I have been told stories of prison walk-throughs where, for instance, these skilled professionals were locked in the cell of the ‘Green River Killer’, the infamous NW serial killer, for 10 minutes to ‘see what it’s like on the inside.’ I am left wondering how these otherwise intelligent people are duped into viewing each prisoner as a Green River Killer—effectively rationalizing the

work they do.”

Another view on the role of prison architects came from former San Francisco assistant sheriff Michael Marcum, who ran the city’s jails for a number of years and was involved with at least four major construction projects during that time. Despite his former job, Marcum is an outspoken advocate of prison reform and abolition, and he assisted ADPSR as part of the selection panel for a poster competition associated with the boycott in September 2005. In our discussion, Marcum recalled prison design meetings:

“With all the people around the table—my staff, the budget guys, cops, and others—it was always the architects who would stick up for the things that would make conditions more humane for the people in jail, so I think they’re already thinking this way. All it would take is a little extra step for them to see that more jails aren’t the solution at all.”

### Negative responses

On the other hand, the two most common negative responses the boycott campaign has received are from people who don’t want fewer prisons and dislike the campaign in general, and from people who feel that the negative message of the campaign—specifically, the call *not* to build things—is in opposition to the essential purpose of architects and architecture. The first response presents a basic conflict in values and world-view that is usually fairly entrenched—in our experience, when someone is convinced that retribution is essential to social order, or that prisons stand for an important social principle, even a lengthy conversation is unlikely to change his or her mind (although it may earn his or her respect).

The second response, objecting to the “not building” message, rather than the “not prisons” message, runs that if architects (especially talented and concerned ones) don’t participate in prison design, then prison buildings will be even more inhumane and dangerous than they already are. We think this puts design professionals in an essentially passive position—that we must make the best of all the projects we are offered or that society desires—but this is a hard view to dissuade many architects from, especially as it ties in to (somewhat well-founded) fears that as generalists in a design-construction industry moving towards increased specialization, architects have increasingly less to offer.<sup>3</sup> Individuals who join the

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design professions tend to believe that they can find design “solutions” to most “problems,” an attitude that is strongly reinforced in many ways by professional training. People with this attitude seem to see ADPSR as detracting from the relevance of our shared professional skills to dealing with social problems, but this is probably only a polite way of indicating a deeper displeasure with the boycott. While the architects who actually design prisons (or more often, those designing county jails where some design flexibility is allowed) may indeed be advocates for good design to benefit people in prison, those defending the need for “better” prisons from the sidelines have substantially less at stake.

### Abolition And Reform

Taken another way, the concern that worse prisons will result from design without architects reflects a conflict between prison reform and prison abolition views. In this instance, prison reform (“we need good architects to make better prisons—and if we have better prisons, there will be less recidivism and hence improved public safety, leading ultimately to less people in prison”) is advanced as the preferred option usually because prison abolition is either inconceivable or grossly misunderstood. We’ve gotten “why not just open the gates and let everyone in prison out?” as a response a number of times. We often first try to reply that saying “no prisons” and “no more prisons” are different things, but this is only a temporary measure, intended to de-escalate the conversation to see if any real exchange is possible. While these questioners misunderstand the time-frame in which we are working, they do grasp the basic challenge the boycott poses to prisons as part of business as usual. To our satisfaction, not too much of the debate about the prison boycott focuses on how costly prisons are from a taxpayer perspective. Instead, the moral and ethical issues around prisons are brought more to the forefront, allowing a discussion about ends more than means.

As a social justice group, prison abolition to us is part of envisioning an ideal future: a society in which respect for every individual is central to social interaction, and where violence and coercion, rather than their victims, are marginalized. We envision healing and prevention as a social response to injuries, as an alternative to assigning blame. As we think that in the abstract, if these ideals were enacted

by everyone, prisons would indeed not be necessary. For us, whether or not this ideal is achievable is not that important; it makes good sense to try to get as close to this goal as possible even if you believe that 100% achievement will never be reached. Prison reform, in contrast, indicates a more pessimistic view of human nature, a willingness to accept human failings without challenging them. While we do not object to those who think that some people will always be violent, we dis-

agree with the conclusion that as a result society must also be violent, whether the rationale is retribution or public safety. No matter what the circumstances, we reject the idea that society must deliver violence and abuse in response to violence. That circle must be broken.

Architects, designers, and planners are, in our experience and from what research exists, more “liberal” in social outlook than average Americans. Nonetheless, the idea of prison abolition is a

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## Prison Design Boycott (cont.)

difficult one for design professionals to understand, let alone to adopt. We believe that the difficulty of this task indicates the power of the transformation it poses to the status quo positions of power and violence.

### Concluding Thoughts: Prison Buildings and Building Community

In a recent discussion with other prison abolitionists hosted by Critical Resistance and the UC Berkeley Law School, we suggested that one unique feature of the prison design boycott that might make it valuable to other activists is its focus on prison buildings. While one could argue, with good reason, that a central necessity of the struggle against the PIC is to humanize its victims in the face of constant demonization, we hope readers would also agree that drawing attention to the structural features of the PIC is just as essential, not least because it is the PIC's structural operations that operate with the least regard for individual humanity. The focus on prison buildings (or structures, to be literal) provides an excellent opportunity for discussing the structural operations of the PIC, from investment decisions, to the dehumanization inherent in the repetitiveness of prison designs, to the demographics of the people who fill them.

As we mentioned at the beginning, we at ADPSR also find that contrasting the structures we don't want immediately brings to mind the structures we do want—both in physical terms: schools, community centers, day-care centers, public parks, safe neighborhoods, etc.; and in societal terms: fair access to employment, equality rather than prejudice and discrimination, affordable health care systems for everyone, and more. We believe that achieving these broader goals will require widespread support from all sectors of society, and we view our attempt as one piece of this necessary organization. We recognize and deeply appreciate the groups of lawyers who are advocating for legal reform, taking responsibility for their sector as we hope to for ours—the work of groups including Justice Policy Institute and the Sentencing Project have greatly influenced our understanding of prison issues and criminal justice. We also deeply respect the organizing and advocacy by those most directly oppressed by the PIC,

and have learned even more from groups like Critical Resistance and All of Us or None, who explain what is at the root of incarceration.

For people who work every day envisioning the built environment, the prison design boycott is an attempt to translate the vision of healthy and productive communities in a just society into a means of organizing around the work that we do every day, and to take responsibility for the part of society we are responsible for. ADPSR welcomes contact and partnership with allied organizations and we hope to support our allies in the ongoing struggle for social justice. We hope that as more people find more ways to organize, together we can build the society that we aspire to, both with bricks and, more importantly, with shared dreams. ■

*[More information about the campaign is available on the ADPSR website: [www.adpsr.org/prisons](http://www.adpsr.org/prisons)]*

### Footnotes

<sup>1</sup> We had hoped to have significantly more detailed research available on this topic for this article.

However, most information about the construction industry is proprietary and, while not tremendously expensive, beyond ADPSR's budget to acquire. Furthermore, despite support from individuals within the AIA, ADPSR's request for joint research with AIA's Academy of Architecture for Justice was rebuffed. We would welcome further contributions to this research from allied professionals or other sources. Please contact us at [prisons@adpsr.org](mailto:prisons@adpsr.org).

<sup>2</sup> Stribling, Dess, "The War for Talent," *Building Design & Construction*, July 2005, p. 74

<sup>3</sup> Saying "if we boycott prisons the government will just get civil engineers to do it without us" plays into the professional fear that architects are on the verge of being replaced by engineers and construction managers. ADPSR tries hard to counter this fear with the message that design professionals can earn a position of greater social trust by demonstrating ethical leadership. We argue that architects can and must gain ground in the industry precisely by holding the projects we do take on to a higher ethical standard than engineers and construction managers do. The design-construction industry is contested terrain in many other struggles for money, control, authority, and prestige; we have yet to see if our attempt to inject social justice into one such struggle can either raise support for social justice within the industry or actually help the groups that embrace social justice in their more day-to-day concerns.

## North Carolina Prosecutors Reprimanded For Intentionally Withholding Crucial Exculpatory Evidence in Capital Case

by Matthew T. Clarke

Alan Gell cried recently after a North Carolina State Bar panel issued a mere reprimand, the least discipline possible, to two former prosecutors who withheld evidence in his capital murder case. "Here I am again and with the system letting me down again," said Gell.

How did the system let him down the first time? By sentencing him to death in 1998 and having him spend over four years on death row for a murder he did not commit. His conviction was reversed due to withheld evidence and he was acquitted in a second trial in February 2004.

Well, wrongful convictions happen all the time, you say. True, but it doesn't always happen that the alleged murderer was in jail when the murder occurred and that the prosecutors withheld evidence of their star witness fabricating accusations against the defendant, nor does it always happen that the prosecutors invent a new time of death contrary to a pathologist's

findings because the defendant was in jail on other charges the actual day of the murder.

That is exactly what David Hoke—now the second-highest administrator in the state court system—and Debra Graves—now a federal public defender—did. They hid a tape of Gell's co-defendant, Crystal Morris, saying that she would have to "make up a story" for the cops. They hid sworn statements by eight witnesses who saw the victim alive after Gell was arrested on other charges. And they claimed that Dr. M.G.F. Gilliland, the state's pathologist, determined that the murder could only have occurred prior to Gell's arrest, a claim that Gilliland called "deceptive in the extreme."

What do Hoke and Graves have to say to this? They admit to hiding the tape, but claimed it was office policy not to reveal impeachment evidence because the prosecutor's office didn't consider it



“exculpatory” despite a 1972 U.S. Supreme Court decision to the contrary. They further claim they were unaware of the eight witnesses’ sworn statements even though the witnesses appeared on the prosecutors’ witness list. They state they never read the case file in the capital murder case which contained the sworn statements. Instead, they say, they relied on the summary of the lead investigator. What about the time of death? They simply don’t address it, claiming instead that the pathologist said the murder occurred prior to Gell’s arrest.

Many blame the lame result in the disciplinary action on the State Bar prosecutors, David Johnson and Margaret Cloutier, who didn’t call any live witnesses and merely read from the depositions of Hoke and Graves to present their case. In those depositions, Hoke and Graves claimed their errors had been inadvertent. The only live witnesses at the disciplinary hearing came from character witnesses, many of them judges, who testified as to the sterling character of the former prosecutors. Were the State Bar prosecutors unaware of the evidence? Hardly, because Gilliland wrote to them to ensure they

knew that the ex-prosecutors had lied about her findings. Gilliland was neither deposed nor called as a witness at the disciplinary hearing.

On Dec. 2, 2004 the State Bar hearing members found that Hoke and Graves had violated three specific ethics rules: 1) They failed to turn over evidence favorable to Gell, 2) They failed to supervise the conduct of their chief investigator, and 3) They brought the judicial system into disrepute by their conduct. Regardless, James Maxwell, the attorney representing Hoke and Graves at the hearing, said his clients “are not the type of individuals who ought to be poster children for what may be wrong with the prosecutorial system in our state, if there is anything wrong with it.”

Did Gell and his family at least receive an apology for Gell’s wrongful conviction and his having to live for years with the terror of knowing the state intended to execute him? Of course not.

“I deserve one, but I don’t expect one,” Gell said. “They’re afraid to admit they’re human and make mistakes.” He also observed that the prosecutors “slapped high fives and hugged each other when I was sentenced to death. Is

that professional conduct?” No it’s not professional conduct, just the typical conduct of professional prosecutors, apparently. As previously reported in *PLN*, while prosecutorial misconduct is very common throughout the US, discipline or negative consequences for such actions is extremely unusual and on the rare occasions when it occurs, like in this case, it tends to be the most minimal punishment available. ■

Sources: *Associated Press*, *New York Times*, *National Law Journal*.

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# Parole for Women in California: Promise or Pathos

by Corey Weinstein, MD, CCHP

Women are not men, but the California Department of Corrections (CDoC) has treated them as such until very recently. They are housed in mega prisons, denied contact with their children and denied important gender appropriate needs.

The sexual abuse scandals in California women's prisons in the late 1990s and recent Federal legislation concerning the elimination of rape in prison forced CDoC to begin deal with the issue of the protection of women in prison and gender equity. Pressure by the community has pushed the prison managers further. During this past winter California Prison Focus, a community based human rights group in San Francisco, launched its Dignity for Women Prisoners Campaign. CPF won a stunning victory that promises the end to the abusive cross gender pat searches of women prisoners. By June 2005 rules and regulations were in place which prohibit male staff from routinely pat searching women, thus ending 50 years of routine formal sexual abuse of women prisoners by staff.

There are other signs that CDoC may be beginning to create other gender

appropriate policies and procedures. But CDoC is a notorious swamp of inadequacy in which positive steps get mired in the muck of malaise and tainted by the stench of the past.

When thinking about how women prisoners do in California prisons it's important to understand the context of this State's detention camps. Consider these facts: CDoC is run by a good old boys network of insular do-nothings never having any top level hires from outside the system. Under orders from the central office in Sacramento staff at Folsom and Corcoran were directed to commit murder and mayhem on the high security exercise yards resulting in the death of seven prisoners and the injury of hundreds by guard gunfire. Not one individual has been identified or accepted responsibility for that decade of mayhem between 1985 and 1995. The guards' union, the California Correctional Peace Officers Association (CCPOA) demonizes prisoners by labeling them as "enemies" and peddles its influence as the State's biggest political contributor to get and keep as many people in prison as possible. The State's political discourse is largely

limited to tough on crime appeals and messages parroting the narrow interest of the CCPOA.

In mid-May 2005 Governor Schwarzenegger signed into law a sweeping reorganization of prison administration. The name of the system is changing to the California Department of Corrections and Rehabilitation. Only time will tell if this will assist real reform or be a change in name only that just moves the chess pieces around the same old board.

Given the overcrowding, boredom, lack of programs, yard violence and guard abuses it isn't surpris-

ing that imprisonment in California helps very few. Prisoners have little positive to do inside and routinely fail to complete their one to three year parole sentences upon release. 44% of women and 67% of men return to prison as parole violators, most on technical parole violations or petty drug offenses.

## Women in Prison

For more than 25 years California has built prisons with two purposes in mind: punishment and incapacitation. Mega prisons have been built including the two largest prisons for women in the world. Just east of Chowchilla, CA the twin sisters, Valley State Prison for Women (VSPW) and Central California Women's Facility each house 3,000 women. These mega prisons are designed for cost effective control and containment despite the relatively low security risk of women prisoners.

There are important differences between female and male prisoners. Women are more likely to be drug users and to need mental health care and medical treatment. 57% of women entering prison have been physically or sexually abused prior to incarceration, a rate four times that of men. 2/3 of the women have been convicted of property or drug related crimes. More have been victims of violent crimes than have been convicted of violence. 2/3 of the women are mothers of minor children and 60% were living with their kids when arrested – most of them single moms. 40% were employed when arrested and 40% had incomes of less than \$600 per month. Women felons are twice as likely to be very poor as their male counterparts and three times more likely to be caring for their minor children. They also tend to have shorter sentences.

Women prisoners have different needs in prison and on parole than men. In its report called *Breaking the Barriers for Women on Parole* California legislature's bipartisan Little Hoover Commission said that California runs a prison system with policies, practices, programs and facilities designed mostly for violent male prisoners and "has remained focused, almost singularly, on a policy of punishment and incapacitation designed for male offenders." The report described that the CDoC had just overlooked the needs of the

## U.S. Torture Information Needed

Because the United States has signed the United Nations Convention Against Torture, they are required to submit reports on the status of US compliance to the Treaty every five years. In May of this year, the US submitted their "Second Periodic Report of the United States of America to the Committee Against Torture". Several national prisoner advocacy groups are planning to issue what is called a "Shadow Report" to supply the Committee with credible evidence of US violations of the Convention which are ignored in the official report. The Convention not only prohibits torture but also "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" committed by a government official. We are seeking testimonies from prisoners on torture and abuse, including isolation and use of devices of torture (stun guns, stun belts, restraint beds, restraint chairs and other restraint devices, spit hoods, black boxes, etc.). Please send testimonies of your experiences and how the authorities dealt with any complaints you made to: Bonnie Kerness, AFSC Prison Watch Project, 89 Market Street, Newark, NJ 07102. We very much appreciate your help.

22,000 women in prison and on parole.

While 70% of the women have a need for drug use rehabilitation services only 14% are in drug treatment in prison or while on parole. Only 33% of the imprisoned women are able to participate in any educational, vocational or employment training. Thousands more are eligible but there are no programs for them. Most jobs in prison are petty make-work jobs like porters, yard crew or menial tasks in the kitchen or laundry. None of which offer any hope for future employment. Drug treatment has been done on a punitive model and women are punished for any drug use by being removed from treatment and put in disciplinary housing.

CDoC has made no effort to keep families together. There are 140 community placement beds available for minimum custody female prisoners to live outside the prison walls with their children under the age of six. This Community Prison Mother Child Program has not been expanded one single bed in the last 20 years despite the number of women in prison increasing by 500%. Also CDoC provides no resources or programs for transporting children to the prison to visit their mothers even though the two mega prisons are located in rural California far from population centers.

For the 12,000 women on parole there have been 1,000 beds available for drug treatment as an alternative to reincarceration for drug use or possession parole violations. 750 women can take a computerized literacy course and 300 get job placement skill training. All together, only 20% of women parolees are in any kind of program assisting them in any way. The rest just get the usual check in visits by their parole agent and nothing else.

One of the ways California has kept its prisons overfull is by sending prisoners back to prison for petty and technical violations of parole. As part of a successful lawsuit brought against the Board of Prison Terms a few years ago the Department agreed to change its parole policies and programs. The *Valdivia* case settlement agreement not only ordered attorney representation at parole violation hearings, but it mandated alternative sanctions with programs consisting of community drug treatment, halfway houses and electronic monitoring. Even though the programs were never fully funded or implemented there was a 4% reduction in recidivism in the first year of operation in 2004.

Enter the CCPOA and the victims' rights groups it organizes and financially supports. As the Governor's various reform programs have been shown to be ill conceived and useless his popularity has been slipping. The savvy CCPOA seized on the opportunity and dragged out its victim rights puppets to shriek that public safety was threatened by keeping parole violators on the streets. Neither the CCPOA nor the CDoC had any real data to argue the case either way, so politics and headlines ruled the day and the Governor cancelled the partially implemented reforms with a stroke of his pen. The court in *Valdivia* later held this was illegal and violated the settlement terms and ordered the programs reinstated.

### Dignity for Women Prisoners

California Prison Focus is working with Human Rights Watch Young Advocates of Northern California to improve the daily life of women prisoners through the Dignity for Women Prisoners Campaign. The Campaign will be monitoring institutional compliance to the new rules that limit cross gender pat searches of women. Regular visits to the two mega prisons in Chowchilla are used for monitoring and to find out from the women what kind of changes they want implemented. Campaign goals include everything from forcing the CDoC to pay for transportation of children to visit their moms and developing early release plans for many offenders to securing adequate

feminine hygiene supplies for the women. The Campaign seeks to end the all too common verbal abuse by guards and the sexual assault on women prisoners by staff. Even access to more feminine dress, especially for visits is on the agenda, as now women must visit their loved ones wearing jeans and T shirts.

So far CDoC has agreed to end cross gender pat searches by 6/1/05 and has promised to remove male custodial staff from women's housing units during the third watch (night shift). That begins to satisfy the Campaign demand to institute Rule 53 of the United Nations' Standard Minimum Rules for the Treatment of Prisoners. Rule 53 requires that no male staff member even hold a key to a women's prison door and not be assigned to guard duty in women's housing units.

The new female Director of CDoC, Jeanne Woodford has created a Gen-

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## Parole for Women (cont.)

der Responsive Strategy Commission (GRSC). The Commission includes high level staff of the Department, community members and specialist consultants. The Dignity Campaign has a seat on the GRSC. It appears to be a serious attempt to identify and solve problems women face in prison and on parole. It is the GRSC that developed the new pat search rules in such a timely fashion, got hygiene supplies available and is beginning to institute Rule 53. The Commission will seriously look at gender specific drug treatment, education and programming. For example, the GRSC is developing a drug treatment model that includes help for trouble caused by the sexual and physical abuse

endured by women. Deincarceration is of special interest with emphasis on community based facilities that reunite women with their minor children and addresses underlying issues such as poverty and drug use that lead to crime.

Certainly there are questions as to whether the GRSC will survive the recent organizational changes, the good old boys who desperately want to see the female Director of Corrections fail and the CCPOA who see the Commission's desire to depopulate the women's prisons as a threat to full employment and the move to gender specific custodial assignments as a threat to their seniority rights over post orders.

One positive sign is that the women's caucus of the legislature has taken a serious interest in the plight of women

under custodial authority. In May 2005 some caucus members toured VSPW and slept overnight in the reception center. They were deeply moved and came away with new understandings of the issues. The caucus has expressed interest in doing regular visits and having face to face contact with the women. Senators Speier and Kuehl have authored bills creating independent oversight task forces.

CPF's Dignity Campaign will keep working to pressure the CDoC, encourage the politicians and blunt the regressive power of the CCPOA as the needs of women prisoners, their children and our communities are pushed forward. ■

*[Dr. Weinstein is an expert on prison and jail medical health care issues and a board member of California Prison Focus.]*

## From the Editor

by Paul Wright

The cover story of this issue about the organizing efforts of design professionals to stop their colleagues from designing and building more prisons is an important example of the organizing that needs to be taking place at all levels to combat the use of mass imprisonment in the United States. Professionals can and should be held to a higher standard, both due to their education and the monopoly licensing they are provided to practice their trade. *PLN's* past coverage on the role of medical doctors supervising torture, executions and providing shoddy and inadequate medical care to prisoners is the flip side of that responsibility

being not just abdicated but abused.

Unfortunately, with tens of billions of dollars at stake each year in prison and jail spending, large segments of American society are now financially vested in the current system of mass imprisonment. This ranges from the 700,000 people directly employed in prisons and jails, to the companies that build and design the prisons, the companies that provide the goods associated with running such facilities and the rural communities that have latched onto prisons as a form of economic development. All of which makes positive change all that much harder.

The situation is similar to the slave trade where many of the people profiting handsomely from the practice: the ship builders and owners, ship crews, bankers, insurers, etc., did not personally own slaves and could simply claim they were only providing a service. But not all services are equal and awareness needs to be raised about the real social consequences of actions.

PLN will be working with the Architects/Designers/Planners for Social Responsibility (ADPSR), to raise awareness around this campaign. We hope that other professions can also take note. Obviously if invest-

ment bankers were to eschew prison and jail bonds no more prisons would be built.

By now readers should have received PLN's annual fundraiser and I hope that you will donate to help support PLN's work and advocacy. We have accomplished a lot this year and look forward to doing even more next year.

We got behind on our publishing schedule this summer but are now on track to be back on schedule by early 2006. We apologize to our readers for the inconvenience.

I would like to thank those readers who send us news and information about happenings in their neck of the woods, especially verdicts and settlements. This is an important area of coverage. Please do not send legal pleadings or documents related to criminal cases or in which there has not been a final decision as we lack the space to report them.

Remember that all donations to PLN are tax deductible for those who pay them. Thank you for supporting PLN. Best wishes for the holiday season and have a happy new year. ■

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# California Prison Gang Linked to Guards and Mexican Drug Cartel

A barber shop in National City, California was allegedly the “war room” connecting the statewide Mexican Mafia gang (“Eme”) to the underworld Arellano Felix drug cartel in nearby Mexico, according to investigators from the California Department of Corrections (CDC). The war room was reportedly headed by barber Roberto Ramiro Marin, who is now one of 35 defendants indicted for robbing and beating imprisoned drug dealers who didn’t pay “taxes” (protection money) to Eme. (See: *PLN*, Feb. 2005, *California Prisoner Trust Accounts Used To Launder Gang Drug Money*.) The 52-count indictment not only involves the notorious Mexican cartel, it is also linked through Marin to CDC Sergeant Michael S. Erickson, who was accused of taking \$500,000 from the cartel to help Eme associate Carlos Sarmiento escape in 2001 from the R.J. Donovan State Prison (RJD) in nearby San Diego.

The escape plot was foiled when fellow guards ratted Erickson off. Erickson was fired in 2002 after disciplinary proceedings. Although CDC forwarded its investigative results to the San Diego District Attorney’s office, the evidence “wasn’t handled properly,” according to prosecutors, leaving them purportedly without enough to get a criminal conviction. That evidence included testimony at Erickson’s termination hearing that linked him both to Eme and to the cartel. Erickson has since moved to Douglas, Arizona, where he reportedly said, “I was railroaded,” claiming he didn’t commit any misconduct and wants to sue to get his job back. But he did acknowledge getting his hair cut at Marin’s barber shop, along with 50 other RJD staff. And when Erickson moved to Chula Vista, he continued to use another barber shop operated by Marin.

The Arellano Felix cartel and Eme were linked to a 1993 Mexican murder of a bishop in Guadalajara. Another hit squad in 1997 killed a Tijuana newspaper editor who criticized the cartel. And in January, 2005, six prison workers were shot dead outside a lockup at Matamoros, Mexico. This was believed to be in revenge for a recent crackdown at La Palma federal prison in Mexico City, where the army and federal police

broke up an alliance between rival gang lords Osiel Cardenas and Benjamin Arellano Felix, transferring some prisoners to Matamoros. In 2003, National City police were alerted from a cartel wiretap to the pending murder of one of its officers, which was subsequently thwarted. Southern California police suspect that up to 100 unsolved murders in the past 15 years might be tied to Eme-Arellano Felix violence. Twenty such homicides were noted in a 2003 San Diego federal drug-trafficking indictment. The magnitude of the drugs involved include “tons of cocaine, methamphetamine and marijuana” brought into the U.S. (On January 27, 2005, federal and state authorities arrested 22 more alleged Eme members for drug, extortion and other organized crime activities. The same sweep picked up former prison guard Jessica Chavez, 38, who is charged with unspecified illegal activity with gang members at RJD.)

The lead defendant in the pending drug case is Jose Albert Marquez, 44, who was allegedly the Eme-cartel link. When he paroled from supermax Pelican Bay State Prison (PBSP) in 1997, he moved to a ranch in Mexico provided him by the cartel, from which he operated as an enforcer in nearby Tijuana. Devan Dawkes, PBSP coordinator, reported that Marquez “became a contact for Mexican Mafia members and associates paroling to ... Southern California.” Marquez was since arrested in 2003 for the 1997 murder of the Tijuana editor, when his phone conversations were tapped revealing incriminating messages relayed to Marin.

Marin’s lawyer, W. Allen Williams, said his client is not guilty and is “a sick, old man,” not a “godfather.” The barber-shop war room story is merely “an urban legend,” he added. But RJD guards and prisoners both testified at Erickson’s Personnel Board hearing about the barbershop, how Marin ran it and Erickson’s involvement. Guard Sean Beever testified that Erickson offered him \$100,000 for an old CDC ID card, saying he needed it for an escape try. Beever went on to reveal that Erickson told him of meeting relatives of Sarmiento who arranged (for \$500,000) for Erickson to “spring” Sarmiento by providing him with a guard’s jumpsuit and the phony ID so he could “walk out

of the prison.” Erickson would then drive Sarmiento to Mexico. “The money was there,” Beever reported. When Beever confided his knowledge to another guard, the other guard reported the ignoble affair to CDC internal investigators. Sarmiento was instantly moved to another prison and Erickson’s investigation was commenced.

Erickson told CDC investigators he didn’t know Marin was a gang leader, “All he did was cut my hair, and my kid’s hair.” Maybe not. On February 12, 2005, PBSP went into emergency lockdown and search mode after a “sophisticated plot” to kill three PBSP guards on one yard was purportedly uncovered. PBSP spokesman Lt. Perez said Eme was behind the plot. However, as with many claims advanced by police, prosecutors and prison officials, hard proof of the claims is hard to come by. ■

Sources: *Sacramento Bee*, *San Francisco Chronicle*, *Los Angeles Times*, *New York Times*.

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# CIA Private Jet Takes Prisoners on Torture Trips

by Matthew T. Clarke

When you step on board a 14-passenger Gulfstream V jet plane, you expect to be treated to a flight teeming with luxuries. The Gulfstream is, after all, a favorite small jet for corporate CEOs and celebrities. Stepping onboard the Gulfstream V with tail number N44982 is quite a different experience for many of its passengers. They arrive handcuffed, leg-ironed and hooded. Their destinations are not the business capitols or luxury resorts such small jets are normally seen at. They are being flown to countries that legally allow torture. They won't enjoy the flight—they'll be heavily sedated and wearing disposable adult diapers all the way.

The jet belongs to Bayard Foreign Marketing, Inc. of Portland, Oregon, an apparent CIA front corporation whose listed owner, Leonard T. Bayard, doesn't appear in any of the normal records such as utilities or business transaction records, a real person would be expected to generate. Bayard bought the jet November 18, 2004, from Premiere Executive Transport Services, Inc. of Dedham, Massachusetts, another company whose officers and directors have newly-minted Social Security numbers and post-office-box addresses, but don't have a history of residences, work, telephone usage or business activities. This is typical of CIA front companies used to mask U.S. involvement in covert operations.

The jet, which is cleared to land at U.S. military bases worldwide, is used for what the CIA refers to as "rendition." That is the removal of a prisoner from U.S. (or another country that formally forbids torture) custody to the custody of a nation that allows torture for the extraction of information and confessions and for administrative purposes. Most prisoners rendered are suspected of being al-Qaeda members or supporters. The practice of rendition has been steadily growing since 9-11, the government's universal excuse for breaking the rules of common decency.

The jet was originally assigned the tail number N581GA when it was manufactured. It was later changed to N379P, then to N8068V, before arriving at its current number, N44982. Is it unusual for a plane to change tail numbers—yes. Will the FAA tell anyone why it frequently

changed the jet's tail numbers—no.

The N8068V number assignment has even been cleaned up by the FAA so that number is now listed as having been assigned to a Robinson R22 helicopter that was exported to South Africa in 1993.

Public records link the officers of Premiere Executive Transport to five post office boxes. A total of 325 names are registered to those five boxes.

A check by the *Washington Post* of 44 of those names showed no business or personal records normally associated with real identities. Additionally, although those persons had birthdates in the 1940s, 1950s, and 1960s, their Social Security numbers were all issued between 1998 to 2003.

The jet has been spotted on October 26, 2001, removing Jamil Qasim Mohammed, a Yemenite microbiologist, a suspect in the USS Cole bombing, from Islamabad, Pakistan, where he had been arrested by Pakistani authorities. On December 18, 2001, the jet was spotted in Sweden where it swept up Ahmed Agiza and Muhammad Zery, two Egyptian men who had applied for political asylum there. Special Swedish security police handed the men, who were wearing red overalls and were fettered with handcuffs and leg irons, over to hooded, American-accented men in the dead of night in a distant corner of Stockholm's Bromma Airport, according to *Cold Facts*, a Swedish television news program that interviewed airport officials and government officials. At the time of the rendition, the Swedish public was told it was an extradition to Egypt with no mention made of U.S. involvement.

Both men complained of having been dressed in "nappies" and involuntarily sedated for the flight, then tortured with beatings and electric genital shock while in Egyptian custody. Agiza was convicted of terrorism-related charges by the Supreme Military Court of Egypt. Zery was released from custody. Sweden is now investigating the decision to allow rendition.

In January 2002, the jet was seen at the military airport in Jakarta, Indonesia, where it whisked away Muhammad Saad Iqbal Nadni, an Egyptian suspected of assisting al Qaeda shoe bomber Richard C. Reid. He too was taken to Egypt according to Indonesian officials.

Plane spotting hobbyists stand at the end of runways and use high-powered binoculars, cameras and video recorders to track aircraft. Some of them specifically seek secret and other government planes. They communicate via websites. According to these web pages, the plane has been spotted in Islamabad, Pakistan; Karachi, Saudi Arabia; Dubai; Syria; Tashkent, Uzbekistan; Baghdad, Iraq; Kuwait City; Baku, Azerbaijan; and Rabat, Morocco. It appears to be based out of Dulles International Airport, the closest major airport to CIA headquarters in Langley, Virginia, but has also made frequent stops at the military airport at Amman, Jordan and airports in Frankfurt, A.M., Germany, Glasgow, Scotland; and Larnaca, Cyprus.

Dennis Plakais, a lawyer in Dedham who filed the Massachusetts incorporation papers for Premiere Executive Transport refused to discuss anything about the company when contacted by the *Boston Globe*. The address of Plakais's law firm is listed as Premiere's address in the sales records for the jet. The same "no comment" was given when Scott Caplan—the Portland lawyer who filed Bayard Foreign Marketing's Oregon incorporation papers and whose suite is listed as that corporation's address—was contacted by the *Chicago Tribune*.

Plakais's law firm also shares its address with Crowell Aviation Technologies, Inc, a company showing only one employee and annual revenue of \$65,000 according to Dun & Bradstreet. Yet Crowell has permission to land aircraft at U.S. military bases worldwide, a privilege it shares with only eight other companies, including Premiere Executive Transport.

Premiere Executive Transport sold another plane, a 2000 Boeing 737, the same day it sold the Gulfstream to Bayard Foreign Marketing. The company that bought the 737, Tate Management LLC of Reno, Nevada, lists its address as the address of the lawyer that incorporated it. It also has a single owner, Tyler Edward Tate, who also does not appear in the usual public records.

The *Sunday Times* of London reported that the 737's flight logs showed it was based at Dulles International Airport and landed at a minimum of 49 foreign destinations including Guantanamo Bay,

Cuba, many other U.S. military bases; and airports in Egypt, Iraq, Jordan, Afghanistan, Morocco, Libya, and Uzbekistan. The sale of the planes seems to have been triggered by an initial *Sunday Times* report that appeared ten days prior to the sales date.

It is little surprise that the self-pro-

claimed world leader for human rights and freedom sponsors torture flights. One needs only to examine U.S. behavior to see what the government of that country truly believes in. A little more surprising is the ease at which journalists were able to “roll up” the identities of CIA front companies and aliases. This seems to

mean that the CIA officials are either lazy or stupid when it comes to covering their covert activities. But with total impunity for kidnapping and torture, who needs to be secret about it. ■

Sources: *Washington Post*, *Chicago Tribune*, *indymedia.org*, *The Independent*

## Connecticut: Rash of Prisoner Suicides Prompt Questions, Concerns

by Michael Rigby

A rash of prisoner suicides in the Connecticut Department of Corrections (CDOC) has exposed serious flaws in the department's suicide prevention policies. The CDOC saw nine prisoner suicides in 2004, many of which could have been prevented.

Joseph Spence is one example. Spence was arrested on June 9, 2004, for allegedly shooting to death his long time girlfriend. A Superior Court judge ordered him held on \$2 million bail and remanded him to the CDOC. Noting the crime and certain statements Spence made, the judge also ordered him placed on suicide watch. When he arrived at the Bridgeport Correctional Center, however, prison officials took no action on the judge's order. Spence hanged himself two days later.

As a result of Spence's suicide, along with the May 9, 2004, suicide of Marlin Bugg in the New Haven Correctional Center, two guards have been fired and one has been reprimanded. Bridgeport guard Carroll Rainey and New Haven guard Raphael Gayle were fired for failing to conduct cell inspections. A third guard, New Haven Lt. Rocco Sweat, was formally counseled for “failing to conduct complete tours when tours were logged, (and) failure to follow proper policies and procedures in completing tours,” the CDOC said. Prison officials said more guards may be disciplined in connection with the two suicides.

Bridgeport attorney Antonio Ponvert, who is representing the family of a prisoner who committed suicide at the McDougall-Walker Correctional Center in 2002, contends the department's suicide prevention efforts have long been inadequate. According to the lawsuit, Scott Walsh, 35—a prisoner with paranoid schizophrenia who had repeatedly threatened to kill himself—was denied his antipsychotic medication and placed in a cell that contained bed sheets and

an upper bunk. On June 6, 2002, Walsh tied a sheet to the top bunk and hanged himself.

“If you look, there have been dozens and dozens of successful suicides at the Department of Correction, many of them involving inmates in virtually identical circumstances to Walsh,” said Ponvert. “They're not doing a good job. There has been, by anyone's estimation, an epidemic of suicides since last April. Given the inmate population, it's a very disturbing number.” Ponvert went on to say that Connecticut prisoners are “not receiving the mental health care required, (living) with substandard supervision and with staff who aren't trained to identify people who are suicidal or do anything about it.”

The CDOC's own records portray an environment of flagrant indifference. When Eduardo Velasquez committed suicide on July 21, 2004, at Bridgeport, investigators couldn't determine if the guard had performed the required cell checks every 15 minutes because the security camera had been broken for weeks. Moreover, the prison doctor failed to respond when the “Code Blue” was called, leaving Velasquez's care to the guards and a registered nurse.

Even more disturbing is the case of Daniel Becker. When guards discovered Becker hanging in his cell at Hartford on April 18, 2004, they delayed cutting him down for 12 minutes while they waited for a video camera and shears. An investigation report said the guards should have relieved the pressure on Becker's neck until the shears arrived by lifting his body.

David Fathi, a lawyer with the American Civil Liberties Union's National

Prison Project in Washington D.C. said that most prison suicides are preventable. “The risk of suicide is ever-present, especially (among pre-trial detainees), but sound corrections practice can virtually eliminate suicides,” he said. “One of the most basic things is regular checks by (staff), because committing suicide takes time. Unfortunately, with crowding, with budget cuts, with understaffing, those checks often aren't done as they should be.”

Ponvert believes the CDOC lacks the initiative to adequately address the problems because many prisoners don't have family or others who will press for investigations or bring lawsuits.

“I haven't heard of anybody bringing lawsuits for the nine people who (committed suicide in 2004). There could be this ... epidemic of suicides and it's possible that none of them will ever be looked into by anyone out of the DOC (and state police),” he said. “Without anyone sort of pressing for change in training or a change in policy and procedure or greater resources ... I think the suicides are just going to continue.” ■

Source: *middletownpress.com*

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# Rising Deaths and Violence Among Problems In Illinois Prisons, Jails

by Michael Rigby

Imprisonment in Illinois is becoming more perilous, according to the John Howard Association, a Chicago-based nonprofit group that monitors prisons and jails. Between August 2003 and May 2004, according to the association, several state prisoners died under suspicious circumstances and three were murdered. By comparison, only 4 state prisoners were killed in the previous 5 years.

Much of the focus has been on the Menard Correctional Center, where two prisoners died in close succession. Charles Platcher, 31, froze to death in the prison infirmary on Christmas Day 2003. Three months later, another prisoner was strangled to death in his cell. Finger pointing and buck passing soon followed.

Platcher, a prisoner serving 40-years for fatally stabbing his mother in 2001, had been moved to a solitary cell in the prison's health care unit (HCU) on December 15 after he allegedly threatened suicide and declined to visit with his father. At HCU, Platcher was issued a gown and a "suicide blanket" (a heavy, carpet-type cover that can't be cut up or made into a noose). His clothes were confiscated.

Around 2 a.m. Christmas morning, the heating went out in three of the infirmary's cells, including Platcher's. The outside temperature was well below freezing. About 4 a.m. a nurse employed by the prison's private health care contractor, Health Professionals Limited of Peoria, Illinois, tried to rouse Platcher for pill call by speaking to him through the food slot. Platcher responded incoherently, which the nurse took to be a refusal. Just after 8 a.m., a prison doctor making his rounds in HCU discovered Platcher lying naked and unconscious on the cold concrete floor of his cell. He died at the hospital about 4½ hours later.

Platcher's death resulted from hypothermia, a Randolph County coroner's jury ruled on March 30, 2004. At the hearing, prison officials testified that defective valves caused the heating failure.

Within a week of Platcher's death, a nurse was fired and two other prison employees—a guard and nurse—were disciplined. Later, on May 15, 2004, Menard Warden Eugene McAdory Jr. was also fired.

In a subsequent interview, McAdory

suggested that nursing errors contributed to Platcher's death. According to McAdory, the nurse should have accepted only a clear "no" from Platcher, and even then should have insisted on an explanation for the refusal. "The nurse's job should have been to contact the shift commander, get security and go in there," he said. It's unclear why the unidentified male nurse was unsupervised, having worked at the prison for only 15 days.

McAdory contends he was a scapegoat and complained that top prison officials neglected to even visit Menard after the incident. "None of these guys came down to the facility to offer support or ask questions, to see if we needed anything," he said. "All they did was point fingers and blame." McAdory also bemoaned the fact that he was fired without explanation. DOC spokesman Sergio Molina said no explanation was necessary because wardens serve "at the pleasure" of the director.

Platcher's family has since filed a \$1 million wrongful death lawsuit against the DOC and Health Professionals. The suit, filed on May 3, 2005, in Peoria County Circuit Court, alleges that Platcher—who was reportedly involved in an altercation with two guards shortly before entering solitary—was abused before his death. "In retaliation for complaining about his treatment, Menard staff stuffed a sock in [Platcher's] mouth and pushed him down metal stairways on the way to [HCU]," alleges the lawsuit. The suit further contends that while Platcher was succumbing to hypothermia, infirmary personnel wore hats, gloves, and coats and sipped hot beverages to stay warm.

"He was allowed to freeze to death in their care," said John Julian, the family's attorney. "At the very least, their conduct was negligent and fell below the standard of care one would expect to be provided to inmates." [PLN has been reporting frigid Illinois prison suits for years. See, e.g., PLN December 1991; February, August, and June 1995; June 1997; February 1998; and April 2000.]

Soon after Platcher's death, another prisoner died at Menard, though his death received far less scrutiny. Joshua Daczewitz, 22, and Corey L. Fox, 28, had been paired together in the prison's segregation unit for several months. Daczewitz was

serving a 7-year sentence for residential arson and robbery, the result of a June 2003 plea bargain, and had been transferred to Menard for an unspecified rule violation. Fox was serving a life sentence for murder; he had been at the prison since 2001.

On February 28, 2004, Fox allegedly used a braided bed sheet to strangle Daczewitz, then flushed the sheet down the toilet. Guards discovered Daczewitz's body after Fox passed them a note saying he was dead. According to investigators, Fox said he strangled Daczewitz because he was "tired of having a cellmate."

Sexual harassment also apparently thrives at Menard. In March 2004, 11 female guards sued the DOC claiming co-workers sexually harassed them over a 4-year period and retaliated when they complained, including forcing them to unsafely escort prisoners.

Interestingly, DOC officials may have done better to stick with McAdory. In October 2004, members of the guards' union at Menard made it clear in a 492-42 vote that they have "no confidence" in McAdory's replacement, Charles Hinsley, said union representative Buddy Maupin. The guards were apparently upset with Hinsley for not placing the unit on lockdown after a prisoner assaulted a guard in July, 2004.

Troubling deaths are also prevalent at the maximum-security Stateville prison, where 3 prisoners died in a recent 19-month period. In August 2003, Andrew Clark was strangled to death in or near his cell. In February 2004, Riley McLarin's lifeless body was found inside his cell; his death was ruled a suicide. A month later, prisoner Michael Robinson was fatally stabbed.

The situation is no better in the state's jails. On October 16, 2004, 21 prisoners were injured in a riot at the Cook County Jail, 3 of them critically. The melee erupted about 1:30 p.m. in Division 9, a maximum-security wing of the jail, said sheriff's spokeswoman Sally Daly. The wing, which typically houses 45 to 50 prisoners, probably had only one guard watching over it when the riot began, officials said. According to Daly, Sheriff Michael Sheahan attributed at least part of the blame to overcrowding. Built to house 9,800 prisoners, the jail held 10,500 when the riot occurred.

In another maximum-security wing of the jail, Jamar Rodgers, 17, was stabbed to death on November 17, 2004. According to sheriff's spokesman Bill Cunningham, a fight between Rodgers and another prisoner began in the dayroom, then escalated in a shower area. Rodgers was fatally stabbed between the shoulder blades when another prisoner joined in. James "Chip" Coldren Jr., president of the John Howard Association, questioned the guards' reaction time. "The detainee had to struggle to an area where an officer was to get some attention," he said. "It doesn't look like anyone rushed in to quell the disturbance."

Both incidents follow criticism over the handling of a 1999 episode in which a group of 40 guards beat and terrorized prisoners. In September 2004, a grand

jury report accused Sheriff's department officials of perpetrating a coverup of "gross if not criminal misconduct" after that incident.

The jail has also been the site of numerous other mass brawls. In March 2002, 1 gang member was killed and 2 others critically injured in weekend gang fights in Division 9. In July 2000, 7 guards and 5 prisoners were wounded during a gang fight. In May 1995, 2 gang members were stabbed to death during a fight over use of the shower; the same week, a fight involving 33 prisoners left 5 seriously hurt.

Violence may also be a problem at the federal jail in downtown Chicago, but in March 2005 the focus was on contraband. Michael A. Hill, 33, a guard at the Metropolitan Correctional Center, is accused of supplying prisoners with a bounty of

banned items, including cigarettes, whiskey, beer, brandy, marijuana, shrimp, and cell phones for \$1,500 each.

Hill, who filed for bankruptcy in 1999, had worked at MCC and two other local jails for four years. From 1994 to 1997 he worked at the Stateville prison near Joliet, where 4 guards were indicted in 2003 and 2004 for providing drugs, cell phones, and sex to prisoners. (It's unknown if Hill was supplying prisoners with contraband there as well.) [See *PLN*, March 2005 for more on Stateville and Cook County Jail.]

Hill was arrested on March 10, 2005, after meeting with the female acquaintance of a prisoner who allegedly provided him with a camera, a cell phone, 418 grams of marijuana, and \$2,000. Charged with providing contraband to prisoners, Hill was released on \$25,000 bail. ■

## Jail Policy Barring Abortion Without Court Order Upheld

The Fifth Circuit Court of Appeals upheld a Louisiana jail's policy prohibiting elective medical procedures, including abortions, without a court order. It also concluded that plaintiff failed to sufficiently show the requisite culpability and causation.

When Victoria W. began serving a sentence in the Terrebonne Criminal Justice Complex in Louisiana on July 28, 1999, a physical examination revealed she was pregnant. Nine days later, an ultrasound established that the pregnancy was fifteen weeks, two days along.

Victoria requested an abortion as soon as she learned she was pregnant. Pursuant to the jail's general, unwritten, policy that prisoners seeking elective medical procedures must obtain a court order allowing transport or temporary release. Victoria was told she needed to obtain a court order to get an abortion.

This required her attorney to motion the trial court for the order. However, Victoria's attorney balked, apparently "for moral reasons" and did not file a motion until September 8, 1999. When he did, rather than seeking "release or transport in order to obtain an abortion" counsel "sought Victoria's release from the remainder of her sentence based on the prison's inadequate prenatal care." He also failed to have Victoria brought to the courtroom for the hearing. When Victoria later confronted him about failing to request release or transport for an abortion, counsel "told

her that he did the best he could."

On October 13, 1999, Victoria was released but this was "too late to obtain a legal abortion in Louisiana. She carried the child to term and placed it with adoptive parents."

Victoria then brought suit in federal court challenging the jail's court order policy. Both parties moved for summary judgment and the court denied Victoria's motion and granted summary judgment to defendants.

Applying the "Reasonable Relationship Test" of *Turner v. Safley*, 482 U.S. 78, 107 S.Ct 2254 (1987) the Fifth Circuit upheld the district court's order, concluding "that the policy of requiring judicial approval of elective medical procedures is reasonably related to legitimate penological interests. The policy was not promulgated with deliberate indifference to its consequences and was not the direct cause of Victoria's injury."

The court noted that Victoria relied heavily upon *Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) "which held that a similar court order policy was not reasonably related to a legitimate penological interest." However, the court distinguished *Monmouth*, finding that it "rested on different facts" and, therefore, was not controlling.

The court also agreed with the district court that prison officials were not deliberately indifferent to Victoria's medical needs, concluding that "her attorney's

action, not the policy, denied Victoria an abortion." Therefore, Victoria failed to sufficiently show the requisite culpability and causation. See: *Victoria W. v. Larpen-ter*, 369 F.3d 475 (5<sup>th</sup> Cir. 2004). ■



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# Oklahoma Prisons Suffer Crisis of Violence and Mismanagement

by Matthew T. Clarke

2005 has turned out to be a violent year in Oklahoma prisons. Between January and July, 2005, the prisons in Oklahoma suffered multiple riots, multiple murders of prisoners, and extensive probes of drug running.

The stage for 2005 was set in 2004. In 2002 and 2003, 274 state prisoners were given disciplinary write ups for possession of a weapon. In 2004 alone, 351 prisoners were given disciplinary writ ups for weapons possession. This prevalence of armed prisoners, combined with an acute shortage of guards in Oklahoma's state prisons, set the stage for an increase in prison violence. Thus, it was no surprise when in 2005 violence exploded in Oklahoma prisons with three state prisoners murdered by mid-July and several riots having occurred in that same time period.

Sometime in the night of January 29th to 30th, 2005, Ronald Stiles, 48, a prisoner at the Lawton Correctional Facility (LCF) was strangled to death. LCF is a private prison run by GEO Group, Inc. Stiles was serving 10 years for possession of contraband. His cell partner, Robert M. Cooper, 32, who is serving life without parole for a first-degree murder, is the main suspect.

On March 22, 2005, a riot involving about 65 prisoners broke out on the recreation yard of the CCA-run Cimarron Correctional Facility (CCF) Cushing. [PLN, July, 2005]. Prisoners were armed with aluminum baseball bats, horseshoes and homemade knives (shanks). Adam Lippert, 32, was stabbed to death and thirteen other prisoners were injured during the riot. Eleven prisoners, Nathaniel O. Griffin, Authur C. Jones, Martin D. Reed, Jr., Jackie D. Ruble, Kentrel Wimms, Sedarfe Moore, Eugene Guterrez, Cedrick D. Poore, Shawn Byrd, Jason Williamson, and Mark Anthony Ford face the death penalty for participating in a riot in which a person was killed. Prisoner Eric M. Johnson has been charged with first-degree murder as the person who fatally stabbed Lippert with a shank. Lippert suffered stab wounds to the face, scalp, chest, abdomen, shoulder, elbow, arm and trunk. District Attorney Robert Hudson has announced his intention to prosecute all prisoners who either actively participated in the riot or took part in its planning.

On March 24, 2005, three prisoners

were injured in a large fight that occurred at the Oklahoma State Penitentiary (OSP) in McAlester.

On April 24, 2005, 33 prisoners were injured in riot at the Dick Conner Correctional Center.

On May 21, 2005, Ronald Pichon, 19, a prisoner at the Madison County Jail, was beaten to death. Prisoners Frankie Pruitt, 35, Alfred Tanner, 34, Christopher Robinson, 35, Jeremiah Davis, 17, Terry Kelly, 39, and Carlos McGalthery were charged with the killing.

On July 10, 2005, a riot broke out at the Oklahoma State Reformatory (OSR) in Granite. Prisoner Donald Ray Jones, 29, died of multiple stab wounds as a result of the melee that started at about 7 p.m. on the prison recreation yard. Eight other prisoners required treatment at a local hospital following the fight. Six of them were returned to the prison following treatment. On July 11th and 12th, guards conducted an intensive shakedown of OSR. They discovered about twenty shanks, mostly in common areas where they had probably been dumped in anticipation of the weapons sweep. Like the previous Oklahoma prison riots, the July 10th incident involved racial groups of prisoners. Prison system officials put part of the blame for the fight on understaffing. Normal OSR night staffing is 24 guards. 20 were on duty the-night of the fight.

The OSR riot triggered a political debate over prison understaffing.

State Senator and chair of the Senate appropriations committee Kenneth Corn, D-Poteau, promised to announce a plan for hiring state prison guards. "We can't wait for the violence to reach beyond the razor wire and into our communities," said Corn.

Todd Heitt, R-Kellyville, Speaker of the House, criticized the use of a prisoner's death for policy debate.

The Department of Corrections has asked for an additional \$12 million to pay for additional staff and requested that the governor call a special legislative session to deal with the special appropriation.

Corn is leading the charge for additional appropriations. "The need is real and immediate. We have a shortage of corrections officers—and our prison guards and our families are at risk," Corn said.

Meanwhile, Sheriff Stanley Glanz

had regained control of the Tulsa County Jail following monumental mismanagement by CCA. [PLN, July, 2005]. CCA is moving 70 of its Tulsa jail employees to its 60 other privately-run prisons and jails. About 150 other CCA employees will be working for the sheriff at the 1,300-man jail.

As a part of the takeover procedure, Glanz had Security Company Black Creek Integrated Systems Corporation conduct a survey of the jail's security system which the company installed when the jail was built in 1999. Black Creek discovered much broken and missing equipment, estimating the cost of repairs at \$259,000. Glanz intends to send CCA the bill. Some of the broken equipment, such as 272 intercoms stations, is critical to the secure functioning of the jail.

In less violent, but still disturbing Oklahoma prison events, a grand jury is investigating a suspected drug-running ring at the LCF. Michael McClain, a former guard, is suspected of bringing drugs into the prison that were sent to him by families of prisoners. In August 2005, the grand jury began taking secret testimony about the drug ring at the 1,900-man prison.

Law enforcement agencies investigating the drug dealings in the prison traced over \$200,000 in drug-buy money from 14 states. They suspect over 100 prisoners are customers of the drug ring.

Paroled prisoner Darrin Brewer, 38, admitted arranging drug deals at the prison using a cell phone McClain smuggled in to the prison. Brewer said he allowed prisoners Lupe Sanchez and Caesar Sanchez to use the phone to have their families arrange for drugs that McClain could pick up.

Natalia Sanchez, 56, received many of those phone calls and also received large amounts of money from other prisoners' families, including Patricia Johnson, the mother of prisoner Barry McClure, who was recorded in a phone conversation instructing Johnson to send money to Natalie Sanchez. Johnson also received \$41,000 from families of other prisoners and wrote a check for \$22,000 to Natalie Sanchez. Brewer's father, Alfred Johnson, received \$99,000 in payments from other prisoners' families and wired \$30,000 to McClain. The drugs



included marijuana, methamphetamine, cocaine and heroin. The drug smuggling scheme is similar to one uncovered at the CCA-run Clinton Correctional Facility in 20011.

Melvin T. Perry, 53, pleaded guilty to receiving a \$100 bill from his wife, Gracie

Lee Perry, 58, during an August 30, 2005, visit at CCF. She has been charged with bringing the money into the prison.

Whether the cause is a culture of lawlessness and violence, poor guard training or pay, understaffing, or a combination of these and other factors, it is clear that

prisons in Oklahoma are broken and in desperate need of repair. ■

Sources: *McAlester News*, *Cushing Daily*, [www.tulsaworld.com](http://www.tulsaworld.com), [newsok.com](http://newsok.com), [www.KTOK.com](http://www.KTOK.com), *The Oklahoman*, *WAIF*, *Associated Press*.

## Overtured Conviction Nets Baltimore Man \$1.4 Million

Maryland's Board of Public Works (BPW) awarded a Baltimore man \$1.4 million for spending 27 years on a faulty murder conviction.

In 1974, Michael Austin, then 25, was convicted for the murder of a grocery store security guard. Austin was not only at work when the murder transpired, but is also 7 inches taller than the killer that eyewitnesses described during his trial. Incompetent counsel allowed prosecutorial misconduct during the trial, including the misuse of evidence and mistaken identification, which caused the jury to convict Austin.

Twenty years later, Austin sent a letter to a Princeton, New Jersey group called Centurion Ministries. Centurion helps prisoners it believes are wrongly convicted. With the help of a private investigator, who was hired by Centurion to look into the case, its findings led the *Baltimore Sun* to examine the case in March 2001. That investigation consequently led to Austin's conviction to be overturned nine months later by Baltimore Circuit Judge John Carroll Byrnes.

Despite being wrongfully convicted of the murder, Austin applied himself to self-betterment. During his incar-

ceration, he had a cellmate that holds a bachelor's degree in Music. Austin not only learned to play the trumpet and piano, but to read and write music as well. This led Austin, upon release to form a jazz band. He also began a career in public speaking.

To receive compensation for wrongful incarceration under Maryland law, Austin had to be granted a pardon. Austin petitioned Gov. Robert L. Ehrlich for the pardon. By telephone, Ehrlich apologized and granted a full pardon to Austin.

Austin, with the help of his attorney, Larry Nathans, petitioned the BPW, which consists of the Governor, Comptroller William Donald Schaefer, and Treasurer Nancy K. Kopp, for compensation based on economic analyses of his potential income, Social Security payments, pensions and other data. Austin's petition also describes the mental anguish he went through during more than two decades of incarceration.

The BPW granted Austin's petition. It awarded him \$1.4 million, which is Maryland's largest award for a wrongful conviction. The award will be paid in payments to be spread out over 10 years. BPN also approved money for Austin to seek

financial counseling, and also received a public apology from the Governor.

"The significance of today is the opportunity for me to feel a sense of gaining my power back...This has been an opportunity for me to look back on what I've been through and look forward." said Austin.

While the BPW award is well deserved, Austin said "no amount of money could compensate me for my years in prison." ■

Sources: *The Baltimore Sun*; [findlaw.com](http://findlaw.com)

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# Federal Prison Problematic For Texas Officials

by Michael Rigby

A 500-bed federal detention center may have caused more problems than it solved for cash-strapped Willacy County, Texas. Three county commissioners have already been convicted of accepting kickbacks from companies involved with the prison, and a state senator's ties to three contractors has raised ethical questions. The detention center is now the focus of a federal bribery investigation and a lawsuit filed by the county.

Between June 2000 and March 2003, Willacy County commissioners Israel Tamez, 58, and Jose Jiminez, 67, accepted a series of bribes totaling more than \$10,000 in exchange for their votes in awarding lucrative prison contracts. Both men pled guilty to bribery charges on January 4, 2004.

Also charged and convicted was David Cortez, 70, a former Webb County commissioner. Cortez pled guilty in May 2005 for conspiring to "obstruct, delay and affect commerce" for helping secure a contract for the detention facility. He admitted funneling at least \$39,000 to county commissioners to help an unnamed consulting firm get part of the prison contract.

Sentencing for Tamez and Jiminez was postponed until January 2006 pending the outcome of the continuing federal investigation; Cortez's sentencing also was postponed by the federal district court in a sealed order.

The three convictions resulted from a yearlong probe involving county auditor Armando Rubalcaba. Rubalcaba cooperated with investigators after pleading no contest to stealing about \$65,000 in county funds.

Another player in the burgeoning scandal is state Senator Eddie Lucio Jr., D-Brownsville, who has worked for three prison contractors. Over about four years, Corplan Corrections and contractor Hale-Mills, Inc. The lawsuit alleges that the firms conspired to bribe county commissioners to select them for the prison project. "We're not going to tolerate companies coming in to take advantage of small counties and offering kickbacks and going on like it's business as usual," said District Attorney Juan Angel Guerra. "Whoever offers kickbacks is just as guilty as those taking kickbacks."

relations, marketing and consulting work. Combined, the companies paid Lucio about \$100,000 a year.

Lucio contends he did nothing wrong and asserts the money was earned. When asked if he thought the firms would pay him in excess of \$100,000 a year if he was not a senator, Lucio said, "it might seem like a lot of money, and it is in our area of the state, but there are senators and representatives that are making much more money on one case than I do in one year. So, I am not ashamed of what I make. I worked for that."

Of course, that depends on how you define work. In 2002, Lucio said that Corplan had been his client for about three years. Yet, according to Corplan's James Parkey, Lucio never developed a single ad for the company. "Public relations doesn't require a product in terms of written materials," Parkey said in 2002. "[Lucio] keeps our name in front of people. We are very pleased with the work provided."

When the investigation heated up however, Lucio quickly suspended his relationship with the companies, citing his desire to avoid the "perception" of impropriety. In a letter dated January 18, 2005, Lucio informed Corplan, Aguirre and MTC that he was taking a "leave of absence" from working with the firms.

Lucio reportedly did not list payments from the three companies on financial disclosure statements until 2004. Previously, in 1999, Lucio had authored legislation clarifying that counties could enter into contracts with a private company for the design, management and construction of jails.

For its part, in May 2005 Willacy County filed a lawsuit against two companies involved in the prison project, Corplan Corrections and contractor Hale-Mills, Inc. The lawsuit alleges that the firms conspired to bribe county commissioners to select them for the prison project. "We're not going to tolerate companies coming in to take advantage of small counties and offering kickbacks and going on like it's business as usual," said District Attorney Juan Angel Guerra. "Whoever offers kickbacks is just as guilty as those taking kickbacks."

According to Guerra the county could win "millions" in damages because a financial firm involved in the prison

project had sold approximately \$25 million in bonds—roughly \$10 million more than the \$14.5 million it cost to build the prison. The extra money has gone to pay interest, said Corplan attorney Edmundo Ramirez.

Guerra also observed that the county may get title to the prison. "The contract would be null and void, so technically the prison would end up belonging to the county free of charge," he stated. Under Texas law, contracts based upon illegal activity are void. The lawsuit was filed on behalf of Willacy County by former Hidalgo County Judge Ramon Garcia, who is working on a contingent fee that will pay him 40% of any damages resulting from the suit.

Willacy County faced more problems in October 2004 when the prison's population dropped from near-capacity to 240 prisoners. MTC pays the county \$2 a day for every prisoner, said Willacy County Sheriff Larry Spence, who lobbied in Washington, D.C. for more prisoners. The county had anticipated \$300,000 in federal prison money to augment its \$3.8 million general fund budget. However, the U.S. Marshals Service transferred prisoners to lower-cost facilities due to a year-end money crunch.

Federal prosecutors declined to name the companies involved in the continuing bribery investigation. However, public records reveal that Corplan, Aguirre, MTC and Hale-Mills Construction of Houston were among the primary contractors for the prison project.

Pursuant to their plea agreements, Tamez and Jiminez are expected to supply prosecutors with information that may lead to charges against the companies that bribed them. "Someone gave them that money," stated County Judge Simon Salinas. "Whoever made these guys get dirty, they're going to go down, too."

Senator Lucio, who has not been charged in connection with the investigation, stated he is "anxiously awaiting to see who is at fault here or who violated any laws." He said he had been in touch with the companies he previously represented and remarked, "they have assured me they are not involved in illegal actions." ■

Sources: *The Valley Morning Star*, *The Brownsville Herald*, *AP*, *San Antonio Express-News*

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# Tulia Undercover Deputy Tom Coleman Convicted of Perjury

by Hans Sherrer

Tom Coleman was on top of the world after being honored as the Texas Department of Public Safety's 1999 Outstanding Lawman of the Year. The award was for his undercover investigation between January 1998 and July 1999 in the small Texas Panhandle town of Tulia that resulted in 46 arrests and 38 convictions for drug dealing. However beginning in 2000, there have been many revelations about Coleman's wrongdoing before, during, and after his investigation.<sup>1</sup>

Among the irregularities in Coleman's investigation was the lack of any audio or video surveillance recordings corroborating that he had bought drugs from a single arrested or convicted person, and when the dozens of people were arrested and their homes searched, no drugs, weapons or unusual amounts of money were found. It was also discovered that when hired by Swisher County, Coleman was under indictment for stealing \$6,700 from Cochran County merchants while employed there as a sheriff deputy.

The disclosures about faults with Coleman's drug "investigation" and his questionable character culminated in Governor Rick Perry's pardon of 35 of the Tulia defendants in August 2003, and a \$6 million settlement in April 2004 of a civil rights lawsuit against counties and cities belonging to the Panhandle Regional Narcotics Trafficking Task Force. That settlement was split amongst the 46 people arrested due to Coleman's investigation.

Coleman's fall from grace was completed on January 14, 2005. A Lubbock, Texas jury found him guilty of one count of aggravated perjury during a March 2003 evidentiary hearing in Tulia. That hearing was ordered by the Texas Court of Criminal Appeals to determine if the drug conviction of four Tulia defendants was supported by any evidence other than Coleman's word. During that hearing Coleman testified that he did not learn that he had been indicted in 1997 for stealing \$6,700 from Cochran County, Texas merchants - while working as a Cochran County sheriff deputy - until August 1998. In convicting Coleman, the jury relied on evidence that included Coleman's signature on a waiver of arraignment dated June 1, 1998 - two months prior to when he swore under oath he knew about it.

An interesting development during

Coleman's trial is that after testifying as a defense witness, Swisher County Sheriff Larry Stewart apparently forgot while being cross-examined by Special Prosecutor Rod Hobson that he was a participating in a perjury trial. Stewart was the person who hired Coleman as an undercover agent in January 1998. Prior to Stewart testifying, Amarillo Detective Jerry Massengill testified that he conducted an extensive background check of Coleman - including interviewing authorities and former associates in Cochran County - and that he shared what he learned about Coleman's shady past with Stewart prior to Coleman's hiring. Yet after Massengill's testimony, Stewart testified on cross-examination that he wasn't aware of Coleman's troubled background and pending Cochran County theft charges when he hired Coleman. Outside the presence of the jury, Hobson told Judge Gleason that Stewart's testimony was possibly perjurious because it was contrary to previous statements Stewart had given under oath, and he said to the judge, "I suggest you appoint Sheriff Stewart a lawyer. We believe there's significant variations in what he said, and it's problematic."<sup>2</sup> Stewart was dismissed as a witness and the judge assigned him a defense lawyer to consult with. It is noteworthy that Stewart's knowledge of Coleman's background prior to hiring him was supported by his testimony that he wouldn't rule out, in hindsight, hiring Coleman knowing that he was under indictment for theft while working as a law enforcement officer.<sup>3</sup>

After the five-day trial, the jury deliberated for about three hours before convicting Coleman of the aggravated perjury count. However he was acquitted of another aggravated perjury count related to whether he testified falsely about filling a private vehicle at a Cochran County owned fuel pump, even though a witness testified to seeing him do so. The jury also recommended he serve a seven-year probationary sentence.

After the verdict, Hobson said that whether perjury charges would be filed

against Sheriff Stewart is up to Lubbock County Criminal District Attorney Bill Sowder and a Lubbock County grand jury.<sup>4</sup>

Four days after Coleman's conviction, Judge Gleason held his sentencing hearing at the Swisher County Courthouse in Tulia. Coleman was sentenced to ten years probation. That makes him vulnerable to being sent to prison for a probation violation. As Hobson observed, "It's not necessarily going to be easy for him to live on probation."<sup>5</sup>

Many people recognize that Coleman was the little fish who took the fall for his superiors. Hobson expressed that opinion after the sentencing hearing, "He (Sheriff Stewart) was the evil architect in this whole deal."<sup>6</sup>

## Endnotes:

1 See: *Travesty in Tulia, Texas*, Hans Sherrer, *Justice: Denied*, Issue 23, Winter 2004, page 3.

2 Swisher County sheriff grilled on Coleman's background, by D. Lance Lunsford, *Lubbock Avalanche-Journal*, January 13, 2005.

3 Sheriff testifies about Coleman's arrest record, by Betsy Blaney (AP), *Lubbock Avalanche-Journal*, January 13, 2005.

4 Coleman convicted of perjury, by D. Lance Lunsford, *Lubbock Avalanche-Journal*, January 15, 2005.

5 Case closed, but echoes still haunt Tulia, D. Lance Lunsford, *Lubbock Avalanche-Journal*, January 19, 2005.

6 Id.

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# Procedural Default In Exhausting State Administrative Remedies Held Not A Bar To Bringing § 1983 Action; Supreme Court Grants Review

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals, deepening a split among the circuits, held that a California state prisoner's alleged untimeliness in filing his administrative grievance would not bar him from access to federal court under the Prison Litigation Reform Act (PLRA) in a subsequent 42 U.S.C. § 1983 complaint. From a factual perspective, the question was, if the state administrative appeals process (a 3-level structure) is truncated below the third level by the state for reasons of alleged procedural error by the prisoner, has the prisoner in fact exhausted his administrative remedies for purposes of the PLRA (42 U.S.C. § 1997e(a)) if he accepts the termination at the intermediate appeal level and proceeds directly to federal court? Or, from a legal perspective, does "failure to comply with administrative filing requirements" amount to a "failure to exhaust" available state remedies?

Viet Mike Ngo, serving 17-life for second degree murder, was placed in administrative segregation at San Quentin State Prison on October 26, 2000, the charges for which Ngo complained wrongly defamed him with allegations of "engag[ing] in sexual relationships with Catholic volunteer priests." Ngo was returned to the general population in December, 2000 on condition that he refrain from evening fellowship and Bible study programs as well as not correspond with a former chapel volunteer.

Six months later, on June 18, 2001, Ngo administratively appealed the disciplinary action as restricting his First Amendment free speech and free exercise of religion rights. The Appeals Coordinator rejected the appeal as time-barred, noting prison regulation 15 CCR § 3084.6(c), which requires appeals to be filed within fifteen working days of the challenged event. Ngo submitted a second appeal six days later, alleging that the first appeal was timely because he continued to suffer the consequences of his punishment. The Appeals Coordinator didn't buy into this, and rejected the second appeal on the same untimeliness grounds.

Having had his appeals "screened out," Ngo was unable to proceed to

higher levels of appeal. Instead, he went to federal district court. But the district court (U.S.D.C., N.D. Cal.) dismissed his complaint for failure to exhaust all available remedies, observing that Ngo had not gone to the "third level." Ngo appealed.

The Ninth Circuit noted that the Sixth Circuit had ruled that an untimely administrative appeal *does* satisfy the PLRA's exhaustion requirement (*Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003)), but that the Third, Seventh and Tenth Circuits had held that it does *not*. (See: *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004). The court observed that adding a procedural default element to the PLRA, would mean that "prisoners' access to courts would be based on their ability to navigate procedural minefields, not on whether their claims had any merit. ... Prison administrators should not be

given an incentive to fashion grievance procedures which permit or defeat prisoners' meritorious claims."

The court concluded that Ngo had exhausted all administrative remedies "available" to him when the Appeals Coordinator lowered the time-bar boom. The state had had a choice to hear and decide Ngo's appeal but twice elected not to do so. It could not later be heard to complain in federal court that it was shortchanged by Ngo's failure to exhaust administrative remedies. Indeed, the state did not even allege any prejudice from the delay. Accordingly, the district court's dismissal was reversed and the case remanded. See: *Ngo v. Woodford*, 403 F.3d 620 (9th Cir. 2005).

On November 14, 2005, the United States supreme court granted review of the case to resolve the circuit split. *PLN* will report the decision when it is issued. ■

## Los Angeles County Pays \$125,000 In Medical Negligence Juvenile Camp Death

Los Angeles County settled a surviving family's suit for \$125,000 that alleged negligent medical care for their son who died while incarcerated in county juvenile facilities.

Sixteen year-old William Lee was taken to Central Juvenile Hall after being arrested on August 16, 2002. During medical screening there, his history of a congenital narrowed aortic (heart) valve was noted. This condition puts one who exercises strenuously at risk of sudden death. On September 3, 2002, Lee was transferred to Los Angeles County's Challenger Memorial Youth Camp, where he was appropriately restricted to low intensity recreational activities. But on November 25, 2002, Lee suffered a loss of consciousness during a march back to the camp. The blackout was thought to be due to temporary loss of oxygen. He was taken to the Camp infirmary, where he was seen by a nurse, but no doctor was summoned and no further medical aid was given.

On December 6, 2002, Lee was found unconscious in a recreational area, lying on his side. CPR was given,

and he was taken by ambulance to Antelope Valley Hospital. However, he died 30 minutes later after resuscitation was unsuccessful. An autopsy determined that death was caused by heart failure related to his preexisting heart valve condition.

Lee's family sued in state superior court for juvenile officials' failure to take Lee to a hospital or doctor after his first unconsciousness. County officials admitted that this failure "fell below the standard of care [and] resulted in a missed opportunity to evaluate a potentially worsening condition [which was] directly responsible for the results observed here." Lee's mother and father had each asked for \$375,000 in damages, plus \$8,000 in funeral expenses. The settlement reached on February 22, 2005 was for \$33,375 each for loss of companionship, \$8,000 in funeral expenses, \$40,250 in attorney fees and \$10,000 in litigation costs, totaling \$125,000. Los Angeles County reported its own attorney expenses and costs at \$40,463. See: *Lee v. County of Los Angeles*, Los Angeles Superior Court No.MC014883. ■

# Escaped Murderer Found Eleven Years Later Living With Warden's Wife

by John E. Dannenberg

Tipped off by a viewer of *America's Most Wanted*, Shelby County, Texas police on April 4, 2005 took into custody Randolph Dial, 60, a murderer who escaped from the Oklahoma State Reformatory in Granite, Oklahoma on August 30, 1994. And in a bizarre twist, he was found living with the wife of then Deputy Warden Randy Parker, Bobbi Parker, 42, who disappeared with their red minivan the same day after leaving a note that she was going grocery shopping. Living deep in the woods near the Louisiana border, the two were raising chickens.

The night of Bobbi's disappearance, her mother received a phone call — later traced to Hurst, Texas — where Bobbi reportedly said, while crying, "I can't talk now. I'm OK. Tell the kids I'll see them soon." A day later, she called from Forth Worth, telling a friend, "I've got 30 seconds to talk. I want you call home. Tell the kids I love them and I'll be home soon." She was never heard from again.

Dial had been accorded minimum custody "trustworthy" status, working outside the walls. He had been convicted in 1981 of killing a karate instructor. A well known sculptor and painter with a master's degree in art, Dial ran a prisoner pottery program with Bobbi. The morning of her disappearance, Randy saw his wife working with Dial in his garage. Randy considered him "personable," yet "an absolute coward." "He was always trying to run a con on people."

The living relationship of Bobbi and Dial was allegedly forced. He abducted her at knifepoint and held her in the constant fear that her family would be hurt if she tried to run. When Bobbi was found, the Texas authorities described her as "traumatized" and "terrified." She was unable to cooperate with police because she feared Dial had "mob" connections and that her family was still in jeopardy. The informant to *America's Most Wanted* was likewise made fearful, but obviously not fearful enough to not turn Dial in. Dial, who attended a local Pentecostal church, had a loaded pistol on the table

and a loaded shotgun by the door of the mobile home near Campti, Texas where he was arrested, while Bobbi was in another part of the county tending their 125,000 chickens. They were living under the assumed names of Richard and Samantha Deahl. FBI agents said Bobbi appeared healthy and unharmed. She asked about her husband and two daughters. But once she knew Dial was back in custody, she was tearfully reunited with her family.

In a post-arrest interview, Dial told reporters that he always expected he would be caught. "I hoped I'd be luckier, see them coming. But I didn't." In one statement, he said his eleven years on the lam were "wonderful," living in Houston [where he worked as a security guard], Crockett and Nacogdoches. But later, he said his time out of prison wasn't really freedom, because he was always hiding. "I was doing time. I never went anywhere. It was just the same as being in prison, except that I had a big yard." That was tempered by "I was a hostage-taker and will probably live to regret it," Dial told reporters. "But now I don't. Doing a life sentence, at my age, I wouldn't trade it for the past 10 1/2 years."

But he did have one adventure. In 1998, he boldly traveled to Oklahoma City to attend a book signing of *At Large*, a nonfiction book about his own life, escape and mysterious disappearance. There, Dial bought a copy and had it signed by author (and former Tulsa homicide detective) Kent Shaffer. After driving back to Texas and reading the book, Dial phoned Shaffer to tell him he "got it right." Although Shaffer notified the FBI, the call was never traced.

Dial has been charged with escape and after firing his court appointed

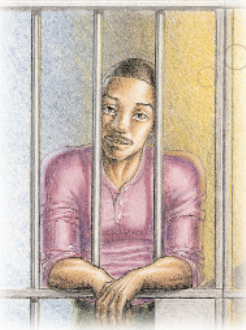
attorneys was scheduled to stand trial in December, 2005. Police have not charged Parker with any crimes but continue to investigate whether she willingly helped Dial elude capture. The fact that over 11 years Parker never attempted to escape, alert police or otherwise leave Dial, despite frequently being separated from him, has troubled police investigators. Dial has not been charged with kidnapping which indicates prosecutors may not be able to prove such a charge.

Bobbi has since been reunited with her husband. Randy Parker is now the warden of the William S. Key Correctional Center in Fort Supply, Oklahoma.

Sources: *Dallas News*, *Houston Chronicle*, *Associated Press*, *The Oklahoman*.

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# Pro Se Tips and Tactics: Three-Strikes and No More Partial Payment of Filing Fees

by Daniel E. Manville

## Introduction<sup>1</sup>

When filing a *pro se* lawsuit you may seek a waiver of the payment of the entire filing fee. However, with the enactment of the Prison Litigation Reform Act (PLRA), courts are now authorized to deny such waiver if you have filed three or more prior lawsuits which have been dismissed based upon a finding that these lawsuits were either frivolous, malicious, or failed to state a claim.<sup>2</sup> If such a finding is made, you will not be allowed to file a lawsuit *in forma pauperis* but you can file it if you pay the entire filing fee when you submit the lawsuit to the court. This is commonly known as the “three strikes” provision of the PLRA.

## What is a Strike?

A strike is when a court has determined that your lawsuit or appeal is frivolous, malicious, or it failed to state a claim.<sup>3</sup> The court will count the dismissal of the complaint as a “strike” if it meets one or more of these criteria. If you then appeal that dismissal and the appellate court finds that the dismissal was correctly based upon one of these criteria, you will then receive a second strike.<sup>4</sup>

Courts are authorized to review your pleadings at any time during the processing of the case to determine if the “action

... is frivolous or malicious ... fails to state a claim ... or ... a defendant ... is immune from such relief” requested by the prisoner.<sup>5</sup> These procedures apply to cases filed by prisoners “regardless ... whether the plaintiff has paid the filing fee or is proceeding [IFP].”<sup>6</sup>

## When is a Lawsuit or Appeal Frivolous?

Since the PLRA does not define frivolous, courts will look to the “ordinary, contemporary, common meaning” of the word in determining whether your lawsuit is frivolous.<sup>7</sup> In determining whether the lawsuit is frivolous, some courts will “focus on whether the action is frivolous in the sense that it is (1) of little or no weight, value, or importance; (2) not worthy of serious consideration; or (3) trivial.”<sup>8</sup> For example, claims that prisoners have a constitutional right to deodorant or steak dinners have been held legally frivolous.<sup>9</sup> Recently, the Fourth Circuit stated that “[a] claim for *de minimis* damage constitutes a frivolous claim within the meaning of ... 28 U.S.C. § 1915(e)(2)(B).”<sup>10</sup> This holding is contrary to a line of United States Supreme Court cases which have recognized that First Amendment and procedural due process violations may only result in nominal damages.<sup>11</sup>

or the courts because if it does, the court will likely dismiss it as being malicious and you will have a strike imposed against you.

## When Does a Lawsuit Fail to State a Claim?

Courts are permitted to summarily dismiss a complaint<sup>16</sup> for “failure to state a claim upon which relief may be granted” (i.e., if the facts alleged in your complaint do not establish a violation of law).<sup>17</sup> For example, if the lawsuit alleges that you were not given due process prior to being placed in segregation, on these facts only, the court will find that you failed to state a claim since you have no due process right prior to placement in segregation. This will count as a strike.<sup>18</sup> Further, most courts will count as a strike a complaint that is dismissed for failure to exhaust the prison administrative grievance process.<sup>19</sup>

## What is Not a Strike?

Courts have held that habeas corpus actions do not count as strikes under the three-strike provision.<sup>20</sup> However, a habeas petition which is more appropriately construed as a § 1983 action is “countable as a strike.”<sup>21</sup> A court should dismiss without prejudice a § 1983 claim that has been improperly filed under the habeas statute.<sup>22</sup>

The “three strikes” provision only applies to lawsuits filed while you were in custody as a result of a conviction or detained for an alleged criminal law violation.<sup>23</sup> This means that if you filed a lawsuit while a civil detainee, such as an INS detainee, and it was dismissed as being frivolous, malicious or failed to state a claim the dismissal would not count as a strike when filing as an inmate.<sup>24</sup>

It has been held “that an action dismissed *entirely* without prejudice is not a ‘strike’ for the purpose of § 1915(g)...”<sup>25</sup> The court went on to state that “if any of the claims were found to have merit, the presence of frivolous claims would not by themselves draw the action into the circle traced by § 1915(g).”<sup>26</sup>

## When Should You File an Appeal?

Not every dismissal of a lawsuit by the district court should be appealed, especially those where the dismissal

## When is A Lawsuit or Appeal Malicious?

In *Andrews* the court held that a lawsuit is malicious if it was filed with the “intention or desire to harm another.”<sup>12</sup> Some examples of malicious lawsuits are those that threaten violence or contain disrespectful references to the court;<sup>13</sup> those that repeat the same allegations from prior lawsuits;<sup>14</sup> or those where the prisoner offered to dismiss the lawsuit if prison officials would recommend to a state court to grant habeas corpus.<sup>15</sup> Your pleadings should not contain abusive or derogatory comments about the other parties

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is based upon a failure to exhaust the grievance process. You must consider the ramifications that can result from appealing a frivolous, malicious or failure to state a claim dismissal. If the appellate court affirmed the dismissal, you will then have two strikes. Review the ruling of the district court and only appeal when you are quite certain you can prevail.

### How is it Determined Whether You Have Three Strikes?

In determining whether you have filed three prior lawsuits to meet the "three-strike" provision, courts are to count lawsuits and appeals filed prior to the PLRA effective date of April 26, 1996.<sup>27</sup> Some courts have held that a dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim.<sup>28</sup>

Each time you file a lawsuit there is a requirement that you list all of your prior lawsuits and the results. A district court will then review these lawsuits to determine if you have three prior dismissals that meet the criteria of 28 U.S.C. § 1915(g). If you do meet the "three strikes" provision, the district court will not file your lawsuit and will issue an order dismissing it, and will not allow you to pay the required filing fee.

Once the district court has determined that your lawsuit should be dismissed without prejudice since you meet the "three strikes" provision, you cannot simply pay the filing fee after being denied

*in forma pauperis* status.<sup>29</sup> You must refile the lawsuit and pay the filing fee at the time you reinitiate the suit.

### Is there an Exception to the Three Strikes Provision?

Once it has been found that you meet the "three-strikes" provision, a federal court lawsuit or appeal cannot be filed unless you pay the full filing fee at the time of submitting the lawsuit or appeal.<sup>30</sup> The only exception to the paying of the entire initial filing fee is if you are under imminent danger of serious physical injury. If you file the lawsuit after having obtained a third strike and it does not meet the imminent danger standard, a district court should dismiss the lawsuit without prejudice.<sup>31</sup>

Courts have held that imminent physical injury must exist at the time the complaint or appeal is filed.<sup>32</sup> In the complaint or appeal you must demonstrate how the conduct complained of threatens continuing or future injury and not just injuries received in the past. Courts have defined the phrase "imminent danger" as encompassing those dangers "likely to cause harm in the 'next week, month, or year.'"<sup>33</sup>

One appellate court required the holding of an evidentiary hearing on the question of "imminent physical danger" where the prisoner had made credible, uncontroverted allegations of physical threats and attacks.<sup>34</sup> Another court held that the standard of imminent danger of serious physical injury was satisfied when prison staff continuously placed a prisoner near his enemies

despite two prior stabbings.<sup>35</sup> Whereas, another court stated that the standard was met when a prisoner alleged a serious medical need that resulted in five tooth extractions and a spreading mouth infection requiring two additional extractions.<sup>36</sup>

Courts have held that this standard is not limited to Eighth Amendment claims and does not require that the imminent danger allegation be accompanied by allegations of an existing serious physical injury; but the alleged conditions must pose an imminent (future) danger of serious physical injury.<sup>37</sup>

### Is the Three Strikes Provision Constitutional?

The "three strikes" provision has survived numerous constitutional challenges, such as that it denied access to the court, due process, equal protection, and others.<sup>38</sup> ■

### Endnotes

<sup>1</sup>. This article is authored by Daniel E. Manville. He is the author and publisher of the recently released *Disciplinary Self-Help Litigation Manual* and is currently working on a rewrite of the *Prisoners' Self-Help Litigation Manual* with John Boston which should be available in late 2006. Mr. Manville is presently an Adjunct Professor and Clinical Staff Attorney for Wayne State University Law School Civil Rights Clinic, Detroit, Michigan. Neither the Clinic or Staff Attorney Manville are able to handle lawsuits in other states.

<sup>2</sup>. 28 U.S.C. § 1915(g) states:

In no event shall a prisoner bring a civil

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## Pro Se Tips and Tactics (cont.)

action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

<sup>3</sup>. *Supra* note 2.

<sup>4</sup>. *See, e.g., Henderson v. Norris*, 129 F.3d 481, 485 (8<sup>th</sup> Cir. 1997) (“dispositions of both his complaint and his appeal are “strikes” under §§ 1915(g)”; *Healy v. Wisconsin*, 65 Fed. Appx. 567, 2003 WL 21054646 (7<sup>th</sup> Cir. 2003) (prisoner “brought due process claim that was barred by precedent, and earned second strike for taking appeal from dismissal of that action”).

<sup>5</sup>. 28 U.S.C. § 1915(e)(2); *Brown v. Bargerly*, 207 F.3d 863, 867 (6<sup>th</sup> Cir. 2000).

<sup>6</sup>. *See, e.g., Ruiz v. United States*, 160 F.3d 273, 274 (5<sup>th</sup> Cir. 1998); *McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6<sup>th</sup> Cir. 1997).

<sup>7</sup>. *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311 (1979). In *Andrews v. King*, 398 F.3d 1113, 1121 (9<sup>th</sup> Cir. 2005), the court relied on the *Webster's Third New International Dictionary* 913 (1993) in holding that “a case is frivolous if it is ‘of little weight or importance: having no basis in law or fact.’” “*See also Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827 (1989).

<sup>8</sup>. *See, e.g., Deutsch v. U.S.*, 67 F.3d 1080, 1087 (3<sup>rd</sup> Cir. 1995).

<sup>9</sup>. *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6<sup>th</sup> Cir. 1990).

<sup>10</sup>. *Nagy v. FMC Butner*, 376 F.3d 252, 2004 WL 1622219 \*\*4 (4<sup>th</sup> Cir. 2004) (\$25 in damages was sought for lost coat).

<sup>11</sup>. *See, e.g., Memphis Cmty. Sch. Dist. v.*

*Stachura*, 477 U.S. 299, 308 n. 11, 106 S.Ct. 2537 (1986) (holding nominal damages should be granted for section 1983 claims when actual injury cannot be shown); *Carey v. Phipps*, 435 U.S. 247, 267, 98 S.Ct. 1042 (1978) (holding nominal damage award of \$1.00 required for procedural due process violation); *see also Hughes v. Lott*, 350 F.3d 1157, 1162 (11<sup>th</sup> Cir. 2003) (holding section 1997e(e) does not preclude nominal damages); *Risdal v. Halford*, 209 F.3d 1071, 1073 (8<sup>th</sup> Cir. 2000) (holding court must award nominal damages in the amount of \$1.00 for First Amendment violations).

<sup>12</sup>. *Andrews v. King, supra*.

<sup>13</sup>. *See Crisafi v. Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981) (per curiam) (“complaint that threatens violence or that contains disrespectful references to the court” properly characterized as malicious); *Spencer v. Rhodes*, 656 F.Supp. 458, 464 (E.D. N.C.), *aff'd*, 826 F.2d 1061 (4<sup>th</sup> Cir. 1987) (complaint filed for purposes of vengeance and not to redress a legal wrong was malicious).

<sup>14</sup>. *Ballentine v. Crawford*, 563 F.Supp. 627, 629 (N.D. Ind. 1983) (complaint that repeated allegations of previous litigation was abusive and malicious). *See also, Bailey v. Johnson*, 846 F.2d 1019, 1021 (5<sup>th</sup> Cir. 1988) (“an IFP complaint that merely repeats pending or previously litigated claims may be considered abusive and dismissed under the authority of section 1915(d).”); *Horsey v. Asher*, 741 F.2d 209, 213 (8<sup>th</sup> Cir. 1984) (a complaint may be dismissed under § 1915(d) if it is “plainly part of a longstanding pattern of abusive and repetitious lawsuits.”).

<sup>15</sup>. *Hernandez v. Earney*, 558 F.Supp. 1256, 1258 (W.D. Tex. 1983).

<sup>16</sup>. This means that the court can review your complaint before it is *actually* filed with the court to determine if it meets the criteria of § 1915A(b). If the court finds that your complaint meets one of the criteria contained in § 1915A(b), it will issue an order dismissing the lawsuit without service upon the defendant. *See, e.g., Ford v. Johnson*, 362 F.3d 395, 399 - 400 (7<sup>th</sup> Cir. 2004).

<sup>17</sup>. 28 U.S.C. § 1915(A). Most district courts have established pre-screening procedures for review of *pro se* complaint before they are even filed or served. Federal district courts are authorized to review prisoners' complaints before filing them, or as soon as practical after filing, to determine if any of the claims are “frivolous, malicious, ... fails to state a claim .... [or the] defendant ... is immune from such relief” requested in the complaint. *Id.*

<sup>18</sup>. *Sandin v. Connor*, 515 U.S. 472, 487, 115 S.Ct. 2293 (1996) (liberty interest not to be confined in segregation exists only if such

confinement imposes an “atypical and significant hardship” on the prisoner).

<sup>19</sup>. *See, e.g., Porter v. Fox*, 99 F.3d 271, 274 (8<sup>th</sup> Cir. 1996); *Henry v. Medical Dept. at SCI-Dallas*, 153 F.Supp.2d 553, 556 (M.D. Pa. 2001) (citing to *Porter* with approval). *But see Snider v. Melindez*, 199 F.3d 108, 115 (2<sup>nd</sup> Cir. 1999) (opining, in dicta, without deciding, that the phrase, “failure to state a claim,” as used in the PLRA, does not include failure to exhaust administrative remedies absent a finding that the failure to exhaust permanently bars the suit); *Clemons v. Young*, 240 F.Supp.2d 639, 641 (E.D. Mich. 2003) (in dictum, dismissal for failure to exhaust should not be strike), citing to *Snider v. Melindez*, 199 F.3d at 111). *See also Smith v. Duke*, 296 F.Supp.2d 965, 966-68 (E.D. Ark. 2003).

<sup>20</sup>. *See, e.g., Smith v. Angelone*, 111 F.3d 1126, 1130 (4<sup>th</sup> Cir. 1997) (three-strike provision does not apply to habeas action); *Blair-Bey v. Quick*, 151 F.3d 1036, 1041 (D.C. Cir. 1998) (same).

<sup>21</sup>. *See Jennings v. Natrona County Det. Ctr. Med. Facility*, 175 F.3d 775, 779 & n. 2 (10<sup>th</sup> Cir. 1999); *Ayers v. Norris*, 43 F.Supp.2d 1039 (E.D. Ark. 1999).

<sup>22</sup>. *See, e.g., Moran v. Sondalle*, 218 F.3d 647, 651 (7<sup>th</sup> Cir. 2000). *See also Cook v. Texas Dep't of Criminal Justice Transitional Planning Dep't*, 37 F.3d 166, 168 (5<sup>th</sup> Cir. 1994) (noting distinction between claims that must initially be pressed by writ of habeas corpus and those that may be brought pursuant to § 1983); *Serio v. Members of La. St. Bd. of Pardons*, 821 F.2d 1112, 1119 (5<sup>th</sup> Cir. 1987) (holding that “in instances in which a petition combines claims that should be asserted in habeas with claims that properly may be pursued as an initial matter under § 1983, and the claims can be separated, federal courts should do so, entertaining the § 1983 claims.”).

<sup>23</sup>. *Page v. Torrey*, 201 F.3d 1136, 1139-40 (9<sup>th</sup> Cir. 2000).

<sup>24</sup>. *See LaFontant v. INS*, 135 F.3d 158, 165 (D.C. Cir. 1998) (INS detainee); *Page v. Torrey, supra* (post-expiration detainee is no longer a “prisoner”); *Cf. Perkins v. Hedricks*, 340 F.3d 582 (8<sup>th</sup> Cir. 2002) (person held on pure civil commitment is not a “prisoner”); *Kolocotronis v. Reddy*, 247 F.3d 726, 728 (8<sup>th</sup> Cir. 2001) (person held on civil commitment following verdict of not guilty by reason of insanity is not a “prisoner”).

<sup>25</sup>. *Clemons v. Young, supra*.

<sup>26</sup>. *Id.*

<sup>27</sup>. Courts have applied § 1915(g) retroactively by finding that it is a procedural rule. *See Tierney v. Kupers*, 128 F.3d 1310, 1311 (9<sup>th</sup> Cir. 1997); *Keener v. Pennsylvania Bd. of Probation & Parole*, 128 F.3d 143, 144-5 (3<sup>rd</sup> Cir. 1997)

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(collecting cases); *Adepegba v. Hammons*, 103 F.3d 383, 385-6 (5<sup>th</sup> Cir. 1996).

<sup>28</sup>. See, e.g., *Rivera v. Allin*, 144 F.3d 719, 731 (11<sup>th</sup> Cir.), cert. dismissed, 524 U.S. 978 (1998); *Banos v. O'Guin*, 144 F.3d 883, 885 (5<sup>th</sup> Cir. 1998) (prisoner "has not alleged, much less established, that he faced imminent danger of serious physical injury at the time that his notice of appeal was filed").

<sup>29</sup>. *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11<sup>th</sup> Cir. 2002).

<sup>30</sup>. *Id.*

<sup>31</sup>. See *Shabazz v. Campbell*, 12 Fed.Appx. 329, 330, 2001 WL 700827 (6<sup>th</sup> Cir. 2001) (unpublished) (stating that because a prisoner's complaint clearly satisfied the provisions of § 1915(g) at the moment of filing, the district court had no authority to consider the merits of the complaint); *McGee v. Myers*, 10 Fed.Appx. 528, 529, 2001 WL 569149 (9<sup>th</sup> Cir. 2001) (unpublished) (affirming a district court's denial of a prisoner's request for *in forma pauperis* status and dismissal of complaint without prejudice pursuant to § 1915(g)).

<sup>32</sup>. See *Ashley v. Dilworth*, 147 F.3d 715, 717 (8<sup>th</sup> Cir. 1998); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 317 (3<sup>rd</sup> Cir. 2001) (en banc) (collecting cases and overruling contrary prior Third Circuit authority); *Bañños v. O'Guin*, 144 F.3d 883, 884 (5<sup>th</sup> Cir. 1998) (prisoner with three strikes is entitled to proceed with his action or appeal only if he is in imminent danger at the time that he seeks to file his suit in district court or seeks to proceed with his appeal or files a motion to proceed IFP).

<sup>33</sup>. *Horton v. Cockrell*, 70 F.3d 397, 401 (5<sup>th</sup> Cir. 1995) (quoting *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475 (1993)); *Payne v. Collins*, 986 F.Supp. 1036, 1052 (E.D. Tex. 1997) (observing this approach includes review of the actions taken to alleviate the threat).

<sup>34</sup>. *Gibbs v. Roman*, 116 F.3d 83 (3<sup>rd</sup> Cir. 1997) (en banc), overruled on other grounds, *Abdul-Akbar v. McKelvie*, *supra*.

<sup>35</sup>. *Ashley v. Dilworth*, *supra*, but see *Martin v. Shelton*, 319 F.3d 1048, 1050 (8<sup>th</sup> Cir. 2003) (forced to work outside in inclement weather twice in five month period does not create imminent serious physical injury).

<sup>36</sup>. See *McApphin v. Toney*, 281 F.3d 709, 710-1 (8<sup>th</sup> Cir. 2002).

<sup>37</sup>. See, e.g., *Gibbs v. Cross*, 160 F.3d 962, 967 (3<sup>rd</sup> Cir. 1998).

<sup>38</sup>. See *Rivera v. Allin*, *supra* at 732 (holding that § 1915(g) does not violate prisoner's right to access the courts, separation of powers, due process, or equal protection); *Medberry v. Butler*, 185 F.3d 1189, 1192 (11<sup>th</sup> Cir. 1999) (citing to *Wilson v. Yaklich*, 148 F.3d 596, 606 (6<sup>th</sup> Cir. 1998)) (§ 1915(g) does not violate *ex post facto* laws)).

## Supreme Court Holds Penalty Phase Shackling Violates the Due Process

In a 7-to-2 decision that Justices Thomas and Scalia criticized as shunning common sense and "risk[ing] the lives of courtroom personnel, with little corresponding benefit to defendants," the United States Supreme Court held "that the Constitution forbids the use of visible shackles during the penalty phase [of a capital case], as it forbids their use during the guilt phase, *unless* that use is 'justified by an essential state interest — such as the interest in courtroom security — specific to the defendant on trial.'"

In 1998, Carl Deck was convicted of a double homicide and sentenced to death in Missouri. The State Supreme Court vacated Deck's death sentence in a new sentencing proceeding was convened. "From the first day of the new proceeding, Deck was shackled with leg errands, handcuffs, and a belly chain." Counsel objected to the shackling on three separate occasions and moved "to strike the jury pool 'because... Mr. Deck is shackled in front of the jury and makes them think that he is... violent today.'" The trial court overruled each objection, stating Deck "has been convicted and will remain in leg irons and a belly chain," and that his "being shackled takes any fear out of their minds." Deck remain shackled throughout the penalty phase and was again sentenced to death.

The Missouri Supreme Court rejected Deck's argument that his shackling violated Missouri law and the U.S. Constitution. See: *State v. Deck*, 136 S.W.3d 481, (Mo. 2004) The Supreme Court of the United States granted certiorari and reversed.

The Court first acknowledged that the law, which "has deep roots in the com-

mon-law," has "long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." It then found that "The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases."

"The appearance of the offender during the penalty phase in shackles,... almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community — often a statutory aggregator and nearly always a relevant factor in jury decision-making, even where the State does not specifically argue the point... It also almost inevitably affects adversely the jury's perception of the character of the defendant."

The Majority concluded that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." However, this "constitutional requirement... is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns that may call for shackling... But any such determination must be case specific; that is to say, it should reflect particular concerns, say special security needs, or escape risks, related to the defendant on trial." See: *Deck v. Missouri*, 125 S. Ct. 2007 (2005).

While this ruling arose in the context of a death penalty case its reasoning applies with equal force to civil jury trials involving prisoner plaintiffs and witnesses where shackling can undermine a prisoner witnesses credibility. ■

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# Fired, Tattooed, Nude-Posing Guard Settles with Maryland DOC for \$10,000

by Matthew T. Clarke

Maryland has agreed to pay an ex-guard who appeared nude on a website and in a tattoo magazine \$10,000 to get her to drop her wrongful discharge claim after an administrative law judge sided with the guard.

Marcie Betts wasn't intending to become an icon for First Amendment rights when she applied for a job as a prison guard with the Maryland Department of Public Safety and Correctional Services in January, 2003. She just needed a job.

"Around here [Hagerstown], you have to work at the [Mack Truck] plant itself or at the prison to find a good paying job, unless you are a doctor or a lawyer," said the 24-year old Betts.

Since graduating high school in 1997, Betts had supported herself, and later her husband, by working in a tattoo parlor, caring for mice bred for research, as a receptionist at a pest control company, and later an insecticide sprayer, and yes, even at the plant as a security guard. In May 2002, she applied for a job at the prison. On May 29, 2002, after filing the application, but before being notified of her acceptance, she sold 81 digital photos of herself that had been taken by her husband to fee-only website "Burning Angel" for \$300. The website specializes in nude photos of alternative and goth women. On October 29, 2002, Betts was hired as a guard. On November 18, 2003, she entered the Training Academy for prison guards. On January 7, 2003, Betts completed her training and reported for duty. She did so well in

training and on the job that the administrative judge made a finding of fact that she "was an excellent employee."

On January 20, 2003, Betts was approached by another guard who asked if she had photos on the internet. She told him no. Later that day, a prisoner asked her the same thing and received the same reply.

On January 21, 2003, someone anonymously pushed a packet of the website photos under the warden's door. The photos included nude and scantily-clad shots of the plentifully-tattooed Betts, one of which depicted her licking a dildo with her fingers in her vagina and anus. The warden had the matter investigated and, when confronted with the photos on January 22, 2003, Betts admitted having sold the photos to the website. The warden met with Betts on January 29, 2003, and terminated her effective February 12, 2003. The sole reason given for the termination was that her photos had appeared on the website.

Betts appealed the termination. Her cause caught the attention of the popular press, with a large spread appearing in the *Washington Post* and Alan Dershowitz, one of the best known lawyers in the country, publishing an article defending Betts in the August 2003 issue of *Penthouse* magazine. In the article, he asked: "If a state prison were permitted to fire a guard based on what the prisoners might imagine, could they also fire a guard who was too busty or too sexy?"

The administrative judge held a hearing at which the prison system pulled out all the stops, even hiring the former head of the Virginia Department of Corrections to present the judge with a parade of horrible scenarios that would happen to Betts if she continued to work as a guard. The basic premise of the prison system was that the prisoners, once they possessed a nude photo of Betts, would be unable to keep from solely viewing her as a sex object and would therefore be unable to control their sexual desire for her and would rape her. This would endanger her and the other guards who would have to come to her rescue. When it was pointed

out that no prisoner had access to the internet, they contended that the mere knowledge that Betts had appeared as a nude model would be sufficient to cause the problem. This likely gives us a greater insight into how prison administrators think about women than into how prisoners think. They also pointed out that the prison mail room had intercepted an issue of *Tabu Tattoo*, which contained a single image of a large tattoo of birds, cherries and a dagger across Betts's chest that had apparently been used without her authorization.

On November 12, 2003, the administrative judge ruled that all of this was rank speculation that paled in comparison to Betts's First Amendment rights. He also ruled that it had not been proven that any prisoner had seen a nude photo of Betts or, with the possible exception of the one who asked her the question, had any inkling that she had posed nude. The prison system had not asked her prior to hiring her, or any other guard, whether she had ever posed nude and did not include it among the examples they gave of conduct unbecoming an officer. No court had ruled that the photos were obscene. Thus, the publication of the photos was protected nonverbal public speech that occurred prior to her being hired. Therefore, the discharge violated her constitutional rights. The judge ordered the prison system to reinstate Betts with full pay and benefits and set a hearing for attorney fees.

The prison system appealed, then, on November 9, 2004, settled the claim by paying Betts \$10,000.

Betts was represented by Lawrence G. Walters of Orlando, Florida, an attorney who specializes in representing workers in the adult entertainment industry. ■

Sources: Decision in *Betts v. Department of Public Safety and Correctional Services*, OAH No. SPSM-RC1-11-03-07088 (Maryland Office of Administrative Hearings), *Los Angeles Times*, *Washington Post*, *Associated Press*, [www.yesportal.com](http://www.yesportal.com), [www.webmastervault.com](http://www.webmastervault.com). A sample photo is viewable at <http://burningangel.com/new/preview/marcie/1/>

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# **PLN Loses Florida Writer Pay Ban/Censorship Lawsuit: Appeal Pending**

*by David M. Reutter*

A Florida federal district court has held that *PLN* has not suffered, and is not currently suffering, a significant First Amendment injury from Florida Department of Corrections (FDOC) rule, policies, or procedures that ban compensation to prisoner writers and caused the impoundment of *PLN* for ad content.

As previously reported, *PLN* filed suit against the FDOC after it began impounding and banning *PLN* from receipt by Florida prisoners because it contained advertisements for three-way calling and pen pal services. *PLN* also challenged FDOC's rule that prohibits prisoners from establishing or engaging actively in a business or profession while incarcerated. See: *PLN*, February 2004, pg. 27; February 2005, pg. 11.

The matter proceeded to a bench trial on June 6-8, 2005. *PLN* was represented at that trial by Randall Berg and Cullin O'Brien from the Florida Justice Institute and Mickey Gendler of Seattle. *PLN* alleged violations of its First Amendment rights, seeking declaratory and injunctive relief.

The Court's July 28, 2005, order granting a directed verdict to the defendants first addressed FDOC's banning of *PLN* by prisoner subscribers due to content of certain advertisements. *PLN*, further, asserted that the FDOC censored its subscription renewal notices because of *PLN*'s allowance of payment by postage stamps.

There was no dispute that there exists a legitimate penological objectives behind the prohibitions on prisoners using three-way calling advertisements and pen pal services. The Court said it would not second-guess FDOC's determination those "services pose a potential threat to security within the prisons, as well as having the potential for fraud and safety issues for citizens outside prison walls." Additionally, "the sale of postage stamps, or the usage of stamps for currency, also pose the potential for safety risks, bartering, extortion, or other problems that the prisons have a legitimate interest in preventing."

The Court held that the FDOC had implemented procedures to ensure that publications such as *PLN*, which are not focused on such content, can be distributed to prisoners, regardless of their advertising content. This is accomplished by FDOC's telephone contractor, MCI, monitoring numbers on prisoners' phone lists and its employees checking incom-

ing and outgoing mail, which now happens. Moreover, FDOC implemented rules to allow publications that contain advertisements that are "incidental" to the main content of the publication. Therefore, the Court held *PLN* failed to show it would be rejected for prisoner consumption, and it had not shown it was significantly affected by censorship of its renewal notices. This was despite the fact that at the time of trial the February, 2005, issue of *PLN* was still being censored by prison officials in Florida. *PLN* had presented evidence the FL DOC had flip flopped on the censorship of *PLN* three times while the litigation was pending and had carried out the censorship even while FL DOC officials were instructing prison mail rooms not to censor *PLN* due to its ad content.

Because the Florida DOC had now enacted administrative rules precluding the censorship of publications based solely on advertising incidental to the magazine's content, the court held that *PLN*'s claim was moot.

As to the writer pay ban issue, the Court found that FDOC's prohibition on prisoner businesses or professions includes "individual activities with profit or revenue potential, such as one-time submission of a single manuscript for publication when such publication will result in or has the potential to result in the generation of revenue for the" prisoner.

The Court found that David Reutter is the only Florida writer who has been disciplined by this rule and only one other Florida writer, James Quigley, has ever submitted articles for *PLN* publication for pay, and he is deceased. The Court said, "Reutter did not even receive compensation when he first began writing for publication, and he has continued to submit a plethora of articles without compensation after being disciplined."

Once again, the Court did not want to "second-guess" the FDOC's justifications that it did not want to become entangled in prisoner business operations that can perpetuate fraud and extortion among prisoners and the general public. FDOC also contended it would incur costs associated with increases of mail or other business requests if prisoners conducted businesses with the outside world. None of the defendants nor the parties' expert

witnesses could identify a single instance where prisoners being paid for writing articles had ever caused a security problem.

The Court, therefore, held *PLN* failed to show it was affected by the writer pay ban, and even if it did, there exists legitimate penological objectives to support the ban. Accordingly, the Court granted judgment in favor of the FDOC on all issues. See: *Prison Legal News v. Crosby*, USDC, Middle District of Florida, Case No. 3:04-CV-00014-JHM-TEM.

In a separate order, the court awarded the defendants \$3,628.97 in costs stemming from their use of depositions at the trial and their status as the prevailing party.

*PLN* has appealed this decision to the 11<sup>th</sup> circuit court of appeals and will report its results. The Southern Poverty Law Center, Southern Center for Human Rights and the Society for Professional Journalists have filed an amicus brief on *PLN*'s behalf. They are represented by Joseph Bringman of the Seattle law firm Perkins Coie. ■

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# Mississippi Juvenile Legal Access Class Action Settled

On January 12, 2005, Mississippi settled a class action suit challenging a policy at the Colombia Training School (CTS) which severely limited residents' access to legal counsel.

CTS is a co-ed juvenile detention facility in Mississippi. The residents range in age from 10-18 years old. CTS was the subject of a 2002 report to the Mississippi Legislature, which "found numerous deficiencies... in the areas of medical care, dental care, prevention of abuse, and treatment and programming for children with special needs."

Simultaneously, the United States Department of Justice, (DOJ), launched a sweeping investigation into the conditions at CTS. In June 2003, the DOJ announced its findings, which included "particularly shocking and abusive conditions... including such inhumane institutional practices and hog-tying, pole-shackling, and prolonged isolation of suicidal youth in dark rooms without light, ventilation, or toilet facilities. DOJ also found rampant and unchecked staff-on-youth abuse, including physical assaults and chemical spray."

"The DOJ's findings were well-publicized... Many parents with children confined in [CTS] were greatly alarmed... and... requested that attorneys from the Mississippi Center for Justice ('MCJ') and the Southern Poverty Law Center ('SPLC') meet with their children."

In January 2004, SPLC attorney Sheila Bedi attempted to visit a CTS resident but was denied access. CTS Administrator Richard James informed Ms. Bedi that the only document he would accept to authorize a legal visit was in order from a state youth court judge, recognizing the attorney as counsel of record in the child's delinquency proceedings. James stated that because children at Colombia were in the custody of the State, written request by parents would not be honored.

On March 14, 2004, Rosetta Williams visited her son K.L.M. and observed dark bruises on his neck and wrists. K.L.M. said they were caused by staff earlier in the

week. He was threatened with retaliation if he reported his wounds.

On March 15, 2004, Rosetta Williams informed James "that her son ... wanted to meet with an attorney ... pursuant to [CTS] policy, K.L.M.'s request to meet with counsel was refused.... James informed Ms. Williams that no child would be permitted to meet with an attorney in the absence of a youth court order."

On April 13, 2004, counsel for SPLC and MJC brought a federal class action on behalf of K.L.M. and all other CTS residents. They alleged that the State's "obstructionist policy" deprived CTS residents of meaningful, effective, and adequate access to the courts and to due process of law, in violation of the First and Fourteenth Amendments to the United States Constitution.

The suit was settled on January 12, 2005. Terms of the agreement require the state to: abandon its former policy of requiring a court order before a lawyer can communicate with a CTS resident; inform residents of the right to seek assistance of counsel; help residents make legal requests; and ensure that the requests are delivered. "The settlement is a very good one," says SPLC and a lead counsel Danielle Lipow. "But I wouldn't call it a model." In the interests of settlement, class counsel waived more than \$30,000 in attorney fees that they were entitled to as prevailing parties. The plaintiff class was represented by Danielle Lipow and Sheila A. Bedi of SPLC and David M. Miller of MCJ. See: *United States of American v. Mississippi/KLW v. James*, USDC No. 3:03 cv 1354WSu (S.D. Miss. 2005). ■

## Higher Property Tax Collections Permit 25% Growth Of Los Angeles County Jail Capacity

by John E. Dannenberg

A six percent increase in property tax collections due to soaring real estate prices will add an estimated \$150 million to Los Angeles County coffers in the coming year. County supervisors have allotted \$68.5 million of that to reverse the cutbacks in the County Sheriff's budget for jails in the past three years that have resulted in 200,000 prisoners being let out early, the vast majority after serving only 10% of their sentences.

Los Angeles County Sheriff Lee Baca plans to hire 500 new deputies and add 4,474 new beds to the jail system, a 25% increase in capacity. High-risk offenders will be moved into the Twin Towers downtown jail in an effort to counter the pattern of five detainee murders in the past two years at the hands of under-supervised fellow prisoners. An additional 63 deputies will be hired to perform "safety checks" on prisoners. This was in response to the infamous security breach wherein a high-risk prisoner was able to freely roam the Central Jail to seek out and murder the witness who planned to testify against him. [See: *PLN*, April, 2005]

Beginning in 2002, Sheriff Baca was forced by budget cutbacks to reduce his jail population from 22,000 to 17,500. While only non-violent offenders were released early at first, as the money waned,

car thieves, stalkers and drunk drivers were also let go. Because the time served (10%) was so short, deterrence was severely jeopardized, reported Baca. "It was the most painful thing I ever had to do in my career as sheriff." Many offenders opted for jail time rather than rehabilitation programs. In December, 2004, the Board of Supervisors gave Baca enough money to reopen 1,778 beds, including a floor of the Pitchess Detention Center in Castaic. This has already permitted time served to increase from 10% to 25%. With the new property tax money, Baca will be able to reopen all of the Century Regional Detention Center in Lynwood and the remainder of Pitchess.

Other public safety expenditures planned from the property tax windfall include hiring 45 more prosecutors (\$5 million) and enhancing Probation Department treatment for delinquent juveniles (\$11.9 million).

But if your only "crime" is to be sick and poor in Los Angeles County, your fate will not improve much. Only \$40 million from the windfall will be used for the county public health care system, where the Department of Health Services expects to run a whopping \$435 million deficit in the next two years. ■

Source: *Los Angeles Times*.

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See Page 45 for more information



# Maryland Prisons MisCalculate Half of All Prisoner Release Dates

by David M. Reutter

Up to one half of all Maryland prisoners early release dates at two prisons were erroneous, concluded a report by the Maryland Office of Legislative Audits. The report declined to identify the two prisons it audited, as it felt the problems exposed are system wide.

The Maryland Department of Public Safety and Correctional Services-Division of Corrections (DOC) oversees the State's 23 prisons. According to DOC records, approximately 23,000 prisoners were incarcerated during fiscal year 2004.

To influence cooperation and promote positive behavior by its prisoners, Maryland law offers a carrot in the form of diminution credits, which provides a mechanism to release prisoners prior to the expiration of their full sentence. Prisoners earnings such credits are placed on mandatory supervision for oversight and monitoring by the Maryland Parole Commission until the expiration of the full-term of their sentence.

Maryland law permits prisoners to earn up to 20 days of diminution credits a month. Those credits fall under four broad categories:

- Good Conduct Credits—Allows up to 10 days credit per month for following DOC behavioral guidelines.

- Work Task Credits—Prisoners can receive up to 5 days a month for satisfactory performance in approved work programs.

- Educational Credits—Satisfactory progress in vocational, educational, and other training programs can merit up to 5 days at month.

- Special Project Credits—for completing special tasks or programs, (such as dual cell occupancy in overcrowded prisons) a prisoner may earn 10 days per month.

The audit was conducted to: (1) determine whether DOC's policies and procedures properly reflect relevant state laws, regulations, and court rulings relating to diminution credits; and (2) to assess processes and controls over diminution credits and to determine if prisoner releases are based on properly calculated and recorded audits.

The report concluded DOC developed and implemented policies and procedures to comply with legal require-

ments surrounding diminution credits. Moreover, it had disseminated the necessary information to all appropriate employees.

The report, however, concluded serious problems existed in calculating those credits. The audit's first finding revealed prisoners were not always released on the appropriate date. Out of a statistical sample of 65 mandatory release cases taken from the two prisons, 22 release dates were incorrect. Early release errors related to 17 prisoners being released from 1 to 112 days early. The remaining 5 prisoners were overdetermined by 3 to 24 days. Based on its test results, the auditors were certain that up to 48.6 percent of prisoners released on mandatory supervision in 2003 were not released on the appropriate date.

The miscalculations resulted from DOC awarding work credits to prisoners unable to work, such as those in segregation. Additionally, DOC did not always post credits awarded for time served while prisoners were in local jails prior to transfer to DOC. As a remedy, the report recommended DOC institute a process to recalculate mandatory release dates based on all available documentation maintained by DOC. Currently, DOC maintains two files on each prisoner, each held a separate locations. Each file contains different diminution credit information that is not considered cumulatively.

The report also found DOC fails to document the number of days a prisoner worked, as required by DOC policy. As a result, in 25 test cases it could not be verified the prisoner actually earned the award. It further found there existed a disparity in work credit awards for similar tasks. For example, at one prison the job of painter receives 10 days per month. Two other prisons only award 5 days for performing the same job. To rectify these problems, the report recommended DOC implement a system to verify days a prisoner works and implement policies to promote consistency in awarding credits.

Finally, the audit team concluded that too many people have access to critical information in the DOC's computer system that maintains and calculates the award of diminution credits. As such, the

current 900 users with such access should be gleaned down to the approximate 240 employees that require access to complete their job duties.

DOC, to its credit, accepted each finding by the auditors. It said it would implement all the recommendations contained in the report.

A copy of this December 2004 report, entitled "Department of Public Safety and Correctional Services Diminution Credits, may be obtained on the internet at [www.ola.state.md.us](http://www.ola.state.md.us) or at [www.prisonlegalnews.org](http://www.prisonlegalnews.org).

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## \$97,000 in Damages and Fees Awarded in Arkansas Over Detention Suit

The Eighth Circuit Court of Appeals has affirmed a judgment awarding compensatory damages of \$50,000 in a civil rights suit filed by James M. Hayes, alleging his 38-day pre-appearance detention violated his right to due process. The Court further held that the attorney fee award of \$47,000 was not an abuse of discretion.

Hayes was stopped for a traffic violation on April 3, 1998. Hayes had bench warrants that stemmed from his failure to appear at a municipal court hearing in 1997. He was arrested, taken to the Arkansas Faulkner County Detention Center (FCDC) and given a court date of May 11.

During his stay at FCDC, Hayes grieved to Kyle Kelley, Faulkner County Jail Administrator (FCJA), that he was entitled to be seen by a judge within 72 hours under the Prompt First Appearance of Arkansas Rule of Criminal Procedure 8.1. The Court held hearings on April 13 and April 29, but Hayes was not taken before a judge until May 11. Hayes subsequently filed a 42 U.S.C. § 1983 action in Arkansas Federal District Court, alleging his Fourteenth Amendment Due Process Rights were being violated by the failure to take him before a court within 72 hours.

The District Court ruled that Hayes' due process rights were violated and entered a bench judgment against Faulkner County and individually against Kelley after the defendants refused to settle. The court also awarded Hayes his attorney fees. See: *Hayes v. Faulkner County*, 285 F. Supp. 2d 1132 (ED AR 2003). The defendants appealed that decision.

The Eighth Circuit Court of Appeals considered several issues. First, the court said the due process clause forbids an extended detention without a first appearance, following arrest by a warrant. The Court held that Hayes' 38 day pre-appearance detention constituted a due process violation.

Second, the Court had to consider whether the defendant's conduct offends the standards of substantive due process. The Court considered FCDC official policy separately from Kelley's individual conduct. The County's policy, however, was examined by the Court under the deliberate indifference standard.

To prevail, Hayes had to prove that his constitutional rights were violated by

an "action pursuant to official municipal policy" to establish municipal liability.

According to Kelley and the Sheriff, the County adopted a policy that arrestees were to be taken to Court within 72 hours, also a jail roster is sent to every court in the County. The Sheriff's office then relies on the Courts to set up court dates and advise FCDC which detainees will be picked up for court.

The Court found the County's policy attempts to delegate its responsibility of taking arrestees promptly before a court. The Eighth Circuit affirmed the District Court's decision holding this policy was deliberately indifferent to Hayes' due process rights.

In responding to Hayes' grievance, Kelley said, "I don't get people up for court. I hope you go to court and are able

to get out. Write the Booking Officer to find out about your court date." Kelley also testified that he would have followed the same course of conduct if Hayes had been jailed for 99 days.

The Court held that Kelley's response and testimony demonstrated a conscious disregard for Hayes' due process right not to be over detained. This disentitled Kelley to qualified immunity.

Accordingly, the District Court's judgment and compensatory damage award of \$49,000 against Faulkner County and \$1,000 individually against Kelley was affirmed. The Eighth Circuit also held that the attorney fee award of \$46,929.50 was not an abuse of the District Court's discretion. The District Court's judgment was affirmed in all respects. See: *Hayes v. Faulkner County Arkansas*, 388 F.3d 669 (8<sup>th</sup> Cir. 2004). ■

## New York City Settles Wrongful Imprisonment Suit For \$1 Million

On February 4, 2005, a man convicted of murder and wrongfully imprisoned for five years based on testimony fabricated by prosecutors settled his claim against the City of New York for \$1,000,000.

Milton Lantigua, 20, was sitting in front of his Bronx apartment building at around 1 a.m. on June 27, 1990, when he heard gunshots down the block. He went to investigate and found the body of Felix Ayala.

Lantigua was arrested approximately two weeks later after one of his neighbors, Frances Rosario, identified him as the shooter. Rosario, who claimed she witnessed the incident from her bedroom window, provided only a "vague" identification of Lantigua at trial. It ended with a hung jury.

The case was retried 1992. This time Lantigua was convicted of second-degree murder and sentenced to 20 years in prison.

In 1996—five years after his initial arrest—the appellate division overturned Lantigua's conviction and freed him after determining that Rosario had committed perjury at prosecutors' behest.

Lantigua sued the City of New York, prosecutor Sophia Yozawitz, and supervisor Theresa Gottlieb under 42 U.S.C.

§ 1983 for violating his civil rights. He claimed unspecified damages for emotional pain and suffering, lost wages, and lost opportunity.

Irving Cohen, who represented Lantigua, contended that Rosario only identified his client as the gunman after being prompted numerous times. She recanted after the verdict. Furthermore, Yozawitz, the prosecutor in the second trial, admitted she had allowed Rosario to testify that she was alone when the shooting occurred, when in actuality she was with a man she had just met.

The U.S. District Court for the Southern District of New York granted immunity to Yozawitz and Gottlieb and dismissed the actions against them. District Court Judge Stephen Robinson refused to dismiss deposition notices against top Bronx prosecutors, however, inducing the City to settle for \$1 million.

Cohen, who is based in New York City, said he did not believe the amount was adequate compensation for Lantigua's ordeal, but felt it offered a more expedient and certain outcome. See: *Lantigua v. City of New York*, USDC SD NY, Case No. 98-Civ-2343. ■

Source: *VerdictSearch New York Reporter*

# New York Employees Families Settle Attica Riot Claims for \$12 Million

The State of New York has reached a \$12 million settlement with the Forgotten Victims of Attica, a group of surviving state employees and relatives of 11 guards killed during the 1971 uprising at the Attica Correctional Facility.

Under a proposal by Governor George E. Pataki, the Forgotten Victims of Attica will receive \$2 million a year for 6 consecutive years. On 2005, Pataki recommended including the first \$2 million payment in 2005-6 budget.

Thirty-two prisoners and 11 guards were slain during the infamous Attica riot, which lasted 5 days. Most of the deaths occurred during the chaotic retaking of the prison when State Police shot to death 10 guards and 29 prisoners as they wildly stormed the compound.

Formed in 2000 after prisoner victims of the riot settled their 30 year old lawsuit against the state for \$12 million [see *PLN*, June 2000, p. 12], the Forgotten Victims sought restitution, an annual ceremony at the prison, the release of all records related to the uprising, counseling, and an official apology from the state.

At least two of those demands have been met. Along with the monetary settlement, Pataki promised that the Attica prison grounds will be open annually for ceremonies on September 13, the anniversary of the deadly retaking. The group and Pataki continue to negotiate over records release and an apology, but no separate money will be provided for counseling.

Genesee County Public Defender Gary Horton, who represented the Forgotten Victims, said only his expenses will be deducted from the settlement.

The Forgotten Victims largely welcomed Pataki's proposal, said Michael Smith, a former prison guard who was shot five times by police as they assaulted the prison. "I don't know if this is justice," Smith said. "But it's recognition. And that recognition is important to the healing process."

It's relevant to note that the Forgotten Victims' settlement for eleven dead guards will be divided among roughly 50 families, while the prisoners' settlement was split between more than 500 beaten and tortured former prisoners and their families and the estates of 32 murdered prisoners. Four million dollars of the prisoners' settlement was also earmarked

for attorney fees to compensate the attorneys who spent 30 years litigating the case. The unspoken implication is that the life of a guard is worth at least ten times that of a prisoner. The Attica insurrec-

tion remains the nation's deadliest prison uprising. ■

Sources: *Associated Press*, *Democrat and Chronicle.com*

## New York Prisoner Awarded \$195,000 for Hand, Knee Injury

On October 6, 2004, a court of claims in White Plains, New York, awarded \$195,000 to a state prisoner who fell in the shower, injuring her hand, and knee.

While imprisoned at the Taconic Correctional Facility, prisoner Juliann Gibson slipped and fell in a shower area on August 25, 2000, cutting her right hand and injuring her right knee. The hand injury required nerve-graft surgery, which entailed removing a nerve from her wrist and implanting it in her palm. Following the surgery, Gibson suffered residual weakness in her hand which she claimed prevented her from performing certain duties required in her job as a blood-donor specialist. She also bears residual scars.

It was also later determined that Gibson had torn the meniscus in her knee, necessitating the temporary use of a cane and inhibiting her ability to play with her son.

Gibson sued the state of New York alleging they were negligent in maintaining the tiles in the shower area. At trial, Gibson's orthopedics expert, Dr. Edward Wang of Stony Book, New York, testified that she has reduced strength in her right hand and pinkie, a limited range of motion, and diminished sensation. Wang further testified that Gibson is unlikely to recover and that she is predisposed to additional hand injuries.

In May 2001, Gibson injured her knee in an auto ac-

cident, prompting the parties to stipulate that her knee-injury claim covered the period between August 25, 2000, and May 2001.

Judge Terry Jane Ruderman found for Gibson and awarded her a total of \$195,000: \$45,000 for her knee injury (past pain and suffering) and \$150,000 for her hand injury (\$85,000 past pain and suffering, \$65,000 future pain and suffering). However, because Gibson was found to be 25% comparatively negligent at the earlier liability trial (this trial was for damages only), the judgment was reduced accordingly for a net award of \$146,250. Judge Ruderman also held that Gibson was entitled to interest dating back to March 26, 2004, the date of the liability verdict.

Gibson was represented by Alfred L. Odom of The Jacob D. Fuchsberg Law Firm in New York City. See: *Gibson v. State of New York*, Court of Claims, White Plains, Case No. 104428. ■

Source: *VerdictSearch New York*

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# Virginia Federal Court: Over 47 Hours in Five-Point Restraint Unconstitutional

by Matthew T. Clarke

A federal court in Virginia held that prison officials violated a prisoner's constitutional rights when they strapped his ankles, wrists and chest to a bed for over 67 hours.

Gary Neal Sadler, a Connecticut state prisoner who was incarcerated out-of-state at Wallen's Ridge State Prison in Virginia, filed suit pro se under 62 U.S.C. § 1983 alleging his constitutional rights were violated when prison officials bound him face-up to a prison bed using plastic restraints for 47 hours and 20 minutes after he allegedly slapped a food tray onto a guard. Sadler was dressed in his under-shorts during the restraint and was not given any covering. He was released from the five-point restraint only six times over the two days, for approximately fifteen minutes each time, to use the toilet and eat.

At trial, the jury returned a verdict for the defendants. At that time Sadler, who was incarcerated in a Connecticut prison and represented himself pro se via video link, timely moved for judgment as a matter of law.

The court found that defendant guard David Allen Taylor recommend the restraint, guards John M. Eaton and Young supervised the temporary releases and warden Stanley K. Young was responsible for the overall operation of the prison and had responded to Sadler's grievance on the matter by stating that the guards had complied with prison policy.

Sadler alleged that he observed a guard named Young taking something out of his mouth and placing it in food trays prior to bringing his tray to his cell. Sadler tried to refuse the tray, but Young tried to push it into the cell anyway. Sadler then blocked the tray from coming into the cell through the food slot in his cell door. This caused the tray to spill. Young claimed Sadler slapped the tray, causing it and the food to hit him. Young reported the incident to Sgt. Davidson. Guard Captain Taylor was watch commander and recommended to Administrative Duty Officer Randy Phillips that Sadler be placed in five-point restraints. This was done. Sadler did not resist the guards who came to take him to another cell to place him in restraints, but did get verbally

abusive after they started putting him in the restraints.

Defendants testified that Sadler wasn't placed in restraints as punishment, but to keep him from assaulting staff. However, prison policy requires that restraints only be used so long as the disruptive or dangerous behavior continues and for a restrained prisoner to be temporarily released at least four times a day. When Sadler asked how long he was to be restrained, he was told that it would be two days. This time period was independent from his behavior.

Sadler claimed that the mattress was soiled with urine and feces when he was brought to it and that he was made to urinate on himself during the ordeal and not allowed to clean up.

The court held that the use of five-point restraints for 47 hours, 20 minutes violated the Eighth Amendment prohibition against cruel and unusual punishment. Although the initial application of the restraints immediately following the food-tray-slapping incident was not unconstitutional, the record clearly showed that there was no need to continue such drastic measures after Sadler calmed down (no more than three hours after the restraints were initially applied). Thus, the continued application of the restraints for nearly two days was nothing more than punishment, not a necessary response to an immediate disturbance. The failure of the guard sergeants to recommend Sadler's release after he calmed down violated prison policy and showed wanton intent. Based upon Sadler's and other prisoners' confinement in five-point restraints around that time, the court found that the prison had a de facto policy to keep prisoners restrained, for forty-eight hours regardless of whether they continued to engage in dangerous or disruptive behavior. Thus, defendants did not act in good faith in restraining Sadler for 47 hours, 20 minutes. The court found that restraining a prisoner in a five-point restraint for almost 48 hours constituted more than a de minimus injury, even if temporarily released six times within that period, and even without a showing of permanent physical injury. The court also found that this use

of force was excessive and "repugnant to the conscience of mankind."

The court noted that the Fourth Circuit had already held that a prisoner had a liberty interest in freedom from arbitrary and capricious confinement in four-point restraints. See: *Williams v. Benjamin*, 77 F.3d 756 (4th Cir. 1996). Five-point restraint was an atypical and significant hardship compared to ordinary prison confinement or confinement in segregation. Thus, a prisoner being subjected to such restraint after he ceases to engage in dangerous or disruptive behavior must be provided some procedural protection to ensure that they are not being arbitrarily and capriciously applied. Therefore, defendants violated Sadler's due process rights by failing to provide him with any process prior to or during his restraint. The opportunity to tell "his side of the story" to a sergeant after hours of restraint was not sufficient process. Furthermore, defendants are not entitled to qualified immunity on this issue because it was clearly established law since the Supreme Court decided *Sandin v. Conner* in 1995 and was reinforced by the Fourth Circuit's *Williams* decision.

Warden Young was liable because he knew his subordinates had engaged in conduct that posed a pervasive and high risk of constitutional injury to prisoners because he was required to review each Serious Incident Report whenever a prisoner was placed in five-point restraint and Sadler had shown that prisoners not displaying dangerous or disruptive behavior had been restrained for 48 hours eight times in the three months immediately prior to Sadler's restraint. Warden Young's failure to correct this practice was deliberately indifferent to or tacit authorization of the practice. No guard was ever disciplined for abusing the five-point restraints despite this evidence of widespread abuse. There was also a causal link between Warden Young's inaction and Sadler's injuries because timely reprimand of the officers abusing the five-point restraint in the previous cases would have prevented the abuse Sadler suffered.

Because a reasonable jury would have found in Sadler's favor on all of

the aforementioned issues, the court granted the motion for judgment as a matter of law and scheduled a jury trial limited to the question of damages. See: *Sadler v. Young*, 325 F.Supp.2d 689 (W.D.V.A 2004).

On interlocutory appeal, the Fourth Circuit court of appeals reversed and remanded in an unpublished opinion holding the district court erred in instructing the jury on a due process claim when Sadler had only claimed an Eighth amendment

violation, not a due process violation. The court declined to address the defendants' qualified immunity claims. The case was remanded for further proceedings. See: *Sadler v. Young*, 118 Fed. Appx. 762 (4<sup>th</sup> Cir. 2005). ■

## BJS Report Reveals Rising Imprisonment Rates, Trends In 2003

by Michael Rigby

**R**ising prison populations...record numbers of female prisoners...rampant overcrowding...continuing racial disparities. These are among the disturbing trends revealed by *Prisoners in 2003*, a Bureau of Justice Statistics report released in November 2004.

At yearend 2003, 1,470,045 prisoners were under the jurisdiction of state and federal authorities, an increase of 2.1% over the previous year. That figure represents an increase of 20,370 state prisoners and 9,531 federal prisoners. The highest percentage growth—5.8%—was in the federal prison system, which held 173,059 prisoners on December 31, 2003.

By yearend 2003, there were an average of 482 prisoners per 100,000 U.S. residents, up from 411 in 1995. Eleven states exceeded the national average, including Louisiana (801), Mississippi (768), Texas (702), and Oklahoma (636). Nines states—including Maine (149), Minnesota (155), and North Dakota (181)—had rates that were less than half the national average.

When local jails and other detention facilities were included, the number of prisoners rose to 2,212,475 for an overall imprisonment rate 714 per 100,000, making U.S. imprisonment rates the highest in the world, according to Washington, D.C. based Sentencing Project. Russia ranks second with a declining rate of 484 per 100,000. Most industrialized countries had much lower rates, including Mexico (169), England and Wales (141), and Japan (58).

Eleven states, including North Dakota (+11.4%) and Minnesota (+10.3%), reported increases of at least 5% while 11 more, including Connecticut (-4.2%) and New York (-2.8%), showed slight declines. In addition, 4 prison systems added at least 2,000 prisoners in 2003, including Texas (4,908), Florida (4,384), and California (3,126).

Females comprised the fastest growing segment of prisoners in 2003, increasing at an average rate of 3.6%. (The rate for men

was 2.0%.) According to the Sentencing Project, the number of female prisoners increased by 48% over the previous 8 years, from 68,468 in 1995 to 101,179 at yearend 2003. However, imprisonment remains a male dominated phenomenon.

This increase “coincides exactly with the inception of the war on drugs,” beginning in the 1980s and continuing into the 1990s, said Marc Mauer, assistant director of the Project. “It represents a sort of vicious cycle of women engaged in drug abuse and often connected with financial or psychological dependence with a boyfriend,” or other male involved in drug crime, he said. Another explanation is that with determinate sentencing guidelines women who in the past would have received probation or suspended sentences now receive prison sentences with no allowance for their gender.

Racial disparities have remained fairly consistent since 1995, the BJS report found. Among prisoners serving sentences of 1 year or more at yearend 2003, black males (586,300) outnumbered white males (454,300) and Hispanic males (251,900).

Especially high was the number of young black men in prison. Of the total population of black males 25-29, nearly 1 in 10 (9.3%) were in prison at yearend 2003. Alfred Blumstein, a criminologist at Carnegie Mellon University notes that, not only does removing so many young black men from society strongly impact families, but “in many ways is self-defeating.” The criminal justice system is based on deterrence, with doing prison time supposedly a stigma, he says. “But it’s tough to convey a sense of stigma when so many of your friends and neighbors are similarly stigmatized.”

Overcrowding plagued many prisons in 2003. According to the report, 22 states and the federal system reported operating above 100% of their capacity. Alabama was the most egregious, operating at more than double (109%) its lowest rated capacity, followed by California (+101%), Hawaii (+64%), and Illinois (+59%), and

the federal system (+39%).

Private prisons—which held 6.5% (95,522) of all state and federal prisoners at yearend 2003—continued to enjoy their parasitic relationship, no doubt sustained by rampant overcrowding. Individually, 12.6% of all federal prisoners and 5.7% of state prisoners were held in private prisons. Among the states, Texas had the most prisoners in for-profit prisons (16,570), followed by Oklahoma (6,022).

Perhaps the most interesting revelation is that rates of imprisonment have continued to climb despite falling crime rates, showing the lack of a connection between the two. Between 1994 and 2003, arrests for all violent crime dropped 16% while arrests for murder and robbery dropped 36% and 25% respectively, according to Allen J. Beck, one of the report’s authors.

Even so, the rate of imprisonment has increased by 49% since 1995, notes the Sentencing Project. The increase is due in large part to tougher sentencing guidelines, including “truth in sentencing” laws, “three-strikes” laws, and mandatory minimums, according to the Project. As a result, the average time served increased by 30% between 1995 and 2001, which has also contributed to an aging prison population, notes the report and the Project.

A copy of the report (NCJ 205335) is available on the internet at [www.prisonlegalnews.org](http://www.prisonlegalnews.org) or by writing NCJRS, P.O. Box 6000, Rockville, Maryland 20849-6000. ■

Additional sources: *The Prison Project*, *New York Times*, *Associated Press*

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# Accounting Errors Plagued California Criminal Justice Agency

A defunct California agency charged with distributing grant money for crime prevention and victim aid may have cost the state millions in federal funds due to poor accounting practices, state auditors said on February 2, 2005.

Lawmakers knew something was wrong at the Office of Criminal Justice Planning (OCJP) two years ago when they couldn't get information from the agency to prepare the state budget. After abolishing the office, auditors were called in to review the books. What they found was criminal.

Cash receipts, payments, and accounts receivable weren't recorded. Funds intended for some programs were spent on others. Files the agency did keep were incomplete and filled with errors.

In fact, accounting records were in such poor shape that forensic accountants

had to reconstruct the agency's files before auditors could do their job. To complete the review, it took 46 employees 16,000 hours and cost over \$1 million.

"In my 30 years experience, this is the worst thing I've ever seen," said Samuel Hull, chief of state audits. "When we got into there and started looking at things ... the problems just kept ballooning."

A copy of the report has been forwarded to the attorney general's office, and a state legislator said prosecutors would investigate whether fraud was committed.

From July 1999 to December 2003, the OCJP received \$425 million in federal grant money to be dispersed among local governments for crime prevention and community programs that assist victims of domestic violence, child abuse, rape, and homicide. Because of the agency's

shoddy accounting practices, however, it's unknown how much of the money was actually distributed.

About \$10 million in funds have been frozen pending the report, and millions more could be lost permanently. The federal Departments of Justice and Health and Human Services, which issued the grants, could penalize the state, seek reimbursement, or deny future funding.

In a supposedly unrelated case, the OCJP's former director has admitted illegally using his position in the agency to help Sun Law Energy Corporation beat out a rival in its bid to build a Stockton power plant. In January 2005, N. Allen Sawyer, 36, pleaded guilty to mail fraud in a Sacramento court. Prison time is expected. ■

Source: *officer.com*, *Associated Press*

## SABER's Sexual History Disclosure Requirement Violates Fifth Amendment

The Ninth Circuit Court of Appeals held that the compelled sexual history disclosure required by the Sexual Abuse Behavior Evaluation and Recovery Program (SABER) violates the Fifth Amendment's guarantee against self incrimination. The court also held that a supervised release condition prohibiting possession of "any pornographic, sexually oriented or sexually stimulating materials" was unconstitutionally vague under *United States v. Guagliardo*, 278 F.3d 868 (9<sup>th</sup> Cir. 2002).

Lawrence Antelope purchased a child pornography video from an undercover agent, over the Internet. He was convicted of possessing child pornography and sentenced to five years of probation. One probation condition required him to participate in the SABER, which included submitting to mandatory periodic and random polygraph examinations. "At sentencing, Antelope raised a Fifth Amendment challenge to this requirement but the court found that the information was protected by the counselor-patient privilege."

The court also impose conditions prohibiting Antelope "from 'possess[ing] or us[ing] a computer with access to any 'online computer service' at any location... without the prior written approval of the probation department."

Antelope's probation was revoked when he refused to submit to a polygraph and violated other conditions. Probation was reinstated with an additional six months of the electronic monitoring. The court warned Antelope that continued refusal to submit to polygraphs would result in his confinement.

Antelope then sought clarification from the court as to whether he would have immunity from prosecution for any statements made as required by SABER. The court failed to respond to this request.

Antelope was again found in violation of his probation. During the revocation hearing a SABER counselor "testified that Antelope had failed to complete SABER's sexual history autobiography assignment and 'the full disclosure polygraph' verifying his 'full-sexual history.'" The counselor acknowledged "that Antelope had been told that any past criminal offenses he revealed in the course of the program could be released to the authorities[]" and that the counselor "was under a legal obligation to turn over information regarding offenses involving victims under eighteen."

"Antelope argued that the autobiography and full disclosure polygraph requirements violated his Fifth Amendment right, expressed his desire to

continue treatment, and sought immunity for statements made in compliance with the program. The district court rejected his argument, ruling that...probation nullifies any Fifth Amendment right Antelope might otherwise have to decline to 'reveal[] information that may incriminate him,' and sentenced him to 30 months in prison."

The appellate court reversed and remanded for resentencing, but declined to address Antelope's First and Fifth Amendment claims. *United States v. Antelope*, 65 Fed. Appx. 112 (9<sup>th</sup> Cir. 2003).

On remand, Antelope was resentenced to 20 months imprisonment and 36 months of supervised release. "The district court again imposed the contested conditions as terms of his supervised release. Antelope once again objected, but the court ruled that the objection was not ripe, and would not be ripe until Antelope was 'prosecuted or subject to prosecution' for additional crimes."

While on supervision, "Antelope reasserted his desire for treatment but continued to refuse to reveal his full sexual history absent an assurance of immunity." At a subsequent revocation hearing Antelope "again argued the merits of his Fifth Amendment claim. The district judge reiterated his belief that Antelope's admissions would be protected by an



'absolute privilege under Montana law between a counselor, psychologist and the patient'; asserted that "Antelope's claim was premature; "and it declined to rule on whether Antelope's admissions would be protected by use immunity, apparently on ripeness grounds." Antelope was then sentenced to another 10 months in prison and 26 months of supervised release with the same conditions.

On appeal, the Ninth Circuit concluded that Antelope's Fifth Amendment challenge was ripe, finding that "it is difficult to imagine a more paradigmatic 'injury in fact' than [the] actual incarceration[]" that Antelope was subjected to.

The court then found that Antelope had proved the requisite elements of a Fifth Amendment claim: the testimony desired by the government carried the risk of incrimination; and the penalty he suffered amounted to compulsion. "Antelope's risk of incrimination was 'real and appreciable.'...The treatment condition placed Antelope at a crossroads – comply and incriminate himself or invoke his right against self-incrimination and be sent to prison." Thus, Antelope's successful participation in SABER triggered a real danger of self-incrimination, not only a remote or speculative threat." Additionally, relying heavily on *Mckune v. Lile*, 536 U.S. 24 (2002), the court held "that Antelope's privilege against self-incrimination was violated because Antelope was sentenced to a longer prison term for refusing to comply with SABER's disclosure requirements."

The court then found that "Antelope followed the appropriate course of action by refusing to answer the sexual history question until he was assured that his answers would be protected by immunity." Additionally, the scope of immunity should be consistent with *Kastigar v. United States*, 406 U.S. 441 (1972).

The court also vacated the condition prohibiting possession of "any pornographic, sexually oriented, or sexually stimulating materials[.]" finding that it was unconstitutionally vague and indistinguishable from the condition invalidated in *United States v. Guagliardo*, 278 F. 3d 868 (9<sup>th</sup> Cir. 2002). However, on remand, "the district court may take note of the condition imposed in *United States v. Rearden*, 349 F.3d 608 (9<sup>th</sup> Cir. 2003), which passed constitutional muster."

Finally, the court rejected Antelope's

argument that "the supervised release term prohibiting...access to any 'online computer service'" was overbroad. The court found that Antelope conceded that

the court rejected the same challenge in *Rearden*, and Antelope's offense occurred via the Internet. See: *United States v. Antelope*, 395 F.3d 1128 (9<sup>th</sup> Cir. 2005). ■

## Jail Prisoner Strangles Psychiatrist; Jury Awards \$2.6 Million

A Florida jury awarded \$2,650,260 in the strangling death of a psychiatrist doing an evaluation on a prisoner at the Collier County Jail. David J. Hoyer was doing a court ordered competency evaluation on January 3, 2001, when he was attacked by prisoner Rodrigus Sanchez Patten, then 20.

The suit was brought by Hoyer's wife, alleging the Collier County Sheriff and the Jail failed to warn and protect Hoyer from an extremely dangerous, mentally ill prisoner. Over the course of Patten's ninety days incarceration, the Defendants had sufficient information to properly warn and protect Hoyer. The Defendants asserted Hoyer had in fact been warned on numerous occasions about Patten's potential danger and it was not foreseeable he would

strangle Hoyer.

The Jury found Hoyer 50% to blame for his death, cutting the jury's May 9, 2005, award in half. Due to the operation of state caps on non-economic damages, the net award was reduced to \$555,130. Hoyer's estate was represented by West Palm Beach attorneys David M. Garpari and W. Hampton Keen. See: *Hoyer v. Hunter*, USDC, MD FL, Case No. 2:04-CV-00211-FTM-29DNF.

Patten was charged and convicted of first degree murder in Hoyer's death in January, 2005. While prosecutors sought the death penalty, on January 25, 2005, he was sentenced to life in prison due to his mental illness. Patten had been found incompetent to stand trial in Hoyer's murder in 2001. ■

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# PLRA Limits Prisoner's Attorney Fees Incurred Defending Appeal of Successful § 1983 Suit

by John E. Dannenberg

The Sixth Circuit U.S. Court of Appeals held that after a prisoner wins a 42 U.S.C. § 1983 lawsuit for damages, the Prison Litigation Reform Act's (PLRA) 150%-of-damages fee cap applies not only to his attorney's fees generated during the trial, but also applies to post-trial litigation, including defense of the state's appeal of any aspect of litigation flowing from the prisoner's suit.

In 1994, Jimmie Lee Riley filed a pro per 42 U.S.C. § 1983 civil rights complaint for retaliation and censorship in U.S. District Court (see: *Riley v. Kurtz*, 893 F.Supp. 709, E.D. Mich. (1995)). On April 16, 1996, the court appointed attorney Daniel Manville [today a quarterly columnist for *PLN*] to represent Riley pro bono. Manville accepted the appointment with the understanding that he could recover attorney fees under 42 U.S.C. § 1988 if Riley prevailed. But just weeks later, on April 26, 1996, Congress passed the PLRA, which severely restricted such fee recovery. The PLRA appeared so onerous as to fees that in December 1996 Manville moved to withdraw as counsel, which the court denied.

After a jury trial in December 1997, Riley won on all four of his claims and was awarded \$25,003 in damages. Manville submitted his fee application and was

awarded \$32,097.80 for his trial work. Prison guard defendant David Kurtz filed a notice of appeal of the jury verdict on January 5, 1998. Significantly, he did not appeal the attorney fee award.

On appeal (194 F.3d 1313), the Sixth Circuit overturned the verdict on one of the four claims and remanded for either a remittitur or a new trial on punitive damages. Riley chose the remittitur, and the trial court entered an amended judgment of \$1,003 on July 13, 2000. Thereafter, Manville was permitted to withdraw and filed his bill for appellate fees and costs of \$25,754.54. Only then did Kurtz object to both the trial and appellate attorney fee claims as being beyond the cap permitted under the PLRA.

Kurtz complained that the trial fee question didn't ripen until after the judgment had been amended (and sharply reduced). Manville countered that he had been appointed before the PLRA was enacted, and had been denied his motion to withdraw. The district court determined that as to trial fee objections, Kurtz was two years too late (F.R.Civ.P. 41(a)(1)(A)) and the court had no jurisdiction to revisit the fee claim. Additionally, Manville was awarded appellate fees and costs when the trial court agreed with him that because the appeal was brought by the state, not by the prisoner, it was not "an action

brought by a prisoner" subject to the PLRA at all.

The Sixth Circuit reviewed both claims de novo. Regarding trial fees, the court agreed that although a 150% fee cap of the \$1,003 amended award would only permit recovery of \$1,504.50 under the PLRA, the trial fees of \$32,097.80 now arguably excessive must stand because the state's appeal was untimely. The appellate fee resolution was another matter, however. The district court below had distinguished a trial (where the plaintiff carries the burden to "prove" a violation of his constitutional rights) from an appeal of such a successful verdict, "since on appeal the standard of review based on a finding by the trier of fact is higher." That court further observed that if Congress had intended for appellate fees to be capped, it could have expressly said so. Defendant Kurtz argued that the failure of the PLRA to mention appellate fees meant that no fees for appellate work could ever be awarded. Still, Kurtz contended that in any event, i.e., for trial, post trial or appellate work, such fees should be capped.

In strictly construing the statutory language, the Sixth Circuit held that because an "action" is "any judicial proceeding, if conducted to a determination, that will result in a judgment or decree," no "action" is final until its appeals process has ended. Therefore, an appeal filed by a defendant is part of the original action.

Manville then argued that because his client was the "prevailing party" even after remand he was entitled to all fees. The court reviewed Congress' intent in enacting the PLRA, and found that "prevailing party" status, as to fees, attached to that proportion of the plaintiff's efforts that was successful. The court went on to agree with the Ninth Circuit (*Webb v. Ada County*, 285 F.3d 829 (9th 2002)) that compensation for successful post judgment work was proper. In sum, the Sixth Circuit concluded that because the underlying fee statute (§ 1988) did permit appellate fees, and the later PLRA did not expressly exclude them, that harmonizing both statutes implied that appellate fees are compensable under the PLRA.

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"We hold that a prisoner who prevails on appeal is entitled to attorney's fees under the PLRA because the hours were part of proving or making certain an actual violation of the prisoner's rights."

Lastly, the court rejected Manville's equal protection argument for full appellate fees in a prisoner action (versus a non-prisoner action) because Congress had a legitimate purpose in dissuading frivolous prisoner litigation by disincanting prisoners' attorneys. Accordingly, the Sixth Circuit reversed the district court and limited appellate fees to 150% of the damage award, or \$1,504.50. But since the court had allowed the otherwise excessive trial fee award of \$32,097.80, it held that that more than covered what Manville was legally entitled to, and abated any further payment towards his appellate fees and costs.

The Sixth Circuit recognized the ob-

vious chilling effect its ruling would have on attorney decisions whether or not to take prisoners' cases, but was compelled to so rule, consistent with Congress' intent to dissuade non-meritorious claims by prisoners "who had nothing better to do than file frivolous lawsuits." However, the sad truth is that PLRA attorney fee caps, because they do not apply to indigent pro per litigants, literally encourage more—not fewer—poorly argued prisoner civil rights claims. Moreover, only prisoners who file and win cases are entitled to attorney fees, thus it has no effect on meritless litigation. This anomalous result comes from discouraging counsel from taking such cases unless the damage award can be so predictably large as to provide for adequate fees—leaving unconstitutionally abused prisoners with no recourse but to flood the courts with their own best efforts. Predictably, prison

officials sensing the growing disadvantage of prisoners in battling state lawyers with deep pockets, will only be thereby encouraged to fill the vacuum with more abuses. See: *Riley v. Kurtz*, 361 F.3d 906 (6th Cir. 2004).

*PLN* readers should note that the 150% fee cap applied here because the sole remedy sought was damages. If the claims could have been framed to also include injunctive relief, the resultant "hybrid case" would not have been limited in fees and costs incurred proving the violation of a constitutional right. At worst, a 150% fee cap could have been applied solely to those hours apportioned to proving the damages. See, e.g., *Dannenberg v. Valadez*, 338 F.3d 1070 (9th Cir. 2003); *PLN*, Mar. 2003, p.20; *PLN*, July 2004, p.20. The better strategy to preserve fees is to "design" each complaint with claims of both injunctive relief and damages. ■

## Mass Parole Re-Hearings in Tennessee Following AG Opinion

by Alex Friedmann

With some level of irony, on June 7, 2005 the Tennessee Attorney General's office sent a letter to the state's Board of Probation and Parole, recommending that the Board limit the amount of time between parole hearings and suggesting that over 375 prisoners be granted early re-hearings.

The letter was the result of the Board's request for guidance following a series of appellate state court decisions. In those rulings, including the seminal case of *Baldwin v. Tenn. Board of Paroles*, 125 S.W.3d 429 (Tenn. App. 2003), as well as *Davis v. Maples*, 2003 WL 22002660 (Tenn. App. 2003), *York v. Tennessee Board of Probation and Parole*, 2004 WL 305791 (Tenn. App. 2004) and *Meeks v. Traughber*, 2005 WL 280746 (Tenn. App. 2005), all petitions for writ of certiorari, the Board was directed to hold re-hearings in cases where prisoners received parole deferments ranging from 10 to 20 years.

The Tenn. Court of Appeals held in the above cases that it was arbitrary for the Board to defer prisoners' future parole hearings for such lengthy periods, finding that the parole board members have staggered six years terms and deferments exceeding that amount of time would prevent future board members from being able to consider those prisoners for parole during their tenure. In the *Baldwin* case, the court ruled that a twenty-year parole

deferral would "undermine the very provisions of the parole statutes that empower the board to grant parole."

Upon review, Tennessee Attorney General Paul Summers stated, "Inasmuch as our Court of Appeals has held that it is presumptively arbitrary for the Board to defer hearings for more than six years, I strongly recommend that the Board formally adopt a policy prohibiting the deferral of future parole hearings for more than six years. Such a policy would demonstrate to the courts and the public the Board's good faith." He further advised the Board that failure to provide relief to prisoners who previously had received parole deferments of greater than six years "poses the potential for civil rights claims against the Board and its members."

The Board of Probation and Parole issued a press release stating it would take immediate steps to

implement the Attorney General's recommendations. Approximately 375 prisoners have been scheduled for re-hearings, with a list being posted on the Board's website. Meanwhile, at least one Tennessee prisoner who litigated this issue, Danny R. Meeks, intends to challenge the Attorney General's recommendation, arguing that six years is still too long a time period between parole hearings. It remains to be seen how many prisoners will actually be paroled despite the new hearings. ■

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# Seventh Circuit Reverses Dismissal of BOP Medical Neglect Case; District Court Abused Discretion in Denying Counsel

The Seventh Circuit Court of Appeals reversed a lower court's denial of the appointment of counsel to a prisoner. The court also vacated the grant of summary judgment to prison officials on medical malpractice and deliberate indifference claims.

Federal prisoner Diego Gil suffers from several serious intestinal and colorectal illnesses. In 1994, "Gil requested surgery for a bleeding ulcer. He later experienced rectal bleeding that resulted in a need for blood transfusions." In 1997, Gil was seen by an outside specialist due to continuing problems. "Eight months after the specialist determined that Gil needed surgery, he was taken to a local hospital for the recommended operation." He was diagnosed with a rectal prolapse which required major surgery.

He had the surgery in early March 1998, but his condition worsened afterwards, causing severe abdominal pain. On March 20, 1998, Gil returned to medical "complaining of pain, fever, chills, and a 'bulge the size of a ping-pong ball' at the site of his surgical incision. The staff diagnosed an infection, lanced the bulge, and prescribed Tylenol III and an antibiotic." He was told both medications would be available later that day and he should begin taking the antibiotic immediately.

When Gil went to medication line to get his medicines Physician's Assistant Jaime Penaflor gave him the Tylenol III but withheld the antibiotic and told Gil in a hostile voice that he could not have it. Penaflor refused to give a reason for the refusal and ordered Gil to leave, "threatening that he would be placed in disciplinary segregation if he" didn't leave. He also hung up on a guard who called concerning Gil's complaints.

Gil received the antibiotics the following day and felt better within twenty-four hours of taking it. The bulge continued to be lanced and drained for another three days.

However, Gil's condition continued to deteriorate, necessitating a second rectal prolapse surgery on May 1, 2000. Colorectal Specialist Dr. Michael Kim performed the surgery and "prescribed Vicodin for pain and Colace, Milk of Magnesia and Metamucil (all laxatives)

to prevent fecal impaction. Dr. Kim specifically warned Gil that he should not take Tylenol III because it causes constipation, which would worsen Gil's condition."

Back at the prison, Gil was given Tylenol III rather than Vicodin because "Vicodin is not included on the national formulary of drugs used by the" Bureau of Prisons (BOP). The following day, Gil told Dr. James Reed about Dr. Kim's warning against Tylenol III. However, Reed prescribed Tylenol III and canceled two of Gil's three laxatives despite knowing Gil was experiencing constipation.

"On May 5, 2000, Gil saw Reed and complained of severe constipation. He had not had a bowel movement since the operation five days earlier, was experiencing severe abdominal pain and was having difficulty urinating. He was also bleeding from his rectum. Reed continued the prescription for Tylenol III and wrote a prescription for Milk of Magnesia which the prison pharmacy did not fill for another three days."

Gil's condition worsened and he attempted to see Reed again on May 8, 2000, but he was "unavailable." Gil was finally seen by a different prison physician on May 10, 2000, who drained his bladder with a catheter and gave him two laxatives for the constipation. This doctor discontinued the Tylenol III and gave Gil Motrin instead.

On May 11, 2000, Gil saw Dr. Kim "who was angry that his post-operative instructions had not been followed. He rewrote his original instructions and prescriptions."

Back at the prison, Reed told Gil his prescriptions would be available later that day. When he went to pick them up, however, Penaflor gave him only Tylenol III. "The next day, other medical staff finally provided to Gil with Metamucil, Milk of Magnesia and Motrin."

"Gil sued the United States for violations of the Federal Tort Claims Act (FTCA) and Reed and Penaflor for violation of his Eighth Amendment rights in connection with the medical care he received." He filed two motions seeking appointment of counsel to assist him with the action.

The district court refused to appoint counsel and granted defendants' motion

for summary judgment, dismissing the action in its entirety.

The Seventh Circuit began with the counsel issue, noting that the "authority to appoint counsel for indigent plaintiffs derives from 28 U.S.C. § 1915(e)(1)[.]" It further noted that in *Farmer v. Haas*, 990 F.2d 319 (7<sup>th</sup> Cir.) cert. denied 510 U.S. 963 (1993), it announced a standard for the appointment of counsel for indigents which simplified the inquiry. The court then held that "[u]nder the *Farmer* factors,... the court abused its discretion in denying Gil's motion for appointment of counsel."

The court then held that "Gil's FTCA claims should survive summary judgment" because, contrary to the district court's holding, "Gil may rely on his treating physicians to establish the standard of care, even if those physicians are defendants or agents of defendants."

Concerning the claims against Penaflor, the court found that "[n]o doubt any physician would testify that delaying antibiotics for a serious infection for no reason other than spite does not meet the standard of care for a physician's assistant. Summary judgment was not warranted because Gil may be able to show just that."

Finally, with respect to Reed, the court found "that prescribing on three occasions the very medication the specialist warned against because of its constipating effect (when a non-constipating alternative was available) while simultaneously canceling the two of the three prescribed laxatives gives rise to a genuine issue of material fact about Reed's state of mind." The court indicated that it was "troubled by Reed's attempt to justify prescribing an admittedly inappropriate drug because the appropriate drug was not part of the Bureau of Prisons formulary." Since Gil did not challenge the adequacy of the formulary, however, the court "reserve[d]" for another day the issue of whether the government or a prison doctor may avoid liability for deliberate indifference by seeking shelter behind an inadequate formulary." See: *Gil v. Reed*, 381 F.3d 649 (7<sup>th</sup> Cir. 2004). ■

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# U.S. Corrections Corporation Stock Suit Settled for \$13.2 Million

The former owners of U.S. Correctional Corporation (USCC) have agreed to settle a lawsuit over misuse of the employee stock-ownership plan for \$13.2 million.

Prior to 1998, when it was purchased by Corrections Corporation of America for \$225 million, USCC ran four private prisons in Kentucky: Marion County Adjustment Center, Lee County Adjustment Center, Otter Creek Correctional Center and River City Correctional Center. Prior to the buy out by CCA, USCC had over 750 employees and an employee stock ownership plan. In 1993, Milton Thompson and Robert B. McQueen, the trustees of the employee stock-ownership plan, used the stock-ownership plan to seize control of the USCC. In 1995, faced with the possible conviction and imprisonment of USCC owner J. Clifford Todd for paying close to \$200,000 in bribes to Jefferson County Corrections Chief Richard Frey for USCC to keep a profitable contract with Jefferson County, Thompson and McQueen, used the employee stock-ownership plan, to purchase the company from Todd at a higher-than-fair-market price. All told, they paid \$9.9 million more than the stock was worth according to the court's expert. In 1996, Todd was

sentenced to 15 months in jail.

The past employees of USCC sued Thompson and McQueen. In 2002, U.S. District Judge Jennifer Coffman found that Thompson and McQueen had failed to investigate the purchase price of the stock, improperly costing the employees millions of dollars. In January 2005, she ordered Thompson and McQueen to pay \$20.7 million in damages. Instead of appealing the decision, Thompson and McQueen, who made over \$70 million in profit on the sale of USCC to CCA, entered into settlement negotiations. On May 6, 2005, they agreed to pay \$13.4 million in damages to settle the suit.

"All the parties will contribute to the payment but the amount each party is paying is confidential," according to Sheryl Snyder of Louisville, Kentucky, who represents Thompson and McQueen. "We had an all-day mediation session and reached a global settlement of three lawsuits among six parties."

It is hardly a surprise that the administrators of a private prison company, an industry that seeks to profit from human misery, have no moral compass when it comes to stock manipulations. ■

Source: *Lexington Herald*.

## News in Brief:

**Alabama:** On September 7, 2005, Carl Ward, 40, escaped from the Elmore Correctional Facility in Montgomery where he worked outside the prison compound in a warehouse. Using a knife, Ward took an employee's wallet and car keys, restrained him with masking tape and stole his car. Ward was recaptured without incident on September 29, 2005, at a Red Carpet Inn on the Gulf Freeway in Texas after police received a tip. Ward had been serving a life sentence for a 1990 murder and had recently been denied parole.

**Argentina:** On October 15, 2005, dozens of prisoners in the prison in Magdalena burned their mattresses and rioted to protest the denial of longer visiting hours on mother's day. At least 32 prisoners died from carbon monoxide inhalation.

**Arizona:** The White County jail has a water leak that has left prisoners

without hot water for weeks as of mid October and is costing the county at least \$3,000 in water bills per month as the jail loses at least 8 gallons of water a minute. The water pipes are buried in concrete below the jail which has made repairs difficult and locating the leaks even harder.

**Arkansas:** On August 15, 2005, Brian Ricks, 28, a prisoner at the Brickeye East unit, was stabbed to death by fellow prisoner Ernest Green, 47. No motive was given for the attack. Ricks was serving a 180 month sentence on a 2003 conviction for incest and first degree sexual assault. Green is serving a life sentence for the murder of an 82 year old woman and attempted rape and sexual abuse convictions. Ricks was distributing toiletries to other prisoners when Green reached through the bars and stabbed him with a homemade shank.

**Burma:** In late September, 2005, over

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## News In Brief (cont.)

41 prisoners died of diarrhea caused by infection in the Tharawaddy prison in a one week period. Among the dead was political prisoner Ko Aung Ye Khaing, a member of the Communist Party of Burma who had been imprisoned since 1986 by the military junta that runs the country.

**Georgia:** On August 3, 2005, Melvin Walker and David Ramsey were convicted in federal court on charges that they conspired to murder Dekalb County sheriff elect Derwin Brown in 2000 when Brown was shot to death in front of his home. Both men had been acquitted of state murder charges in 2002 where Sidney Dorsey, Dekalb county sheriff, was convicted of ordering Brown's murder. Prosecutors claimed that Walker was offered a job as a deputy sheriff and Ramsey as a jail guard for carrying out the murder.

**Georgia:** On September 2, 2005, Latrell Richardson, 36, a prisoner in the Gwinnett County jail, escaped from a local hospital by climbing through its air vents. Richardson was at the hospital to undergo a psychological evaluation. In June, 2005, he had escaped from the jail and remained free for a month.

**Georgia:** On September 22, 2005, Richard Dorsey, 22, a guard at the Telfair State Prison, was arrested for speeding and police found a half pound of marijuana in his car. Police claimed he tried to "badge" his way out of the arrest by identifying himself as a prison guard.

**Guatemala:** On September 19, 2005, three members of the Mara Salvatrucha gang were shot and beaten to death by rival gang members in a Guatemala City prison.

**Iowa:** On September 21, 2005, Moses Bittok, a guard at the Iowa Correctional Institution for Women in Mitchellville became a US citizen. On the same day the Kenya native learned he had won the Hot Lotto Jackpot worth \$1.8 million.

**Kentucky:** On October 2, 2005, Whitley County jailer Jerry Taylor, 67, resigned after being indicted on September 12 by a Whitley county grand jury on charges that he forged jail employee's names on checks to steal \$2,500 and sold pain killers and prescription drugs to prisoners. Taylor's son, Jerry Allen Taylor, 40, was also indicted for selling drugs to prison-

ers. The Department of Corrections shut the jail down in July, 2005, saying it was filthy and out of control. Taylor was first elected chief jailer in 1998.

**Michigan:** On August 17, 2005, Lenawee county jail sergeant James Whiteman was charged in state court with assault and battery for attacking a jail prisoner in July, 2005.

**Missouri:** On September 30, 2005, Kansas City municipal judge Deborah Neal was sentenced to 28 months in federal prison after pleading guilty to mail fraud charges for accepting "loans" from at least 17 lawyers who appeared in cases before her. In exchange for the money, Neal provided the attorneys with special favors ranging from favorable plea agreements to revising probation orders and granting extra access to her chambers. While Neal is headed to prison, the identities of the lawyers remain secret and none have been, or will be, charged criminally. Federal prosecutors have referred them to the Missouri state supreme court for disciplinary action.

**New Guinea:** On October 7, 2005, 33 prisoners in Baisu prison near Mt. Hagen overpowered the six guards on duty and escaped. Police shot and killed one of the escapees and recaptured 15 others and launched a manhunt for the remainder. Police Commander Wini Henao blamed the escape on incompetence and negligence by prison guards and complained it placed additional burdens on police to have to track down the escapees.

**New Jersey:** In September, 2005, defective steam line pipes installed at the South Woods State Prison in 1997 when it was first built, burst leaving the prison without hot water. Apparently the prison installed steam lines 20 feet underground when it was built but no access tunnels to repair them. The acidic soil has caused the pipes to corrode and fail much sooner than anticipated. Prison officials estimate it will cost millions to repair the pipes.

**New Jersey:** On September 30, 2005, Camden superior court judge Stephen Thompson, 59, was convicted in federal court on charges that he traveled to Russia to have sex with a young boy. However, the jury acquitted Thompson, by reason of insanity, on charges that he possessed thousands of pictures and videos of child pornography. Thompson's lawyer argued that Thompson, a Viet Nam veteran who lost a leg, his testicles and bladder in combat before returning to the US to attend

law school and become a judge, was too traumatized to form the criminal intent necessary to be convicted of the crimes. Thompson oversaw New Jersey's first drug court and as a superior court judge sent hundreds of convicted sex offenders to prison.

**New York:** On October 18, 2005, Edward Mulroney, 54, a lieutenant at the federal Metropolitan Correctional Center was sentenced to 28 months in federal prison after pleading guilty to beating a handcuffed prisoner being held down by two other guards in 2003. The prisoner suffered multiple fractures to his left eye socket and cheekbone. The other guards were not charged.

**New York:** On October 7, 2005, John Geruso, 51, a 21 year guard at the Onondaga county jail was arrested and charged with having sex with two female jail prisoners.

**Nigeria:** On September 27, 2005, at least 120 prisoners escaped from the Auchu Prison in Edo state by attacking guards and fleeing the prison.

**Ohio:** In September, 2005, Allen Correctional Institution prisoners Jermain Lyons, 26; Antoinne Neal, 28; Harvey Townsend, 39; and Stephon Graves, 31, were indicted on charges that they received marijuana sent to them concealed in food packages and then sold it to other prisoners. Four non prisoners from Toledo were also indicted on charges of sending the drugs.

**Ohio:** On September 26, 2005, Rex Elam, 32, serving a 25 to year life sentence for raping and killing an 86 year old woman in 1991, was attacked and killed by another prisoner at the Southern Ohio Correctional Facility in Lucasville. The first murder to occur at the prison since the uprising in 1993 left ten people dead.

**Ohio:** On September 26, 2005, Warren County judge Dallas Powers, 71, agreed to resign as a judge after he and his lover, Libbie Gerondale Sexton, 35, were sentenced to three years probation after pleading guilty to assorted misdemeanor charges, including intimidation, aiding and abetting the receipt of improper compensation and public indecency. Felony charges of sexual battery and gross sexual imposition were dropped. Prosecutors claim that Powers and Sexton engaged in sex in the courthouse during business hours and Powers paid Sexton to be paid for work she did not perform and then attempted





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## 133 Prisoners Killed in Dominican Republic Prison Fire

A fight between rival gangs for control of a Dominican Republic prison resulted in a fire that killed 133 prisoners. Prisoners caused the blaze by setting ablaze their pillows and sheets. Attempts to rescue them were thwarted by a jammed door. Only 26 prisoners were rescued from the prison in Higüey, 75 miles northeast of the capital on the island's eastern tip.

The March 6, 2005, Higüey fire is the latest in a series of deadly blazes at Dominican Republic prisons. Thirty prisoners died in September 2002 at a La Vega prison after prisoners ignited mattresses. At that time, La Vega, designed to hold 50 prisoners, held 400 men in nine cells. A February 2005 fire caused by an electrical shortage at Santo Domingo's largest prison resulted in one prisoner dying.

The Dominican Republic is notorious for operating overcrowded prisons controlled by prisoners. "Some prisons were totally out of the authorities control and were, in effect, operated by armed

inmates," said the U.S. State Department in February 2005.

The Higüey incident erupted from rival gangs trying to control the prison. The gang that controls the prison, sells food, cigarettes, and drugs to the other prisoners. "The problem began because there were two Higüey people who wanted to control the prison and were extorting 1,000 pesos (\$25) from each of us," said injured prisoner José Prichard Silverio.

The Higüey violence started after one prisoner shot and wounded a rival gang member. Dozens of prisoners then began fighting for control of the prison. Guards eventually broke up the fight. Shortly thereafter, prisoners began rioting by setting fire to pillows and sheets.

Although officials said Higüey only housed 148 prisoners, the toll of dead and injured was 159. The dead included two Puerto Rican prisoners. ■

Source: *Associated Press*

## Other Resources

### ACLU National Prison Project

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

### Amnesty International

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

### Children of Incarcerated Parents

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

### CorrectHELP

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP, PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### FAMM-gram

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

### Florida Prison Legal Perspectives

Bi-monthly newsletter that includes court rulings, administrative developments and news

about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

### Justice Denied

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### November Coalition

Newspaper published 4-times a year reporting on information related to ending the drug war, releasing prisoners of the drug war and restoring civil rights. Yr sub: \$6 prisoners; \$25 all others. Members receive the Razor Wire. Write: November Coalition, 282 West Astor, Colville, WA 99114.

### Stop Prisoner Rape

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

### Western Prison Project

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.

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**Everyday Letters For Busy People**, by Debra Hart May, 287 pages. \$15.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Lots of tips for writing effective letters 1048

**The Criminal Law Handbook: Know Your Rights, Survive the System**, Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$34.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

**Represent Yourself in Court: How to Prepare & Try a Winning Case**, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

**Law Dictionary**, Random House, 525 pages. \$17.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

**The Blue Book of Grammar and Punctuation**, Jane Straus, 68 pages, 8-1/2 x 11. \$11.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

**Legal Research: How to Find and Understand the Law**, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

**Spanish-English/English-Spanish Dictionary**, 60,000+ entries, Random House, \$5.99 Two sections, Spanish-English and English-Spanish. All entries listed from A to Z. Hundreds of new words. Includes Western Hemisphere usage. 1034

**Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. & Canada**, by Jon Marc Taylor, 341 pages. \$24.95. Includes contact info & outlines courses offered by over 250 education providers. Info on high school, vocational, paralegal, law, college and graduate courses. One of a kind prisoner resource. 1047

**The Citebook**, 21st ed., by Tony Darwin, Starlite, 306 pages, \$41.95. This plain language legal manual lists positive cases (cases that give you a right, not take one away) and gives a short synopsis detailing each. 1057

**Deposition Handbook**, by Paul Bergman and Albert Moore, 2nd Rev Ed., 352 pages, \$29.99. How-to handbook for anyone who will conduct a deposition or be deposed. Valuable info, tips & instructions. 1054

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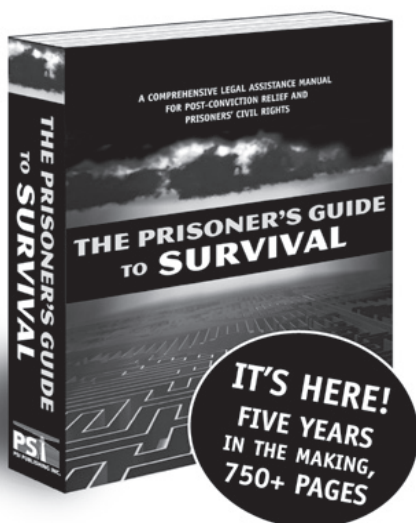
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# PRISON

## Legal News

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### Privatized Medical Services in Delaware Kill and Maim

*by David M. Reutter*

Anthony Pierce was serving a 14-month sentence for parole violation of a burglary charge at Delaware's Sussex Correctional Institution when he discovered a marble-sized lump growing on the back of his head. A prison doctor employed by the Delaware Department of Corrections' (DDOC) medical contractor, Correctional Medical Services (CMS), said the lump was most likely a cyst or an ingrown hair.

Seven months later, the lump had become ten inches in diameter, or like a second head. The growth caused Pierce to be known by cellmates as "the brother with two heads." In August 2001, CMS' medical director, Dr. Keith Ivens, stabbed

the bulging tumor five times with an 18-gauge needle, withdrawing a bloody fluid, which he emptied into a trash can rather than send to a lab for analysis.

Despite the size and rapid growth of Pierce's "lump," CMS medical staff ordered no tests or treatment. They just allowed it to grow unhampered. An autopsy report after the 21-year-old Pierce's death determined his lump was cancerous and he died from a "brain tumor due to osteosarcoma of the skull."

"That boy was growing another head," said Michell Thomas, a former CMS substance abuse counselor. "It was the most grotesque thing I have ever seen in my life...All of us who worked there will forever carry his death on our conscience."

Pierce's death is one of the more egregious cases of medical neglect by a private medical contractor that is more focused on profit than caring for its patients, but it is far from an isolated incident. "They're the scum of the earth," said Thomas of CMS, her former employer. In October, 2005, CMS settled the wrongful death lawsuit brought by Pierce's estate a month before it was scheduled to go to trial. The terms of the settlement were kept secret.

#### Privatized Medical Care

DDOC has a 25-year history of contracting with private medical service providers to deliver health care service to its prisoner population. In the 1970s, states began contracting out their medical services, hoping to improve medical care for their prisons, often under court order to do so. Most contracted with local hospitals and clinics.

By 2000, 34 states contracted for some medical services and 24 states' corrections systems were run completely by private contractors. By then, private medical correctional services in the United States had developed into a \$7.2 billion a year enterprise.

CMS, founded in 1979, is the largest provider of privatized prison medical services in the United States. [Editor's Note: With constantly changing contracts and different definitions of what constitutes "largest", the company with the most market share is constantly changing. At any given time either CMS or its rival Prison Health Services (PHS) will be the "largest" private prison and jail medical care provider in the country.] With its 6,000 employees and 450 independent contractors, it provides health care at 360 facilities with more than 285,000 prisoners in state, municipal, and federal jails and prisons. It operates in 27 states.

CMS is on its third round of caring for DDOC prisoners. It held the DDOC health care contract from 1985-96, and again from 2000-02, when First Correctional Medical (FMC) outbid CMS by about \$200,000. Delaware operates a unified jail and prison system that houses both pretrial detainees and sentenced prisoners.

In July 2004, DDOC raised questions about "deficiencies" in FMC's performance. After an audit by the National Commission on Correctional Health Care (NCCHC) revealed deep-rooted problems that couldn't be quickly corrected, it was agreed in March 2005 by FMC and DDOC to terminate FMC's contract effective on July 30.

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**PUBLISHER**  
**Rollin Wright**

**EDITOR**  
**Paul Wright**

**ASSOCIATE EDITOR**  
**Alex Friedmann**

**EXECUTIVE DIRECTOR**  
**Donald W. Miniken Jr.**

**COLUMNISTS**  
**Mumia Abu Jamal, Andrea Cavanaugh, Denise Johnston, Daniel E. Manville, Kent Russell**

**CONTRIBUTING WRITERS**  
**Lonnie Burton, Matthew Clarke, John Dannenberg, Gary Hunter, David Reutter, Mike Rigby, Sam Rutherford, Roger Smith, Silja J.A. Talvi, Bob Williams & Mark Wilson**

**LAYOUT**  
**Lance Scott/Catalytic Communications**

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### **Privatized Medical Services (cont.)**

CMS was then awarded the contract without going through DDOC's usual bid process. "I did that with full disclosure," said DDOC's Commissioner Stanley W. Taylor. "There was no sleight of hand. It was a vendor leaving on relatively short notice and having to ensure we would get quality health care and finding a vendor to come in and assume the current contract."

The new contract with CMS is worth \$25.9 million. Sen. Charles L. Copeland criticized that contract and the process leading to it. "Instead of getting competitive bids from different medical providers, the administration gave a long-term, no-bid contract to a single provider, and what's worse, paid \$9 million more than to the previous provider," says Copeland.

After a four-day series by the *News Journal*, a public outcry ensued to protest the medical care given DDOC prisoners. Taylor emphasized DDOC has been accredited since 1986 by the NCCHC. However, he neglected to say the accreditation is meaningless and measures only whether a prison system is physically capable of providing adequate medical care, not whether they actually do.

### **A Baby's Death**

That accreditation was of no consequence to Bridgett Fogell, who was serving time for traffic violations – including driving under the influence – when she started experiencing trouble with her pregnancy weeks before giving birth.

Shortly after arriving at the Delores J. Baylor Women's Correctional Institution, Fogell began experiencing symptoms that suggested problems with a pregnancy: severe cramping and vaginal discharge. She was given extra food and some tests were performed, but CMS doctors told her everything was fine.

Twenty-two weeks into her pregnancy, Fogell's water broke on March 19, 2001, at 11 p.m. Other prisoners changed Fogell into dry sweatpants. Two CMS nurses arrived. One scolded Fogell by suggesting her water had not broken, but that she had urinated in her pants.

Fogell was taken to the infirmary. There she was left in a filthy room with no sheets, blanket, or pillow. Nurses checked in on her at 2:25 a.m. No one else bothered to check in on her condition again until 8:30 a.m. "I just couldn't figure out

why I wasn't going [to the hospital]," said Fogell.

At 8:40 a.m., an ambulance was called. Upon admittance to St. Francis Hospital, Fogell was told she would be transferred to Christina Hospital, and they would try to prolong delivery to allow time for the transfer. Neither ever happened.

Instead, Fogell languished until 4:30 p.m., when a CMS doctor arrived. He wrote in her medical records that there had been "no prenatal complications until now." Around 6:00 p.m., "The nurse came in and told me they were inducing the baby," Fogell said.

24 hours and 27 minutes after her water broke, Fogell gave birth to Anna Lee. When the infant was handed to Fogell, dressed in a light blue gown, Anna Lee's eyes were fused, she wasn't breathing, and heart monitors showed her heart rate was slowing. Fogell cried for help, but no nurse or doctor responded.

"There was no attempt to save her," Fogell claimed. "Nobody was doing anything. I kept crying and singing to her, 'You are my sunshine.' I just didn't know what else to do." Anna Lee died at 3:10 a.m.

Two hours earlier, the CMS doctor had reached into Fogell's womb and supposedly removed the placenta. Days later, Fogell contracted an infection caused by a part of the placenta still being in her womb, which resulted in hospitalization to have it removed.

Fogell knows she was receiving inadequate prenatal care before her water broke. "What could I do?" asked Fogell. "You're helpless. It's not like you can get in your car and leave looking for competent medical care."

### **Lack of Oversight**

Because prisoners have no health care options other than that provided by prison authorities, their only way to have the adequacy of that care examined is to file grievances. That option, however, is of no consequence in DDOC.

Delaware prisoners file about 500 grievances a month complaining about the quality of their health care. For a system that holds only 6,600 prisoners, it seems that many complaints would sound an alarm to prison administrators that something is amiss. DDOC, however, is so confident in its contracted health care provider that it allows CMS to oversee itself. Thus, no alarm can be sounded.



## Privatized Medical Services (cont.)

All prisoner health care grievances go directly to CMS "so they can be handled on the local level," says Taylor. If the grievance is denied, prisoners can appeal to guards, who lack medical training and in turn ask CMS for advice. A final decision is made by two senior DDOC officials, who also turn to CMS when medical issues are raised as they too lack medical training.

DDOC defends CMS' contract authority to oversee its delivery of health care. "Every vendor, medical vendor that we have chosen has met that criteria," says Richard Siefert, DDOC's deputy bureau chief of prisons. "Part of that is not only do they have to have the certification, in order to get the certification, they have to have by history proven that they provide the services within medical industry acceptable best practices. So, from my perspective, the selection of the vendor is the guarantee that these people are capable of delivering those things that they say they can."

Attorney Stephan Hampton questions Siefert's rationale. "What he's saying is 'They're a good vendor, because if they weren't a good vendor, the state wouldn't of hired them,'" said Hampton. "It's absolutely crazy."

Even when a prisoner dies, an internal "peer review" is led by the contract vendor. The entire process is confidential, and the review stays with the vendor. Even autopsy reports, when done, are sent

straight to CMS.

A physicians group, The Medical Society of Delaware Prison Health Committee, may be asked to investigate a prisoner's death. But, their investigation can't order corrective actions. "We are an advisory board," said Mark Meister, the society's executive director. "If appropriate, a letter will be sent to the person inquiring as to the disposition of our review."

### Buried under Dirt

While DDOC touts the acceptable best practices its medical contractor provides, *News Journal* reporters found the kitchen at the Delaware Correctional Center appeared cleaner than the infirmary.

The medical examiner who examined prisoner Bernard Coston's body would agree CMS infirmary's aren't very sanitary. Coston, diagnosed with AIDS, went to prison in March 2002. His death 18 months later caused his release. In the four months prior to his death, according to prison officials, Coston remained in and received care in the prison infirmary.

While his death certificate simply states Coston died of AIDS, the autopsy report points a gruesome picture of neglect: "The scalp is dirty"; "Examination of the skin on the back reveals a layer of dirt"; "Dirt is noted under the fingernails"; "Fecal matter is smeared on the buttocks."

"It's obvious he got poor, poor, poor medical care," said Lynda R. Kopiske, a forensic nurse and a branch director of Interim Healthcare in Newark. "If I did not

know this individual was in the infirmary, I would wonder if he had been buried under dirt at some point in time."

The "medical industry acceptable best practices" CMS gives its DDOC patients has resulted in an AIDS death rate inside prisons that is 10 times that of the general population outside prison. Many of those deaths come from treatable infections, including wasting syndrome, pneumocystis carni pneumonia, and cryptococcal meningitis – a brain infection caused by a fungus found mainly in dirt and bird droppings.

In the last five years, 3 of the 22 AIDS deaths in DDOC resulted from pneumocystis carri pneumonia. "Its very rare to see patients with [pneumocystis carii pneumonia] nowadays," says Dr. Robert L. Cohen, a prison medical expert and former director of the New York City jail system. "You have to have AIDS experts seeing all patients with HIV infections." CMS only employs an infection-control nurse.

The lack of an AIDS expert in DDOC prisons cost Louis W. Chance, Jr., his life. Chance, 37, was serving a six-month DUI sentence when he developed a headache at the Webb Center, a work-release facility.

At his first medical visit, an FMC nurse, Beverly Anderson, was informed Chance had had a headache for three days. She gave him Excedrin and sent him back to his cell. The next day he was prescribed Motrin after he reported no relief.

Three days later, a guard reported Chance was confused and possibly "overdosed." He was transported to Gander Hill Prison, where he was reported to be disoriented, uncooperative, and hostile. Guards subdued him, put him in a strait-jacket, and placed him in an isolation cell. Despite not being examined by a doctor, Chance was prescribed Antivan, Benadryl, and Haldol, which treat panic attacks, allergies, and psychosis, respectively. Together, they can calm a person.

After three more days, FMC's Dr. Niranjana Shah prescribed Tylenol and a daily cup of coffee because, according to Chance's medical records, caffeine helps combat headaches. Chance was then sent back to the Webb Center. Five days later, and seven days short of release, Chance died.

Had FMC doctors followed protocol for treating HIV-positive patients such as Chance, his life could of been saved. Chance had contracted cyptococcal meningitis, a disease HIV patients are

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highly susceptible to. It was the cause of his headaches and the disease created so much pressure in Chance's head that it affected his hearing, making him disoriented and uncooperative. "It appears to be a concerted effort to avoid treating someone who was HIV-positive," charged Ken Richmond, a Philadelphia attorney representing the Chance family in suing FMC. "This is gross negligence."

Despite cases such as those illustrated above, DDOC's bureau chief never considered that the medical vendor might delay or deny medical care to save money. Moreover, his confidence in the vendor is so high that he never asked DDOC employees to investigate prisoner claims of inadequate care; he just referred questions and grievances back to the vendor.

### Early Release for Seriously Ill

Those in the know, however, are cognizant of the fact that DDOC will act to release seriously ill patients, which then places the cost burden onto the released prisoner and his/her family or the state Medicaid budget rather than upon DDOC and its medical vendor.

William "Brian" Hindt, 42, experienced a release shortly after a very

serious and costly injury occurred while in DDOC's custody. Hindt was walking down a stairwell on March 28, 2005, in a courthouse to appear on charges of possession of marijuana, possession of drug paraphernalia, maintaining a dwelling where drugs are used, and conspiracy.

Wearing handcuffs and shackles, Hindt was ordered by guards to walk down the stairwell alone. Meanwhile, "The guards wanted to grab a cigarette," Hindt claims. With no one to hold his arm in case he slipped, Hindt did just that, tumbling from midway down the stairs to the concrete floor.

"I tried to save myself three times, reaching out, but I was handcuffed and shackled," said Hindt. "When I landed on that concrete floor, I hit my head, messed up my shoulder, and there was blood oozing out of my left leg. I busted the bones clean in half."

The blood was oozing from a compound fracture of Hindt's lower left leg. "I was screaming and yelling for a long time before anybody even came to help," he said. The next day, surgeons inserted nine pins and a metal plate in Hindt's leg.

After the leg was set, Hindt was returned to the infirmary at the Sussex

Correctional Institution. He faced months of costly and intensive care and rehabilitation. "One day a doc comes in and cuts off my cast because I was gonna be released," Hindt says. The charges against Hindt were suddenly dropped "in the interest of justice" 31 days after his arrest.

If the court's order releasing Hindt had been truthful, it would have said in the "interest of fiscal savings." "Once he was discharged from the system, he was on his own," said Dover attorney Steve Hampton. "Maybe he'll be eligible for Medicaid." One thing is for certain, neither DDOC or its medical vendor will have to bear the costs unless or until Hindt successfully sues them for his injury and medical costs.

For the first time in his 20 years as a public defender, Ed Hillis experienced something for the first time after it was learned his client, Bill Cathall, Jr., needed open-heart surgery: An attorney general asked him to help get Cathall released. "It was bizarre," said Hillis.

Hillis could not believe that DDOC wanted a prisoner charged with arson to walk free without posting bail. "I was concerned that once DDOC was no longer technically responsible for him, he'd



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## Privatized Medical Services (cont.)

end up having to get his own care,” said Hillis. The 44-year-old Cathall wasn’t mentally capable of seeking care for his endocarditis, an infection of the heart valve. Cathall had spent most of his life in mental hospitals because he had the mind of an 8-year-old, was mentally disabled, and was schizophrenic.

Hillis decided against filing a motion that would result in Cathall’s release. “If a judge granted the request, the prison could have discharged Cathall, called a taxi, and sent him on his way,” says Hillis. Instead, he told DDOC to provide Cathall medical care immediately.

DDOC officials, however, took no action to rush Cathall to a surgeon. Rather, they wasted four days to orchestrate his release. Those officials deny they were scrambling to release Cathall to avoid costly surgery. While they allegedly sorted through the “complex issue of jurisdiction” to send Cathall to John Hopkins Hospital in Baltimore, Cathall’s condition continued to deteriorate. By time DDOC got Cathall to John Hopkins, it was too late. Cathall died shortly after arrival at that hospital. Once again, DDOC and its medical vendor avoided a costly procedure for one of their wards.

### Charging Prisoners

In the last year, numerous current and former DDOC prisoners have received bills for medical treatment they received while in DDOC’s custody. Those bills came from private vendors that performed contract work for FCM. Apparently, because FCM has been delinquent paying its bills, the vendors began billing prisoners.

FCM owes St. Francis Hospital close to \$1 million. A Kent General Hospital spokesperson confirmed FCM owes them money too, but not as much as St. Francis. The result is that CMS is now having difficulty contracting with these same community medical providers.

Although he is still in prison, Ed Brittingham received a bill for about \$2,100 for the massive doses of antibiotics prescribed in the hospital to treat a flesh eating bacteria. Don Bates, serving life for murder, received a bill for \$76 from a radiology firm for two chest x-rays he received in 2003.

“Lots of inmates have received these bills,” Bates wrote in a letter to the *News*

*Journal*. A fitting question was raised by Brittinghams common-law wife. “What happened to all the millions of dollars the state paid FCM to take care of Ed and the other inmates?” asked Lee McMillion. “Where did all that money go?”

### Infecting the Community

As *PLN* has reported for years, a virulent bacteria called methicillin-resistant staphylococcus aureus (MRSA) is prevalent in the prisons of the United States. Delaware is no exception.

MRSA bacteria enter the body through a cut or scrape. The infection is usually treated with a massive infusion of antibiotics. Amputations and skin grafts are common, and most survivors end up scarred when treatment is delayed. Physical contact is enough to pass on the bacteria. It can also be spread by touching surfaces or laundry that has been contaminated with tainted body fluids.

MRSA causes welts, boils, and oozing wounds that are often confused with spider bites. Treating MRSA is expensive. New York City, for example, spends \$7 million annually to treat 3,000 people infected with MRSA.

Mark Stewart, 45, was exposed to and contracted MRSA after watching a cellmate burst his own untreated boils. Stewart spent six months in the Sussex Work-Release Center after violating his probation for possession of drugs and drug paraphernalia. For two of those months, he shared a cell with a prisoner prescribed Benadryl to treat a large boil on his leg.

“It got so bad he eventually cut it open to drain it himself,” Stewart said. “I know because I watched him do it.” Soon after, Stewart developed a bump in the back of his head that continued to grow.

Because he felt he would not receive adequate treatment in prison and he had less than a month until release, Stewart waited until released to see a doctor. Within 24 hours of seeing a doctor, surgery was performed to remove an area from the scalp the size of a half dollar.

“I was in the hospital for four days while they treated me with IV antibiotics to stop the infection from spreading to the rest of my body,” Stewart said. “On September 16, [2005], I was again operated on to perform a skin graft in order to cover [several more] inches of removed tissue.” Stewart required 17 staples to hold that graft in place.

His problems are far from over, for he

still carries an antibiotic resistant strain of MRSA. He fears infecting his fiancée and friends. “I’m sentenced to a lifetime of MRSA,” says Stewart.

After having a wisdom tooth removed at Gander Hill Prison, prisoner Michael Surtees contracted MRSA in October 2004. Despite complaining to prison medical personnel that he was experiencing pain, neck swelling, and shortness of breath, Surtees was not treated for five days. When he finally was treated, he required several surgeries on his neck and throat. He was placed on a ventilator and remained unconscious for nearly a month. Surtees is lucky to be alive. It’s an experience he will recall every time he speaks, for his now soft-voice has earned him the prison nickname of “whispers.”

While MRSA infections are a community threat to be feared, absolute terror reigns from the flesh-eating bacteria breeding in DDOC prisons. Necrotizing fasciitis is the medical term for flesh-eating bacteria. That disease can infect the skin through lesions caused by MRSA infection.

While on a weekend furlough, Gander Hill prisoner Ed Brittingham began experiencing intense pain in his shoulder. At sick call, an FCM nurse suspected a broken bone. She gave him a sling, took some blood, and ordered tests.

“When the x-rays showed I didn’t have any broken bones, they wrote me up for faking,” Brittingham said. “I knew it wasn’t a broken bone. I told them this. They gave me Motrin, but the pain was pretty awful, so I took a double dose. They wrote me up for that, too.”

When severe abdominal pain followed with blood in his urine, FCM’s doctors assumed Brittingham was passing a kidney stone. He was given Motrin and a strainer. “I was drinking five gallons of water a day, but never passed any stone,” he said. “I kept trying to get to medical, filling out sick call slips.”

Prison officials prohibited Brittingham from seeking outside medical care. “They told me if I went to the hospital on a home furlough, they’d consider it an escape, and I’d get sent back to prison for the remainder of my sentence,” he recalls. His wife was similarly warned.

“They told me if he had a heart attack and fell on the floor, I wasn’t supposed to call 911,” said his wife. “I was supposed to bring him back to the prison.”

As time passed, Brittingham’s pain became so unbearable that he went back



to prison early from a home furlough. Rather than go to medical, he went to a guard. Brittingham then stripped naked and showed that guard the massive red lesions on his legs, foot, and shoulder. Prison doctors thought they were blood clots, causing Brittingham to be sent to St. Francis Hospital.

Once there, doctors lanced his shoulder and used a vacuum to remove dead tissue. After 11 days, Brittingham woke up and looked at his left shoulder. "When I saw it, it threw me into shock," he said. "They had to sedate me." The toll on his body caused him to go from size 38 pants to 27.

The frequent trips into the community exposed Brittingham's wife, friends, and the general public to the deadly disease eating away at his shoulder. One cough or sneeze could have spread the infection.

DDOC's Taylor contends that only three cases of the flesh-eating bacteria have been confirmed within his prisons. Yet, eight prisoners or family members told the *News Journal* that they have been treated over the past three years for necrotizing wounds.

"It's a nationwide problem in prison care," says Dr. Robert Cohen, a prison health expert who serves as a court-appointed monitor in four states. "It spreads rapidly in a corrections environment. It doesn't have to if appropriate infection control techniques are followed."

### A Mountain of Lawsuits

Since 1986, over 300 cases have been filed in Delaware federal courts against the DDOC's medical vendors. Most of those cases were filed *pro se*. Many were dismissed on summary judgment for lack of evidence to support the claims, failing to file paperwork, or the courts could not locate the prisoner. It is virtually impossible to win a medical

case in court without expert testimony to show both causation and appropriate standards of care. Medical experts costs thousands of dollars to retain and are typically beyond the reach of most pro se prisoners.

Some cases, however, result in favorable judgments on behalf of prisoners for instance, CMS agreed in October 2005 to pay an undisclosed amount to the family of Anthony Pierce for the gross negligence that resulted in his death.

CMS is no stranger to lawsuits alleging it was deliberately indifferent to prisoners' serious medical needs. In fact, such suits seem to be part of the business model. In the Eastern District of Arkansas, CMS has been named as a party in about 200 lawsuits.

The last Arkansas suit against CMS comes after its physician, Dr. Olabode Olumofin, prescribed ineffective antibiotics to treat a bacteria that caused prisoner William Jobes' lungs to fill with infected pus. The suit alleges the lab reports "were blatantly and willfully disregarded" by Olumofin, who "wholly failed to take any action in response to save Bill Jobes' life." Moreover, it is contended that the failure to send Jobes to a hospital sooner

than four days after he entered the prison infirmary cost him his life.

Of course, sending prisoners out for care at a community hospital greatly reduces CMS' profit. "I have been in many settings where I have seen medical vendors rewarded for not providing care," says Dr. Cohen. "When care is tied to the profit of these companies, there will be serious problems on care in specific sensitive areas: specialty consultation and hospitalization. Delaying or denying services will make a lot of money for the company. When the state negotiates these contracts, that's likely to happen."

CMS, like legal experts nationwide, know that prisoners have an extremely difficult time procuring counsel. Absent competent counsel, most prisoners fail in the legal arena. "It is certainly very hard for prisoners alone," says Gouri Bhat of the ACLU's National Prison Project. Knowing that, why should CMS worry about the odd successful suit while making millions denying or delaying care?

Typically private medical companies are paid a flat per diem rate for each prisoner in a system. That rate supposes a basic level of care for all prisoners and the companies profits. When the com-

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## Privatized Medical Services (cont.)

pany skimps on medical staffing, doesn't provide expensive care, etc., it maximizes its profits as every penny not spent on medical care for prisoners equals profit for the company.

Moreover, the private prison companies pursue a litigation policy of demanding secret settlements, even when they lose cases at trial, to prevent an accurate accounting of how many times they have been found liable or paid damages for inadequate medical care to prisoners. Something the government cannot do.

### Nation's Highest Death Rate

Along with its horrid health care comes a distinction for the second time in four years: DDOC had the nation's highest rate of AIDS related deaths.

According to Dr. Janet Kramer, an expert in prison health care, DDOC's 6,600 prisoner population should equate to no more than three to four deaths a year. With 90 prisoners dying since 2000 until September 2005, that equates to about 18 DDOC prisoner deaths a year.

DDOC's suicide rate is twice the national average. DDOC, however, contends its suicide rate falls "in the middle of the statistical range by any reasonable standard." That contention is based on DDOC's unique population, which holds convicted prisoners and those just arrested because Delaware has no local jail system. The national rate for jails is 14 suicides per 100,000 prisoners and 41 per 100,000 for convicted prisoners.

When you examine the attempted suicide of Gander Hill prisoner Robert Swan, one is left to wonder if DDOC takes appropriate steps to prevent suicide in prisoners known to be at risk to kill themselves. Swan called his mother, Tillie Carello, and told her he was going to kill himself. Carello called the prison to report the threat. Despite that warning, Swan was not placed on suicide watch and he hung himself with a bed sheet two days later. While he was found and resuscitated, he now exists in a progressive vegetative state.

To avoid reporting deaths to public or federal regulators, DDOC acts to discharge its most seriously ill prisoners. Anthony Pierce, for instance, received a medical discharge before he died from his untreated brain tumor. While it is uncertain how many DDOC prisoners have

died after receiving a medical discharge, it certainly has to be enough to raise DDOC's prisoner death rate.

### Circling the Wagons

After the *News Journal* published its four-day expose on the deplorable medical care provided by DDOC's medical vendors, Gov. Ruth Ann Minner and DDOC Commissioner Taylor began circling the wagons to assert its vendors were doing the job.

"Commissioner Taylor has worked very hard in recent years to improve the health care provided to inmates in Delaware prisons," said Minner. "Like any program, there are areas we would like to improve, and the Commissioner has repeatedly said that. But to say the system is in crisis is not only wrong, but irresponsible."

Taylor does admit that deficiencies exist, but he defends the delivery of health care to DDOC prisoners because of DDOC accreditation by NCCHC since 1986. Yet, Taylor refuses to release the latest NCCHC audit, which found such serious problems it resulted in FMC's contract being terminated, on the basis it's not a public document. DDOC spokeswoman Elizabeth Welch, in response to a *Delaware State News* request for that audit, cited "a statute that specifically prohibits the disclosure of documents such as the audit. Therefore, the DOC is denying your request." The *News* contends the statute is inapplicable and has asked the attorney general for clarification.

When pressed on why DDOC's death rate is so high, Taylor said, "The inmate population tends to be a population that comes to us with a difficult medical history: substance abuse, tattoos, risky sex, a lot of drug behavior. They don't take care of themselves."

While Taylor may have a point, the bottom line is what really counts for its medical vendor. "Patients come to correctional facilities without a history of regularly receiving care," says CMS spokesman Ken Fields. "The diagnoses might not always be immediate and might take several tests and medical evaluations. Patients often have multiple and complex conditions that in some cases are very rare." In other words, prisoner health care can be very cost intensive.

Dr. Vemulpalli, a former FMC employee who is now in private practice, experienced firsthand the bottom-line syndrome. While working at the Delaware Correctional Center, FCM's company own-

er, Dr. Tammy Kastre, ordered him to treat AIDS or hepatitis C – but not both, even though many patients have both – because "it was too expensive to treat both."

"Most patients who come to the hospital from the Department of Corrections are generally too far advanced," says Dr. Vemulpalli. "I've seen several cases from prison – all patients who have died – that didn't get referred to the hospital at the appropriate time. They're not providing adequate care."

Despite Minner and Taylor's best efforts to put a happy face on DDOC's medical care, the images of Pierce's head and Brittingham's shoulder seared the public conscious.

### Public Outcry

Protesters took to the streets of Wilmington and Dover on October 2, 2005. Over 50 protesters gathered on the steps of Legislative Hall before marching to the governor's mansion, where they outlined 10 recommendations to improve the prison health care system. One of those was to pay the vendors its cost plus a percentage. "The Delaware system is sick," says protest organizer Rev. Christopher Bullock. "The system is in critical condition."

A coalition of 30 churches, social service organizations, and the ACLU of Delaware asked the governor to dispatch medical teams to every adult prison to assess medical care. "This is as much a human rights issue as a civil rights issue," said Drewry Fennell, Executive Director ACLU of Delaware. "There are people who are in pain, who have medical issues that need to be addressed. They don't have the luxury of time."

The Delaware Legislature finally jumped into the fray on November 7, 2005, holding an "informational" hearing to educate lawmakers about prison medical care for possible action at the next legislative session.

At the hearing, 50 members of the public did some scolding, testifying the state treats its prisoners worse than animals. "It's your facility – clean it up," Matilda Carello yelled at Taylor, who was sitting at her side; Carello's son is a prisoner with Grave's Disease. "CMS – you're a liar. Stan Taylor, you are a liar."

"I believe a person needs to be punished when they break the law of the land, but the punishment does not include neglect, humiliation, and death," testified Denise Rodriguez, a former CMS em-

ployee who worked at Gander Hill Prison. "Stan Taylor, I always told my clients that to make changes in your life, you have to hold yourself accountable. Someone needs to be held accountable."

Dover residents Lynn and Robert Sadusky mentor a Delaware prisoner. They testified that prisoner has relayed a list of complaints concerning medical care in the DDOC, including having to wait for two weeks now to be seen by a doctor to determine if he's suffering from lung cancer.

After about 50 people testified, speaker of the House, Terry Spence, R-Stratford said, "We've lost confidence in the department. We've lost confidence in CMS." Spence wants an independent oversight panel.

DDOC hired a health services administrator on November 28, 2005, to "oversee the DOC's day-to-day medical operation," said Ed Jynoski, DDOC's bureau chief of the Bureau of Management Services.

In that position was placed James Welch, a longtime HIV/AIDS educator from the Department of Public Health. What good Welch's appointment will do remains to be seen.

Welch said he's never experienced criticism's of CMS Medical Director, Dr. Keith Ivens, the same doctor who stabbed Chance's bulging tumor with an 18 gauge needle. "All I can say is he performed appropriately. I am not a physician. I can't give a professional opinion of his level of care," said Welch, a registered nurse. "His orders were appropriate." The public wants more done.

"The lack of response by our governor is the strongest indication of the need for outside oversight of prison conditions," says Maryanne McGonegal, secretary of Common Cause of Delaware. Common Cause has asked U.S. Attorney General Alberto Gonzales to open a federal investigation.

The *News Journal's* exposure and public outcry finally pushed the Civil Rights Division of the U.S. Department of Justice (DOJ) to open a "formal inquiry" into medical care and other systematic issues inside DDOC. The DOJ was alerted to problems within DDOC in mid-2004 by a defense attorney, who advised a prisoner had been assaulted by guards and then deprived adequate medical care. Only now, has the DOJ decided to start a "formal inquiry." Historically these DOJ

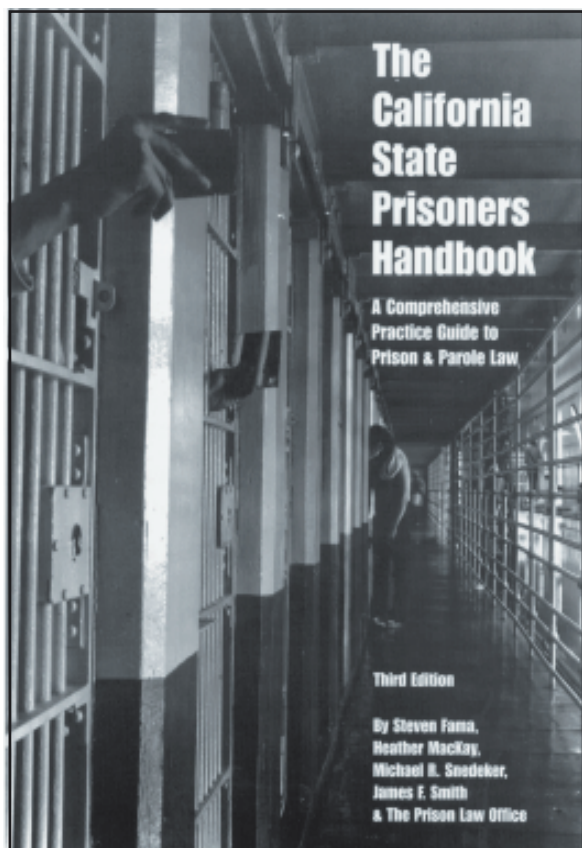
inquiries result in the occasional report and not much else.

Despite all the publicized ill-treatment and pending investigations, Minner continues to defend the system's care provided to its prisoners. "If she thinks it's that good, maybe she should use the prison health system - not with a name, but as a number," suggests Sen. Karen E. Patterson, D-Stanton.

With its new \$25.9 million contract, CMS seems likely to continue providing care to DDOC prisoners for the foreseeable future. After 25 years of relying on private medical vendors to care for its prisoners, one can only wonder if DDOC could ever rid itself of private contractors. The real questions, however is: Can privatized medical care of prisoners ever work?

One expert thinks not. "Any of these companies, with a risk-based contract-less services, more money-are extremely likely to go wrong," says Dr. Cohen. "I'm not aware of anywhere they've gone right." ■

Sources: *The News Journal*; *Delaware State News*; *Newszop.com*; *Baltimore Sun*; *nwanws.com*; *Associated Press*; *Discover Magazine*.



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# Washington State Supreme Court Grants PLN Public Disclosure of Washington DOC Medical Malpractice Records

by John E. Dannenberg

*Prison Legal News* won a big victory for the cause of investigative journalism on July 14, 2005 when it prevailed in the Washington State Supreme Court to gain access to public records regarding Washington state prisoner deaths and prison medical employee malpractice. The court labeled as “undemocratic secrecy in government” defendant Washington Department of Corrections’ (DOC) attempt to hide behind a statutory “law enforcement” exemption to Washington’s Public Disclosure Act (PDA). Specifically, the court held that “neither providing patient care to DOC inmates nor disciplining medical employees is ‘law enforcement’ within the meaning of the PDA.”

Commencing in 2000, *PLN*’s editor Paul Wright, who was concerned about suspicious DOC prisoner deaths and a relationship to medical staff qualifications and disciplinary history, requested that DOC provide *PLN* with prisoner-patient specific and staff-employee-specific records pursuant to Washington’s PDA (Chapter 42.17 RCW). The requests included data on disciplinary actions against medical providers, names of all medical staff employed by DOC, any records of their restricted or suspended licenses, records or prisoner deaths in 1999, records of prisoner deaths where medical negligence was a factor, related postmortem records, and records of in-prison assaults between 1994 and 1999 that required medical treatment. Wright later added requests for names of medical providers who had been fired, disciplined and those with misconduct records.

DOC was initially recalcitrant, releasing only the names of medical staff, the number of prisoner deaths in 1999 and quarterly intelligence reports. After a self-granted extension of 60 more days, DOC came up with 11 pages of records of DOC medical staff working with restricted licenses and 1,207 pages of reports from investigation of medical staff disciplinary actions that had resulted in the death of at least two prisoners and the serious maiming of at least another 12. However, the names of all patients, staff involved and witnesses were redacted (citing RCW 42.17.310(1)(d),(e), RCW 42.17.312 and RCW 70.02.020 as authorities for the

redactions and nondisclosures).

When *PLN* sued in Thurston County Superior Court for full disclosure, alleging that DOC’s cited PDA exemptions did not apply, the court ruled that DOC’s actions did not violate the PDA. *PLN* appealed, but the Court of Appeals, in an unpublished opinion, upheld the trial court, except for reversing on the limited issue of copies of preliminary drafts, notes, recommendations and opinions. See: *Prison Legal News v. Washington Department of Corrections*, 2003 Wash. App. Lexis 2349. The court bought the DOC argument that if prisoners knew the names of doctors and medical care providers that had killed or crippled previous patients they might not seek care from these same providers. *PLN* petitioned the Washington Supreme Court for discretionary review regarding the application of the remaining PDA exemptions and the failure of the Court of Appeals to award a statutory penalty. DOC did not cross-petition the issue of preliminary drafts and notes. The Court granted review and ruled 6-3 in *PLN*’s favor. Reversing the two lower courts.

The Supreme Court set the standard by recognizing that “the PDA is a strongly worded mandate for broad disclosure of public records.” As to the investigative records exemption, the Court reviewed privacy protection accorded by the relevant PDA statutes, holding that statutory exemptions only apply if disclosure would endanger any person’s life, safety or property. The Court focused on the statutory requirement that the investigative record sought must be “essential to effective law enforcement” if it is to fit within the exemption, with the burden of proof falling to DOC.

DOC argued (hypothetically) that they were entitled to this exemption because of possible prisoner reprisals for exposed staff misconduct, that disciplined staff could be blackmailed by prisoners, that disciplined staff might be subject to “ridicule, retaliation and distrust by other staff members,” that reporting of future misconduct would be chilled by not keeping such matters secret, that prisoner informants on misconduct would have to be protected, and that exposed medical

staff might be unwilling to work in a facility such as DOC.

The Court was unimpressed with all of DOC’s hypotheticals, instead focusing on construing the meaning of “law enforcement” as used in the PDA. The Court rejected DOC’s global self-serving “law enforcement” exemption because it would permit DOC to hide any misconduct, however egregious, from disclosure because every facet of running a prison is arguably “law enforcement.” In fact, such an interpretation would frustrate the legislative intent of the PDA. Accordingly, the Court held that DOC’s nondisclosure in *PLN*’s requests was not “essential to effective law enforcement,” and ordered DOC to release the unredacted investigative records.

As to the separate question of release of specific health care information, the Court held that upon remand to the trial court, DOC “must prove that each patient’s health care information would be readily identifiable with that patient even if that patient’s identity isn’t known, given that *PLN* has not contested the nondisclosure of patient names or identification numbers.” In other words, if individuals’ privacy rights would be adequately protected by using case numbers to identify reports instead of using actual patient I.D.s, then DOC must release the complete files on that basis.

Finally, as to attorney fees and statutory penalties, the Court relied on RCW 42.17.340(4) to find that as the prevailing party, *PLN* was entitled to its costs and reasonable attorney fees, and remanded to the trial court to determine the amount of statutory penalties required by the PDA. Washington’s PDA allows penalties of \$5 to \$100 per day that each record is withheld. In this case the records had been withheld over 2,000 days as the DOC fought to keep secret the medical misconduct of its employees.

Closing on a philosophical note, the Court cited the U.S. Supreme Court for the proposition that “secrecy in government is fundamentally antidemocratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health.” Indeed, *PLN*’s investigative journalism is just the

type of “open debate and discussion of public issues” that the Washington Supreme Court protected here. See: *Prison Legal News v. Washington State Department of Corrections*, 154 Wn.2d 628; 115 P.3d 316 (Wash. 2005).

The groups who filed amicus briefs on PLN’s behalf in the Washington supreme court are the Coalition for Open Government, Washington Association Of Criminal Defense Lawyers, ACLU National Prison Project, ACLU of Washington, Columbia Legal Services, Allied Daily Newspaper Of Washington Inc, Washington Newspaper Publishers Association, Pro-Family Advocates Of Washington and Angelo Lambrou.

## PLN Sues Bureau of Prisons for Lawsuit Information

On September 12, 2005, Prison Legal News (PLN) filed suit in federal district court to overturn an agency ruling denying it access to documents held by the Federal Bureau of Prisons (BOP).

The lawsuit, filed in federal district court in Washington, DC, appeals a ruling by the BOP denying PLN a fee waiver under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. PLN requested BOP documents related to money the BOP paid for all lawsuits and claims between January 1, 1996, and July 31, 2003. The BOP demanded almost \$7,000.00 to search for the documents, which it claims it does not have in any centralized location. PLN sought a fee waiver under § 552 4(a)(iii). PLN appealed to the Department of Justice which delayed a final ruling on PLN’s fee waiver request for almost two years. The DOJ eventually denied PLN’s request for a fee waiver, effectively denying PLN access to the information. The BOP first claimed there was no public interest in this type of information. The DOJ later claimed PLN lacked the ability to effectively disseminate the information.

According to Edward Elder, PLN’s attorney at the DC law firm of Klimaski and Associates, “These are public documents being requested by public-interest journalists recognized for their expertise

PLN was well represented throughout this six year case by Michelle Earl Hubbard, Andy Mar, Alison Howard and David Bowman of the Seattle law firm Davis, Wright and Tremaine. The DOC belatedly provided some of the requested records in October, 1995. *PLN* will report its conclusion. This is the third successful Public Disclosure Act suit *PLN* has filed against the Washington Department of Corrections. In each case the DOC has attempted to evade public scrutiny of the misconduct of its employees by withholding public records in its possession. For the past seven years the DOC has sought various legislative exemptions from the PDA, but has been rebuffed. 📰

in prison issues. They clearly qualify for a FOIA waiver.”

BOP runs the largest prison system in the United States, with approximately 200,000 prisoners behind bars. Paul Wright, editor of *Prison Legal News*, stated, “This lawsuit is an important step towards government accountability and determining how well managed our nation’s federal prisons are. As tax payers, we should be concerned with how well, or poorly, the federal Bureau of Prisons is spending its multi-billion dollar budget.”

Both parties have filed motions for summary judgment and are currently awaiting a ruling from district court judge Reggie Walton. *PLN* will report the outcome of the case. See: *Prison Legal News v. Lappin*, US DC, D DC, Case No. 05-1812 (RBW). 📰

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# From the Editor

by Paul Wright

By now all *PLN* subscribers should have received our annual fund raiser letter and our reader survey. As you know, subscription and advertising income only cover a fraction of *PLN*'s operating expenses. We operate a very lean operation where all four full time employees and our part time workers and volunteers put in long hours at very modest salaries to bring you the a wide selection of prison and jail related news and information each month. In addition to publishing the magazine *PLN* engages in advocacy on behalf of prisoners around the country and we are the only media organization that regularly steps up to the plate when it comes to challenging prison and jail mail regulations on behalf of prisoners and publishers alike. This also includes filing friend of the court briefs in U.S. Supreme Court cases and in the lower courts that involve the rights of prisoners. We do all this without a litigation budget but we require your support above and beyond the cost of your subscription to keep doing it.

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As this issue of *PLN* reports, we are also engaged in public records litigation against the federal government, private prison companies and state prison systems designed to shed some light on prison operations and bring exposure and accountability to a part of the government that is used to having neither. All of this takes scarce staff time and money. If you believe in an independent prison media this is your chance to support it. Lip service doesn't pay the bills. Unlike large organizations with huge budgets, every penny donated to *PLN* has a measurable impact and goes directly to supporting our work on a national basis. No donation is too large or too small to help.

On January 8, 2006, postage rates increased. Don't know what to do with those 37 cent stamps? Donate them to *PLN*. We can always use stamps as we send out hundreds of pieces of mail each week.

We also sent readers a survey to get feedback on what you think of our content and also changes to future in print coverage. Please return the surveys and we will report the results in a future issue.

*PLN*'s website continues to grow and expand. In addition to all 188 back issues of *PLN*, it includes the full case text of all court decisions we have reported, an additional 1,300 case summaries and cases we have not reported in print, a brief bank of pleadings, lawsuits, verdicts and settlements available nowhere else and an attorney referral directory and huge links section. We add new material pretty much every day and have the most comprehensive prison litigation and news site in the world. We also started *PLN*'s list serv where people can sign up for free and receive daily news bulletins and court rulings on prison and jail litigation and events. Did I mention the list serv was free?

The website has been designed so that all of its contents can be easily printed and sent to prisoners by supporters outside of prison. It has been a huge undertaking but the results are well worth the effort. Check it out at [www.prisonlegalnews.org](http://www.prisonlegalnews.org).

On December 8, 2005, long time *PLN* subscriber Richard Williams, 58,

died in a federal prison in North Carolina. Richard had spent over 20 years in prison as a prisoner of war who had dedicated his life to the struggle for justice and liberation. Richard was convicted, as a member of the United Freedom Front, also known as the Ohio 7, of assorted armed actions against military and corporate targets that had supported apartheid in South Africa and US imperialism in Central America in the 1980's.

After the September 11, 2001, attacks on the World Trade Center and the Pentagon, Richard was among many political prisoners and prisoners of war held in US prisons who were arbitrarily placed in a control unit and abused despite not being linked or supportive of the Islamic Fundamentalism long supported by the US government. While in segregation Richard's health significantly deteriorated, and included at least one mild heart attack. [See the February, 2002, issue of *PLN* for more details.] Ultimately Richard died from untreated hepatitis C.

While a lot of media attention was focused on the state murder of Stanley Williams in California the same month, Richard Williams was just as surely killed by the government as Stanley was with medical neglect rather than lethal injection being the means of execution. Unfortunately, Richard's death received virtually no media attention and no celebrities pleaded for his life. Unlike Stanley, Richard had dedicated his adult life to struggling for a just society and challenging the perpetrators of oppression. And he was not repentant about having done so. Richard will be sorely missed by his friends, comrades and family members. Oppressed people everywhere have lost a comrade.

Richard is one of some 100 or so political prisoners and prisoners of war being held in American prisons from leftist and nationalist struggles. Many of these prisoners have been imprisoned for more than 3 decades, making them among the longest held political prisoners in the world. This issue of *PLN* contains a blurb for the Certain Days calendar which is a project of US political prisoners and their supporters. The calendar is great and a good addition to any cell, home or office wall.

Enjoy this issue of *PLN* and encourage others to subscribe. 



# Mexican Prisons in Crisis: Cartels Murder Prisoners and Guards

by Matthew T. Clarke

One of the achievements of which Mexican President Vicente Fox is most proud is the record-breaking number of drug lords who have been arrested and thrown into federal prison during his tenure. He has a right to be proud of that achievement. However, such success does not come without a price both inside and outside the prison walls.

Turf battles by Mexican drug cartels have led to the murder of three cartel-related prisoners, in addition to violence outside the prisons. This, in turn, resulted in a crackdown on federal prison facilities by Mexican authorities. The cartels' response to the crackdown was to murder six prison employees and dump their bodies near the facility where they worked.

Two of the most infamous incarcerated drug lords are Benjamin Arellano Felix and Osiel Cardenas Guillen, leaders of cartels based out of Tijuana and the Gulf area. While imprisoned in adjacent cells at Mexico's second highest security prison -- federal prison No. 1, known as the La Palma federal penitentiary located 50 miles west of Mexico City in Almoloya de Juarez -- the two agreed to combine forces against another drug lord, Joaquin "El Chapo" Guzman, leader of a drug cartel based in Sinaloa. Guzman had been a prisoner at the highest security prison in Mexico, Puente Grande federal penitentiary in Guadalajara, until January 2001 when he escaped in a laundry truck with the help of guards he had bribed. [The U.S. government has offered a \$5 million reward for information leading to the 47-year-old Guzman's recapture.]

Fox's crackdown on the drug lords created a power vacuum that resulted in gang warfare among the competing cartels. One of the results of the gang war has been a significant rise in the murder rate in Mexico, especially along the U.S. border, as rival drug gangs fight for control of the lucrative drug smuggling trade. An estimated 1,000 people have been murdered since January 2005, including cartel members, police officers, attorneys and innocent citizens. Another result of the crackdown has been the exposure of rampant corruption within Mexican law enforcement. The most dramatic example was the defection of a 45-member team of U.S. specially-trained army drug-suppression troops known as the Zetas who

openly joined the Gulf cartel. About a third of the Zetas have since been captured or killed. The narco-violence along the border prompted U.S. Ambassador Tony Garza to issue a travel advisory in January 2005, warning that American visitors may be at risk. Mexican government officials reacted harshly to the advisory, claiming that the level of violence was not rising and that the advisory implied criticism of Fox's efforts to crack down on the drug cartels' influence behind bars.

Fox's latest campaign against the drug lords started in the high-security part of the prison system after three high-profile, cartel-related prisoners were murdered. In May 2004, Alberto Soberanes was strangled to death in a La Palma shower room. On October 7, 2004, Miguel Angel Beltran Lugo, one of Guzman's lieutenants, was shot to death with a pistol smuggled into La Palma for that purpose. And on December 31, 2004 Arturo Guzman Loera, brother of Joaquin Guzman and a lieutenant in his cartel, was shot to death in the attorney visitation area of La Palma. Jose Ramirez Villaneuva, a prisoner who was awaiting trial on murder charges, emptied seven shots from a 9mm pistol into him. Villaneuva has said that he committed the murder under threat of death, but won't say who threatened him. The slaying may be retaliation by Vicente Carrillo Fuentes, leader of the Juarez drug cartel, for the murder of Rodolfo Fuentes, Vicente's brother, outside a Culiacan mall in September 2004.

Such in-custody assassinations are reflective of the larger problem of violence and unrest in Mexican prisons. On Nov. 25, 2005 a gun battle between gang members at the Venustiano Carranza prison in Tepic left eight prisoners injured. And on December 17, 2005 six prisoners were stabbed or beaten to death during a fight in-

volving the Aztec and Mexicle gangs at a prison in Ciudad Juarez; nine other prisoners and three police officers were wounded.

In October 2004, the Guzman family had sent a letter to prison officials warning that Arturo's life was in danger and requesting that he be moved to another facility. Guillermo Montoya Salazar, La Palma's warden, and several other former La Palma employees are being held in connection with Arturo Guzman's murder and mismanagement of the prison. According to news reports, undercover agents posing as guards videotaped the warden in his office in private meetings with incarcerated drug lords. Carlos Tormero Diaz, head of the federal prison system, resigned as a result of the scandal.

Determined to gain control of the prison, on January 14, 2005, over 750 Mexican army soldiers, supported by eight tanks and a military helicopter, raided La Palma. The reason given for the raid was that a breakout was being planned that might involve the Zetas liberating imprisoned drug lords. However, lawyers and relatives of prisoners claimed that strict new security measures at the 724-bed facility, along with a prisoner hunger strike and a protest that left ten prisoners injured, led to the army intervention. According to Undersecretary of Security Miguel Angel Yunes, the raid yielded two cellphones, personal stashes of cocaine, 20

The original greeting cards for the incarcerated



## Mexican Prisons in Crisis (cont.)

knives and a plasma TV. The cell phones were considered an important find, as top federal prison officials said drug lords were using them to run trafficking operations and order murders while incarcerated (an imprisoned kidnapper at a Mexico City prison used a cell phone to coordinate the July 19, 2005 abduction of Ruben Omar Romano, coach of the top-ranked Cruz Azul soccer team, for a \$5 million ransom; Romano was freed by police after spending two months in captivity).

The army raid and takeover of La Palma resulted in the suspension of visitation privileges for prisoners at the facility. That didn't last long. On January 18, 2005 around 200 wives of La Palma prisoners staged a protest at Congress complaining of the suspension of visitation, including conjugal visits. They found a sympathetic ear at the office of congressman Gilberto Ensastiga, who agreed that the drug lords, like all prisoners, had the right to family visits. He took the protestors' grievances to the national human rights commission. The next day, all visitation privileges were restored. On May 17, 2005 nine prisoners, including several high-profile drug traffickers, were transferred from La Palma to other maximum security facilities.

Some see Mexico's current prison crisis as the result of a decade-long attempt by organized crime to take control over the country's 450 federal, state and local prisons. Indeed, Mexico's 190,000 prisoners enjoy privileges, and relaxed security, unheard of in U.S. prisons and jails facilities. Prisoners are often allowed and even encouraged to start businesses within the prisons. Prisoners' families are frequently allowed to stay overnight. Visits with prostitutes are allowed at some prisons.

While some might see this as coddling criminals, Mexicans view it as part and parcel of their commitment to rehabilitation, which is enshrined in the nation's constitution. For instance, Moises Moreno Hernandez, director for the Study of Criminal Science and Politics, says that family and prostitute privileges account for the near absence of sexual violence in Mexican prisons. The attitude that no prisoner is beyond rehabilitation is also reflected in the Mexican constitution and the scarcity of life sentences imposed under Mexican law. And on Dec. 9, 2005, Mexico officially abolished the death pen-

alty. While still technically on the books, the death penalty had not been used since 1961. "Mexico shares the opinion that capital punishment is a violation of human rights," said President Fox.

However, Mexico's Supreme Court ruled on Nov. 29, 2005 that life sentences could be imposed under Mexican law and that defendants could be extradited to the United States even if they faced life sentences. Previously such extraditions were disallowed under a 2001 Mexican Supreme Court decision that life sentences were "cruel and unusual" punishment. Despite the ruling, Mexican suspects must still go to trial in Mexico before being extradited; also, defendants who face the death penalty in the United States will continue not to be subject to extradition. President Fox welcomed the Court's decision, saying he wanted to transfer Mexico's top dozen drug-lords to the United States for harsher punishment. "I hope very soon to send all of them to face [American] justice," he said during a December 2005 interview. The U.S. Attorney General's office is already considering extradition requests for Benjamin Felix and Osiel Cardenas.

The downside of Mexico's criminal justice system, and perhaps its downfall, is corruption. No place seems immune to the narco-traffickers' millions. For example, after the army takeover of La Palma, 105 of the prison's 145 guards failed lie detector and drug tests. They have been replaced, but how long will it be before the mountains of drug money corrupt the new prison employees?

The second death blow to the current system is the brazenness of the drug lords. Following the army raid and crackdown at La Palma, they made their displeasure known by having six prison employees murdered. The employees -- three technicians, two drivers and a guard who were employed at the high-security CERESO 3 prison in Matamoros -- left work in three separate vehicles around 6:00 a.m. on January 20, 2005. They were discovered blindfolded, bound and shot to death in a bullet-riddled white Ford Explorer a half mile from the prison that same day. According to Matamoros prosecutor Marco Antonio Ramirez, the prison workers were stopped at a roadblock set up near the prison by armed men, who wore black clothing and allowed other cars to pass unmolested.

Fox's reaction to the prison workers' murders was to tighten security at more

high-security federal prisons. First, the day of the murders, army troops supported by a helicopter sealed off the area around the Matamoros prison. On January 27, 2005 the army raided the Puente Grande prison using tactics similar to those employed at La Palma. Puente Grande has been derisively called "Puerta Grande" (the big door) since Guzman's escape. However, "nothing relevant" was found at Puente Grande according to Mexican Attorney General Rafael de la Concha. Previously, during an October 4, 2004 shakedown, 57 cell phones, cocaine and marijuana had been found at the facility.

During the Puente Grande raid, Mexico's most famous drug lord prisoner, Rafel Caro Quintero, who is serving a 40-year sentence for the torture-murder of DEA agent Enrique "Kiki" Camarena in 1985, was transferred to the CERESCO 3 prison. Finally, the army raided CERESCO 3. However, it once again met with mixed success. Contraband discovered during a shakedown included 15 knives, a saw, six computer diskettes, six box-cutters, five pairs of scissors and 10 pairs of sneakers with shoelaces (shoelaces are considered contraband). The local newspaper then published a derisive cartoon showing police holding a bag of sneakers and calling the raid a huge success.

Fox also reinstated most of the restrictions that had been lifted following the protest of the La Palma prisoners' wives. On January 31, 2005, someone paid for a full-page ad in *Reforma*, Mexico's most popular daily newspaper, calling for Fox to respect the human rights of the prisoners by restoring conjugal visits. Prisoners also complained of random beatings by hooded guards who burst into their cells, hit and kicked them, and told them that for true social rehabilitation the prisoners had to learn to obey orders. The guards also allegedly told the prisoners that they were "worthless" and in prison "to be severely punished" because they "are the scum of society." Prisoners also claimed they were only receiving one cold meal a day at 1:00 a.m. and that they had lost their flat-screen TVs, cell phones, pizza deliveries, extended visits and ability to buy soft drinks of choice from the prison commissary [the lack of potable water makes Mexico one of the largest soft drink consumers in the world]. They said they were being subjected to "subhuman" conditions and treated "like dogs." The ad was signed "La Palma" prisoners.

The problems in Mexico's federal prisons led to the renewal of a long-settled debate on the use of island penal colonies. One such island prison, 70 miles off the southern Pacific coast, is being renovated instead of being turned into a nature preserve as was previously planned. Some prison experts are urging the government to make even more remote islands into prison colonies. Whether this plan will take hold, and whether it could be a solution to the problem of corruption caused by narco-money, are open questions. For now the military is running the highest-security prisons in Mexico, a measure that may bring some relief until military officials become corrupted by the ocean of

drug money flowing from the cartels.

Ironically, a military takeover of the prisons was the solution advocated by Mexico City Mayor Andres Lopez Obrador, an early front-runner for the 2006 presidential election and Fox's chief rival in January 2005 before the prison employee murders. At that time, Fox's government dismissed the suggestion as unworkable. Now Fox finds himself in a lose-lose situation, seeming foolish for having dismissed the idea he ended up implementing. If the military solution works, the opposition can claim credit; if not, they can blast Fox for taking action that he publicly stated could not work.

Either way, Fox continues to face

problems involving the violence, corruption and overcrowding endemic in the Mexican prison system. On Sept. 21, 2005 he experienced another setback when a helicopter carrying Public Safety Secretary Ramon Martin Huerta, the cabinet minister in charge of the federal police, and 8 other people, crashed while en route to La Palma prison for an induction ceremony for new guards. All on board were killed. The crash was determined to be an accident. ■

Sources: *Austin American-Statesman*, *BBC*, *News*, *Washington Post*, *Los Angeles Times*, *San Antonio Express-News*, *El Universal*, *Associated Press*.

## Excessive Force Claim Nets \$3,200 in Attorney's Fees; \$1,000 in Damages

An Illinois Federal District Court has awarded \$3,200 in attorney's fees in a prisoner's claim that his Eighth Amendment rights were violated.

The civil rights action was brought by Illinois prisoner Frank Farella against Logan Correctional Center guards Dennis Hockaday and Ricky Skelton. Farella's suit alleged that the guards used excessive force against him on February 25, 1998. Farella contended that he was assaulted by the guards because he refused to be a "stool pigeon." The assault, which occurred in Farella's cell, caused numerous lacerations, which resulted in several stitches in Farella's ear.

The matter proceeded to jury trial in March, 2003. The jury rendered a verdict that found Hockaday not liable on the claim he bit Farella's ear. The jury, however, awarded damages of \$1,000 against Skelton for squeezing Farella's throat and genitalia.

Skelton moved for judgment as a matter of law, which the Court denied. Skelton then appealed that decision.

While that appeal was pending, Farella filed a Revised Bill of Costs and Application for Attorney's Fees pursuant to 42 U.S.C.S. § 1988. Farella initially sought \$29,823.95 in fees and costs. He later reduced the request to \$3,235.88 in light of a recent Seventh Circuit opinion that upheld the PLRA limit on § 1988's attorney fee award to 150 percent of the judgment in civil rights cases filed by prisoners. Farella ultimately conceded to a \$1,500 fee cap.

Skelton argued the \$1,500 in fees was

not proportionately related to the judgment, maintaining the jury's award of \$1,000 showed that the jury believed the violation was insignificant. He sought to reduce the fee award to \$750.

The Court held the \$1,000 jury award was not insignificant. The Court said, "Rare is the prisoner who succeeds in winning a case at all, much less winning more than nominal damages." The Court held that "proportionately related" does not mean the fee award must be less than the judgment. Moreover, the Court stated the issue here, the right to be free from excessive force, is one of the prisoner's most important rights.

Skelton pressed that 25 percent of the judgment be applied to the fee award under 42 U.S.C. § 1997e(d)(2), which directs that whenever a monetary judgment is awarded in a prisoner's civil action, a portion of the judgment, not to exceed 25 percent, shall be applied to satisfy the amount of attorney's fees awarded against the defendant.

The Court said that under the Prisoner Litigation Act prisoners must bear a portion of their litigation costs, whether successful or not.

The Court determined that 10 percent of Farella's judgment should be applied against the attorney's fees award. This amount demonstrated Farella's failure to succeed his claim against Defendant Hockaday and failure to recover punitive damages. The amount, however, is sufficiently low to recognize his pro se status, the fact that counsel was appointed by the court pro bono, and the seriousness of the

constitutional violation.

Accordingly, the Court awarded Farella's Council \$1,500 in attorney's fees. Additionally, the Court awarded Farella \$1,599.88 in costs. Farella, however, must apply \$100 of his \$1,000 judgment to satisfy the attorney's fee award. See: *Farella v. Hockaday*, 304 F.Supp.2d 1076 (C.D. Ill. 2004). ■

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# Guards Flee Texas Prisons After Overtime Eliminated

by Michael Rigby

The virtual elimination of overtime pay for guards--a cost-cutting move by the Texas Department of Criminal Justice (TDCJ)--has contributed to rising turnover rates and probably compromised safety in the state's chronically understaffed prisons.

In March 2003, TDCJ began awarding "comp" time for the first 240 hours of overtime worked during a year, rather than traditional overtime pay. (Comp time simply allows guards to take off an amount of time equal to that worked in overtime.) The practice realized huge savings on the surface--TDCJ paid \$36.1 million in overtime in fiscal year 2002, compared with \$2 million in 2004--but has cost money in other areas, such as safety and training.

Prison guards in Texas earn \$2,589 a month, roughly one-fifth the salary of TDCJ executive director Brad Livingston. With the elimination of overtime pay guards are leaving in droves, making it difficult for administrators to keep prisons fully staffed. In 2004, 5,511 prison guards quit--roughly 21% of the entire workforce.

"It worries me, and I suspect it worries people in charge of these prisons," said Dan Beto, director of the Correctional Management Institute of Texas at Sam Houston State University. "It creates additional stress on those who are there."

Now, with thousands of vacancies to fill, guards are sometimes forced to come in early or stay late. Those who refuse are "written up" for failing to obey an order. A third offense can lead to termination. (Forced overtime is legal in Texas, where employment is considered an "at will" relationship.)

Guards also complain that it's difficult to schedule comp time. "With the shortage of staff, they can't take off," said Samuel Davis, President of the Correctional Association of Texas. "That's why many of the correctional officers are walking away from the job."

The staffing shortage negatively impacts the work environment in other ways as well. Some guards, such as those with positions in the law library or education department, work standard 5-day, 8-hour schedules. Most, however, work 12-hour shifts, with 4 days on and 4 days off. Those working 8-hour shifts get no meal break

and are lucky to get a restroom break. Guards working 12-hour shifts are supposed to get at least one 30-minute break, but even that is sometimes impossible.

"Morale's not real good right now because of the shortage," said Beto. "Just how serious an issue it is, is hard to comment on. Sure, it proposes a safety issue."

In addition to compromising safety, the high turnover costs taxpayers. Each new guard must undergo 5½ weeks of

training, which cost the state \$3.8 million in 2004. "It's a disaster because you're constantly training a new work force," said Richard E. Griffin, an attorney with Houston-based Jackson Walker and former chairman of the Arkansas prison system. "It's a tremendous expense, and it's inefficient because you don't have experience at the positions that you need." ■

Source: *Houston Chronicle*

## Los Angeles County Settles Two Jail Medical Malpractice Wrongful Death Suits For \$325,000

Los Angeles County settled two prisoner wrongful death suits for \$325,000 that alleged negligent medical care during incarceration at the L.A. County jail.

On May 8, 2002, 39 year-old county jail prisoner Crystal Baize was transferred from the Twin Towers Jail to U.S.C. Medical Center, complaining of severe chest pain and shortness of breath. She was diagnosed with bacterial bronchial pneumonia, placed on a gurney in the emergency room, given antibiotics and put on oxygen.

That evening, when she requested to go to the bathroom, the nurse removed her oxygen mask and let Baize walk unassisted. Upon her return, she appeared pale, and a few minutes later, sitting on the gurney, suffered cardiac arrest. She was resuscitated, but continued to decline and died two days later from sepsis caused by pneumonia. Experts opined that the removal of her oxygen mask to walk to the bathroom was an error known to cause heart attacks. Her companion's lawsuit, *Gulley and Estate of Crystal Baize*, U.S. District Court (SD Cal.) Case No. CV -03-3112 NM (CSx) was abated by a December 13, 2004 settlement for \$100,000 to Gulley, \$55,250 in attorney fees and \$19,750 in costs. L.A. County incurred \$106,424 in legal costs defending the suit.

On February 10, 2003, 38 year-old Twin Towers prisoner Pamela Wimberly, a known diabetic patient, complained of high pulse, high blood pressure, and fever.

Because diabetics are at risk for respiratory infections, the doctor (orally) ordered a complete blood count (CBC) and a microscopic urine analysis. No written copy of the doctor's order was made. The tests were never performed. The next day, she was seen by a doctor for her complaints of fever and cough. The doctor diagnosed viral upper respiratory infection, and gave Wimberly cough medicine. On February, 12, she was seen for her diabetes. No one inquired regarding her missing blood and urine tests. On February 14, she was seen for chills, a sore throat and laryngitis. No antibiotics were prescribed, and no blood or urine tests were made. On the 15th, when seen by medical staff, she was observed to have decreased breath sounds, high pulse and low blood pressure, which led to diagnosis of septic shock. That evening, she was taken to U.S.C. Medical Center, but despite aggressive treatment, she deteriorated and eventually died on February 17. Cause of death was bacterial pneumonia.

Experts testified that the missed opportunity to timely diagnose Wimberly's condition from the failure to make prescribed blood and urine tests fell below the standard of care, and was directly contributory to her death. L.A. County settled on December 14, 2004 for \$97,000 with Kimberly's husband, \$47,900 in attorney fees and \$5,000 in costs. The County had invested \$48,341 in defending the suit. See: *Wimberly v. County of Los Angeles*, Los Angeles County Superior Court Case No. BC306333. ■

# Supreme Court Justice Clarence Thomas Accepts Gifts Worth Thousands

by Michael Rigby

Justice Clarence Thomas is the Supreme Court's poorest member -- he's also its most prolific gift taker. From 1998 through 2003, Thomas accepted \$42,200 worth of cash, antiques, clothes and other free merchandise. The largess includes a bust of president Lincoln valued at \$15,000, a Bible once owned by noted 19th-century abolitionist Frederick Douglass worth \$19,000, a \$5,000 personal check to help pay for a relative's education expenses, and an \$800 Daytona 500 commemorative jacket.

Federal law loosely regulates gifts given to public servants, but a glaring loophole exists. While judges and other federal employees are prohibited from accepting "anything of value" from persons with official business before them, gifts of unlimited value can be lavished by those without official business.

Such lax rules have raised ethics concerns in some circles. In October 2004, for instance, a panel of the American Bar Association called for more restrictive rules to bar judges from accepting expensive gifts, free tickets and other valuable items regardless of who gives them.

"Why would someone do that -- give a gift to Clarence Thomas? Unless they are family members or really close friends, the only reason to give gifts is to influence the judge," said Mark Harrison, a Phoenix attorney who heads the ABA's Commission on the Model Code of Judicial Conduct. "And we think it is not helpful to have judges accepting gifts for no apparent reason."

The commission's proposal was modeled on a similar regulation adopted by Congress in 1995. Under that rule, members of Congress and their staffs are prohibited from accepting "anything of monetary value" in excess of \$50 at one time or more than \$100 annually from any person other than a relative.

In the case of the justices, however, simply tightening the rules may not be enough. In addition to being exempt from rules that govern lesser judges, each Supreme Court justice is allowed -- by law and tradition -- to decide for himself or herself how general ethics guidelines apply to them.

In 2004, for example, Justice Antonin Scalia was criticized for accepting a free

plane ride aboard Air Force II from Dick Cheney, who at the time was involved in a case before the court involving an energy taskforce. When the other party in the lawsuit, the Sierra Club, filed a motion to have Scalia removed, the court simply referred the motion back to Scalia to decide the matter for himself. He declined to recuse himself. Thus, even if the ABA's recommendation for stricter rules was adopted for federal judges, it would serve merely as a guide for those on the Supreme Court.

Still, even with the current rules, most Supreme Court justices show at least some restraint. While Thomas accepted \$40,000-plus in gifts from 1998 through 2003, the court's next most prolific gift taker, Sandra Day O'Connor, raked in just \$5,825 worth of free items. Third was former Chief Justice William Rehnquist (now deceased), who accepted only one gift during that time period -- a \$5,000 award from Fordham University. Most justices do, however, accept free club memberships and all expense-paid teaching appointments overseas.

Thomas has reported taking gifts every year he has been on the Supreme Court, save one: 2003. That year Thomas received a \$500,000 advance on a \$1.5 million book deal from Harper Collins, which plans to publish his autobiography.

In 2005 the justices each earned \$199,200, up from \$194,300 in 2004 (the Chief Justice receives \$208,100). They may earn another \$23,000 through outside activities such as teaching. Not that most of the justices aren't well off without their hefty paychecks or free gifts. At least six of the nine Supreme Court judges are millionaires. Ruth Bader Ginsburg and David Souter are reportedly the wealthiest, with a net worth between \$5 million and \$25 million. The justices on the low end of the financial scale include

Clarence Thomas, with listed assets of \$410,000 or less (excluding the payment from his book deal), and Anthony M. Kennedy, who reports assets worth a maximum of \$230,000 (Kennedy has reportedly been divesting major assets for years).

The above figures do not include the worth of the justices' personal homes; if those values were included most if not all of the Supreme Court judges would be considered millionaires.

Newly-appointed Chief Justice John Roberts' net worth, according to a 2005 filing with the Senate Judiciary Committee, is approximately \$5.3 million. Interestingly, his financial holdings increased by some \$1.5 million since Roberts became a federal appeals judge in 2003. He owns stock in Dell Computer, Microsoft, Texas Instruments, XM Satellite Radio, Intel, Cisco, Hewlett-Packard, Lucent, Nokia, Pfizer, Merck, Johnson & Johnson, Time Warner, Disney, Blockbuster and Citigroup, among other companies. All or most of whom have cases before the supreme court on a regular basis.

President Bush's recent Supreme Court appointee, Samuel Alito, who replaced justice Sandra Day O'Connor, is another millionaire justice. Alito holds about \$850,000 in financial securities and has a net worth of \$1.72 million. His stock investments include Exxon-Mobile, McDonald's Corp, Intel and Walt Disney Co. ■

Source: *The Seattle Times*, *World Socialist Web Site*

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## New York Prisoner Assaulted By Guard Awarded \$4,200

On September 8, 2004, a court of claims in Buffalo, New York, awarded \$4,200 to a state prisoner who was assaulted by a guard at the Attica Correctional Facility.

Juan Matias, a 36-year-old prisoner, claimed that he was assaulted by a prison guard in April 2002. (The guard was not identified.) A month earlier, Matias had become involved in a heated argument with the guard. Matias promptly reported the incident to the prison superintendent, noting that he feared retaliation. A sergeant investigated and filed a written report with the deputy superintendent.

As Matias proceeded to dinner on April 22, the same guard threatened him, Matias claimed. Matias immediately reported the incident to a lieutenant who said he would notify the sergeant. However, as Matias returned from the dining hall, the guard grabbed him by the neck and removed him from line, shoved his head into a wall, and punched him in the jaw. The guard then hit Matias a second time, causing him to fall. Once on the ground, Matias alleged, the guard kicked him in the back, forehead, and ribs several times.

Matias sued the State, pro se, for failing to protect him from the assault. Matias claimed he suffered a swollen right jaw, a lacerated forehead, and abrasions of his skull, abdomen, forehead, and back. Matias underwent physical therapy for the back injury.

The guard claimed that Matias failed to obey him when asked to step out of line. He further claimed that Matias struck him in the face with his right elbow and punched him in the chest and shoulders. After he grabbed Matias and both fell to the ground, the guard contended, other guards

responded and helped subdue Matias.

At a bench trial, Judge Michael Hudson noted that because the state failed to produce any prison staff to corroborate either Matias's fear of retaliation or the guard's testimony--despite his cautionary notice--he was forced to draw adverse inferences. Hudson further noted the guard's animosity and aggressiveness toward Matias at trial. Additionally, Hudson found that Matias's injuries were consistent with his claims and that it was unlikely the guard would have bruised only his knuckles in a fall.

Consequently, Hudson ruled that the guard assaulted Matias without justification. The State was liable, Hudson held,

based on respondeat superior and because it failed to protect Matias after he reported the guard's threat to a lieutenant, who agreed to act on it.

Hudson awarded Matias a total of \$6,000 for past pain and suffering. .

However, Hudson also found that Matias was 30% comparatively negligent because he hit the guard. Thus, the award was reduced accordingly for an adjusted total of \$4,200. Matias represented himself at trial. See: *Matias v. State of New York*, Court of Claims, Buffalo, Case No. 106441. ■

Source: *VerdictSearch New York Reporter*

## 28 Die in Philippines Jail Uprising

A March 14, 2005, botched escape attempt by an Al-Qaida linked Abu-Sayyaf member at the Camp Begang Diwa (CBD) detention center in Tanguig, Manila started as a two-day takeover of CBD that ended with 28 dead.

When the incident began, CBD held 470 detainees, including 129 suspected members and leaders of Abu-Sayyaf group, which is notorious for deadly bombings and ransom kidnappings in which some hostages have been beheaded.

The takeover of CBD began when an Abu-Sayyaf member, who was about to be escorted to a morning court hearing overpowered a guard before he could be handcuffed, took a rifle, and shot the two prison guards around him. Other prisoners then grabbed weapons. Other guards and policeman prevented the prisoner's escape, killing two prisoners in the process.

CBD was then taken control of by 100 prisoners. Police began negotiations, which appeared to reach a settlement the same day. In return for their surrender, police agreed to allow the prisoners to hold a news conference. After the prisoners decided the next day that they wanted to keep their weapons during the news conference, police decided to storm CBD.

Hundreds of police stormed CBD on March 15, firing tear gas grenades

and automatic weapons. Within an hour, police had taken over control of the prison, evacuated most prisoners, and began hunting down the armed prisoners. That operation resulted in the deaths of 22 prisoners, one guard, and one police officer. In all, 28 died from the uprising. In keeping with Muslim tradition to bury the dead within 24 hours, all were buried in a mass grave outside CBD. Among the dead were 10 leaders of Abu-Sayyaf.

The Philippines has a history of Abu-Sayyaf members escaping from its prisons, which are often dilapidated, with inadequate and sometimes corrupt staff. "We are fast becoming the world's laughingstock because of what is happening in our jails," said Sen. Mary Villas, Chairman of the Senate Committee on Public Order and Illegal Drugs.

An investigation into the failed jail-break is to determine how the Abu-Sayyaf prisoners smuggled five handguns and two grenades into the prison. Those weapons were used to engage the assault team inside the prison compound.

The day after raid, police announced the warden and four of his subordinates were relieved from duty. Their negligence and that of other guards will be examined to determine if action should be taken against them.

The CBD raid had the Philippines on alert for threatened bombing attacks from Abu-Sayyaf or retaliation for storming the prison and killing its members. ■

Sources: *sunstar.com*, *New York Times*, *Los Angeles Times*

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# Disclosure of Washington State Prisoner Phone Rates Stymied by the Courts

by John E. Dannenberg

When recipients of Washington state prisoner-originated long distance phone calls sought to compel disclosure of the telephone rates for those calls, the Washington superior, appellate and supreme courts held (as of July 2004) that relevant Washington statutes which on their faces appear to require such disclosure in fact do not, and instead only provide legal remedies if a complainant demonstrates that underlying Washington regulations flowing from the cited statutes have been violated. The complainants accordingly next sought regulatory relief before the Washington State Utilities and Transportation Commission (WUTC) on remand from the Superior Court, which on July 18, 2005 ordered the complaint to proceed there in the discovery phase. However, on September 6, 2005, the Superior Court summarily dismissed the entire complaint for lack of standing, without explanation.

Plaintiffs Sandra Judd and attorney Tara Herivel (collectively, "Judd") for years received collect phone calls from *PLN's* Editor, Paul Wright, then a Washington state prisoner. They sought to compel the telephone companies, who were charging exorbitant tolls, to disclose their rate structures. The legal vehicle for the inquiry was Washington Revised Code §§ 80.36.510, .520 and .530. These statutes stated that failure to disclose rates would establish an action for damages under the Washington Consumer Protection Act (CPA). In a King County Superior Court complaint, Judd sought disclosure, injunctive relief and penalties/damages for failure to so disclose. That class action complaint seeks damages for the failure to disclose the applicable rates for collect calls from prisoners between 1996 and 2000. Shortly after the suit was filed prison phone companies began disclosing the cost of the calls. This mooted the plaintiffs' claim for injunctive relief.

However, that court, and the appellate court above, denied relief by interpreting the three Revised Code provisions as only providing legal authority for the WUTC to promulgate regulations (under the Administrative Procedures Act) (APA); the statutes were not legal authority in themselves from which to take a complaint.

This interpretation, which seemingly

avoided the obvious meaning of the Revised Code sections, was upheld by the Washington Supreme Court. It ruled that the three code sections, when read together "in para materia," only represented the state legislature's findings that "unfair or deceptive acts" related to telephone rate structures were to be disfavored and could become actionable for damages under the CPA. But the court finessed the law to conclude that an intermediate event must precede such enforcement. That event was that the WUTC must promulgate appropriate regulations to carry out the Legislature's intent, and any complaint taken must either attack the regulations themselves (the legal forum for which is the APA) or allege a violation of those regulations (the legal forum for which is the WUTC.) Since Judd had not availed herself of these fora, her Revised Code-based complaint was dismissed for want of jurisdiction and remanded to the Superior Court. See: *Judd v. AT&T*, 152 Wn.2d 195 (WA 2004).

In November 2004, Judd defended against the telephone companies (now, collectively, T-Netix), who sought summary judgment in the Superior Court. That court deferred to the WUTC to resolve open regulatory and factual issues. On July 18, 2005, an administrative law judge ruled on the remanded issues. Importantly, the judge denied T-Netix' motion for summary judgment, because there remained plainly disputed facts.

But TNetix had tried to obfuscate the facts by failing to respond fully to Judd's discovery motions. The judge, sharply verbally sanctioning T-Netix, ordered them to stop delaying discovery and denied their motion to stay further discovery. The discovery was aimed at exposing which phone companies "carried" the phone calls in question on their lines, versus which companies "participated" in their connections. These facts are im-

portant in piercing the veil of secrecy as to how the seemingly illegally high rates were both calculated and covered up in apparent violation of the Washington Revised Code. At issue are obscure entities called "Local Exchange Carriers," "Alternate Operation Services," and "Operator Service Providers," artifacts used by the phone companies to dodge the reach of rate control as well as of disclosure, the gravamen of Judd's legal quest. T-Netix also complained loudly that Judd had no standing in the complaint because she could not show actual injury. The administrative judge properly declined to rule on this because it was outside the scope of the Superior Court's enabling order. See: *Judd v. AT&T*, WUTC Docket No. UT-042022.

But on September 6, 2005, when the administrative judge's findings were received back at the Superior Court, that court inexplicably suddenly granted T-Netix' motion to dismiss Judd's complaint for lack of standing. The order did not explain the court's reasoning at all. Judd will appeal this ruling. Meanwhile, the outrageous collect call rates for state prison originated calls continue unabated, and beyond all judicial review. Judd has appealed to the state appeals court. Plaintiffs are represented by Seattle attorneys Jonathan Meier and Chris Youtz. See: *Judd v. AT&T*, King County Superior Court No. 00-2-17565-5 SEA. ■

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# Colorado DOC's Medical Oversight Found Remiss

by G.A. Bowers

An independent auditor found the Colorado Department of Corrections (CDOC) to be lax in its oversight of medical care contractors.

In April 2005, Navigant Consulting, Inc., reported the results of its audit, commissioned by the Colorado State Auditor, of the CDOC external health care services provided to prisoners. The audit examined the rates paid to external care providers, administration of the utilization management program, and the CDOC's oversight of its external care contractor. It did not examine the quality of care provided to prisoners, the facilities, the credentials of the personnel providing the care, or the appropriateness of medical care provided to any prisoner. Navigant concerned itself only with fiduciary matters. If it had looked deeper, as did other auditors, it likely would have found more problems than it did.

Another state audit of the five private prisons in Colorado found "lax oversight," *The Denver Post* reported. None of the private prison medical clinics were licensed by the state. The CDOC had not inspected any of the clinics from May 2003 to December 2004. Two prisoner deaths may have been caused by medication changes ordered by private prison doctors who had not even examined the prisoners. Kit Carson Correctional Facility, a Corrections Corporation of America (CCA) prison, had sought to save \$35 by switching Jeffrey Buller, 26, to another drug. He died 27 hours before he was to be released.

The CDOC's medical services are, at best, little better. The *Rocky Mountain News* reported that the CDOC's poor medical care turned two prisoner's prison terms into death sentences. Dan Smith, 44, complained of chronic back pain for eight months before receiving an MRI. It found a 10-inch tumor on his spine and another on his pancreas. Deric Barber, 31, complained for six to nine months before receiving a colonoscopy, which found colon cancer. Both prisoners are now housed in maximum security medical facilities where the CDOC refuses to allow reporters to interview them. Both men are considered terminally ill.

Navigant made nine recommendations. It recommended that the CDOC (1) improve its oversight of contractor's

rate negotiations for external services, and (2) minimize the cost duplication for hospital security; regarding utilization management, Navigant recommended that the CDOC (3) hold the contractor accountable for prior authorization, (4) improve concurrent reviews and discharge planning, (5) ensure the contractor is conducting retrospective reviews, (6) review emergency visit claims, and (7) ensure that claims are accurate. In regards to oversight, Navigant recommended (8) that the CDOC improve its oversight of the external health care service's contractor by ensuring that it complies with the contract. Finally, the auditor recommended (9) that the CDOC consider using a capitation system rather than a fee-for-service payment system. The CDOC agreed or partly agreed with all nine recommendations.

The CDOC spent \$59 million in fiscal year (FY) 2004 to provide medical care to over 18,000 prisoners. Access Correctional Care contracts with the CDOC to provide all external services and was paid about \$1.4 million in FY 2004 for administering services totaling approximately \$24 million. These services include inpatient hospital admissions, outpatient care, specialist visits, and ancillary services, i.e. laboratory services and durable medical supplies (e.g. hearing aids).

Navigant found that the CDOC provided "minimal oversight" of Access' rate-setting methodologies. Although the contract allowed the CDOC to review rate information, the CDOC did not request and Access did not volunteer this information. As a result, the CDOC occasionally sent prisoners to hospitals that charged twice the prevailing rate. Additionally, the auditor found that Access failed to negotiate cost-effective rate-setting agreements with hospitals, costing the CDOC as much as an additional \$2.5 million. The CDOC failed to establish guidelines and financial targets as contractually required nor had it reviewed the obsolete and inappropriate guidelines Access used. Navigant found that in nearly 80 percent of the hospital billings for providing security to intensive care patients, the CDOC actually provided the security. The CDOC agreed to improve its oversight of rate negotiations, inform its contractor when it provides security and require the

contractor to negotiate an intensive care rate without security.

The auditor found that Access' external providers deny only two percent of specialist referrals while CDOC staff denies 29 percent of these referrals. The auditor recommended that the CDOC require the contractor to use more restrictive criteria and collaborate to modify the standard criteria, and to monitor, measure, and enforce performance of the contract.

The CDOC's contract with Access requires the CDOC to annually evaluate service delivery and utilization management along with periodic reviews of the contractor's claims processing. The CDOC has not performed any evaluation or audit since January 2001.

When the CDOC has found Access' performance deficient, its response has been to assign CDOC staff to perform the function or has taken minimal action to induce Access to correct its deficiencies. The CDOC has never used the remedial actions available in the contract--a contract existing since 1997.

Finally, the auditor noted that under the current arrangement, Access has no incentive to control costs. Access gets paid the same regardless of costs. Navigant recommended the CDOC perform cost/benefit analysis of a capitation arrangement where the CDOC pays a set rate for every prisoner. Twenty-three states use such an arrangement.

CDOC Director Joe Ortiz admitted to *The Denver Post* that "we were lax in our supervision of medical staff." One state audit found "lax oversight of private prisons" while another found the CDOC provided "minimal oversight" wherever the auditor looked. Even when the CDOC stumbled upon a problem, it has taken, at most, minimal action to address the problem. The CDOC has been a sleeping, toothless watchdog. Sadly, the CDOC's failings may have cost the taxpayers millions of dollars and a few unfortunate prisoners their lives and remaining prisoners inadequate medical care.

The full report is available at [www.state.co.us/auditor](http://www.state.co.us/auditor) and [www.prisonlegalnews.org](http://www.prisonlegalnews.org). ■

Additional sources: *The Rocky Mountain News*, *The Denver Post*.



# \$820,000 Damages Upheld Against NY Jailer Who Housed Informant with Defendant

by John E. Dannenberg

The Second Circuit U.S. Court of Appeals upheld \$820,000 in damages for injuries suffered by an informant who was severely beaten by the defendant he had testified against, when the Nassau County Sheriff inadvertently housed the two in the same dorm.

In 1997, Neville Rangolan, an illegal alien, completed a criminal sentence.

Prior to being deported, he was first called to testify in the trial of Steven King, a purported drug dealer. Following King's conviction, the Nassau County Sheriff was ordered to keep the two housed separately. Negligently, however, he put them in the same dorm, where King beat Rangolan severely, causing permanent brain injuries from kicking him in the head.

Rangolan sued Nassau County and King under a state tort claim for both past and future suffering. His wife sued for loss of consortium. The jury verdicts were for \$1.6 million and \$60,000, respectively. On appeal, defendants contended that the jury should have been instructed that King could be partially liable, under a New York

state law that prevents "deep pocket" joint tortfeasors from getting stuck with all of the liability. Both parties then agreed to a settlement of \$800,000 for Rangolan (\$300,000 for past suffering and \$500,000 for future suffering), plus \$20,000 for his wife's claim, provided there was no retrial on joint liability with King. (See: *PLN*, July 2000, p.3.)

In the meanwhile, defendants had the Second Circuit certify to New York state's highest court the state law question of whether a jury must be instructed on joint liability. That court eventually ruled "yes," but no retrial was held because of the settlement. (See: 96 N.Y. 2d 42 (2001); *PLN*, Sep. 2001, p.21.) Defendants thereafter appealed the \$820,000 settlement as excessive, while Rangolan cross-appealed that he should get his \$1.6 million verdict back. The Second Circuit denied the cross-appeal because Rangolan had agreed to the reduced judgment and had gained the benefit of no retrial.

As to defendants' excessive judgment claim, the court found that \$300,000 for past suffering was justified by the record of Rangolan's extensive injuries.

Future suffering, however, was more subjective. A neurologist testified that Rangolan could suffer future seizures without warning, thus putting him out of the realm of driving a vehicle, operating machinery, or even climbing a ladder. His brain injuries caused recurrent pain, "voices," and other dysfunctions. Looking at precedent, the court decided that \$500,000 was not out of line with other cases of severe injury, and affirmed the judgment. The \$20,000 for his wife had already been substantially reduced from the jury's award of \$60,000, and was left intact.

An ancillary question of who should pay the \$4,792 in U.S. Marshal fees for bringing Rangolan to court to testify against King was decided against the County.

However, the amount to be paid was limited by law to just the Marshal's overtime expenses, and remanded to the district court to resolve. Defendants were held liable for all appellate fees and costs. See: *Rangolan v. The County of Nassau*, 370 F.3d 239 (2nd Cir. 2004). ■

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# Virginia Governor Warner Restores Felons' Voting Rights, Ignites Controversy

by Matthew T. Clarke

Then Virginia Governor Mark Warner restored the voting rights of 1,892 felons who had served their sentences, 1,110 of them in 2004. Opposition politicians have accused him of "rubber-stamping" the restoration process.

Virginia is one of only seven states that permanently disenfranchise felons. The others are Alabama, Florida, Kentucky and Mississippi. Seven others have lesser restrictions. The remaining states restore voting rights upon completion of the sentence.

About 1.7 million felons nationwide are denied their voting rights despite having completed their sentences. More than 200,000 of them are in Virginia. Warner's restoration of less than one percent of those persons' voting rights since he took office in 2002 prompted some members of the Virginia General Assembly, such as Bradley P. Marrs (R-Richmond), to complain.

In a letter to Warner, Marrs said he was "very disturbed to learn of the breakneck pace" of restoration, warning Warner not to make the process automatic. Warner heeded the warning and prior to leaving office did not restore any additional voting rights to felons.

Warner counters that he reviews each restoration carefully. His increased pace compared to previous governors is because he is addressing the 732-request backlog they left him and fulfilling his campaign promise to simplify the process. Prior to Warner's administration, felons had to fill out a 13-page form to request restoration. Warner simplified and shortened the form to one page for non-violent felons. Violent felons must continue to use the 13-page form. Warner has rejected 114 requests since taking office.

The restoration allows felons to vote and serve on juries. Some opponents of the speeded-up process, such as Delegate Bill Janis, are especially concerned about felons serving on juries. An especially large number of restoration petitions were received in 2004 ahead of the presidential election.

The three Virginia governors immediately preceding Warner restored between 120 and 200 felons' voting rights each year of their term.

Non-violent felons in Virginia seeking restoration must wait three years after

completion of their sentences before filing the petition; violent felons must wait five years.

Meanwhile, in Orleans Parish Prison, Louisiana, a record number of jail prisoners have registered to vote following a successful "get out the shut in" voter registration drive.

"It seems to me that we will probably receive the largest number of voters we've ever had from Parish Prison," said Orleans parish Registrar of Voters Louis Keller.

Voice of the Ex-Offender (VOTE)—an organization founded by Noriss Henderson, who had been a state prisoner until 2003—began the registration drive in August, 2004. Henderson, who had become a paralegal during his 28-years at Angola, discovered that pre-trial detainees and misdemeanor prisoners could still vote, a fact not known to most prisoners. Henderson's research revealed that Orleans Parish

had about 2,000 vote-eligible prisoners. He and volunteers, mostly ex-prisoners, got permission to start the registration drive and wound up with 700 applications from Orleans Parish Prison.

Then problems began. The registrar's office demanded a certificate from the Sheriff's Office showing the prisoner was not a felon. This required a background check, something the sheriff's office couldn't complete before the election. The NAACP's Legal Defense Fund and the Right to Vote Campaign intervened to get the process back on track. When all persons convicted of a felony (including those on parole or probation) or released were eliminated, 137 valid registrations remained. They were sent absentee ballots. ■

Sources: *Washington Times*, *New Orleans Times-Picayune*, *Washington Post*.

## Prosecutors Check Perspective Jurors Background, Hoping to Disqualify Them

A new tactic prosecutors are using to disqualify jurors—use of a federal criminal records database to run background checks.

Timothy Jordan is an African-American who was charged with aggravated murder in the April 2002 shooting of Raemone Williams. His jury pool had four prospective African-American jurors in it. In requesting a mistrial, Jordan's attorney, Robert Ranz charged prosecutors checked the records of only three of those four prospective jurors because they had indicated that they did not drive, which could have been the result of a probation or parole restriction.

Ranz, a Cincinnati solo practitioner, also alleged that prosecutors deliberately checked the black jurors in an effort to disqualify them because the defendant was also black. The Assistant Prosecutor, Judith Mullen, said she used the database because she had "reason to believe" that some of the jurors lied about their criminal background. Prosecutors searched the jurors' background by using the National Crime Information Center (NCIC), a national database available to law en-

forcement officials, including prosecutors. According to Ranz, defense attorneys are not granted access to the records, and prosecutors are not required to alert the defense when they are running background checks on prospective jurors.

The frequency of prosecutors' use of background checks on prospective jurors is unknown by defense attorneys. "We had always heard rumors, but never confirmation until now," said Martin Pinales, Vice President of the National Association of Criminal Defense Lawyers. "But it does happen, and it may be a frequent practice." Pinales feared the practice could have a "chilling effect" on minorities desiring to serve as jurors.

Ohio's Hamilton County Common Pleas Judge Mack Schweikert denied Jordan's motion for mistrial. See: *Ohio v. Jordan*, Case No. B0404140 (Hamilton Co., Ohio, Ct. C.P.) ■

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# Remedial Plan And \$427,158 Attorney Fees In Wyoming Failure to Protect Suit

by John E. Dannenberg

The Wyoming Department of Corrections (WDOC) settled an Eighth Amendment-based class action complaint brought by prisoner Brad Skinner for WDOC's failure to protect prisoners from assault by other prisoners. The court (U.S. District Court, D. Wyo.) also awarded Skinner's attorneys \$427,158 in fees and costs, an amount exceeding Prison Litigation Reform Act (PLRA) limits.

Skinner had previously won summary judgment against WDOC officials and class action status for a remedial plan to prevent future such danger to WDOC prisoners.

(See: *Skinner v. Uphoff*, 234 F.Supp.2d 1208 (D. Wyo. 2002), *PLN*, Mar. 2004, p. 31.) The remedial plan is comprehensive in that it not only protects WDOC prisoners, it goes to the core issues of gross failure by WDOC staff to have even rudimentary controls in place to report, analyze and correct prisoner safety deficiencies. Although WDOC offered to propose a plan if the court would moot the lawsuit, the court stated that it did not trust WDOC and insisted upon a formal settlement. The court's Eighth Amendment findings were (1) failure to adequately supervise and train subordinates in how to investigate and abate dangerous conditions, (2) failure to develop an effective internal review process for reporting of violations and (3) failure to discipline malfasant employees, thereby substantially jeopardizing prisoner safety. The resultant remedial plan covers Investigations, Institutional Culture and Compliance.

WDOC began by replacing its old investigations policy with new Procedure 1.012, "Investigation of Inmate Physical Altercations or Assaults on Inmates at WDOC Facilities" (4/30/03). Its purpose is to document and analyze all such assaults, determine any staff non-compliance or institutional deficiency, and take corrective action. WDOC's policy is to protect prisoners from such harm by both developing appropriate policies and enforcing staff's obedience to them.

Every incident will first be reviewed by a WDOC Investigations Major who reports directly to the Director of WDOC. If the Major determines that the incident was not a "spontaneous fight," the matter shall be

referred to a non-WDOC Outside Investigator for review. All such incidents will be logged, tracked and reported on, including personnel action, if any. If policy procedure changes are needed, they shall not occur unless and until WDOC gains prior approval of plaintiffs' attorney and a neutral, non-WDOC Joint Expert. The court shall be a referee for any disagreements.

The plan incorporates staff discipline regimens. This was needed when prior history revealed that fewer than 1 % of staff misconduct was ever reported in WDOC. Any personnel action recommended from an incident report shall be implemented by the Warden within 14 days.

For a top-down attitude adjustment at WDOC, to shake up the culture that was at the root of Skinner's injuries, WDOC enlisted aid from the National Institute of Corrections (NIC), who, through a contract with the Criminal Justice Institute, in Middlebury, Connecticut, reported its findings on January 7, 2003. WDOC agreed to comply with all of the recommendations for a Cultural Change Process.

The Process begins with staff training on prisoners' rights to protection against harm, and staff's responsibility to ensure this. It encompasses studying constitutional law governing prisoners' rights, including an analysis of the *Skinner* summary judgment order. Also included are WDOC and state ethics codes as they relate to honesty and cooperation in investigations.

For Compliance, WDOC agreed to hire attorney William C. Collins, of Olympia, Washington, as the neutral Joint Expert. Collins will make at least quarterly visits to the Wyoming State Prison (Rawlins) to review all incident documents and all training procedures. He may interview any staff or prisoner at any time in this endeavor.

Skinner's attorneys had requested \$434,366 in fees and costs. WDOC countered that \$200,000 was fair for the results achieved, but the court disagreed.

First, the court observed that Skinner prevailed on 100% of his claims on summary judgment, an "excellent result." Thus, the fees all related to work necessary to prove the violation of a constitutional right, per 42 U.S.C. § 1997e(d)(1).

Defendants next argued that the

hourly rate should be that set for appointed counsel by the Tenth Circuit (\$90/hr.) rather than the \$113/hr. set by the Judicial Conference. The court followed *Webb v. Ada County*, 285 F.3d 829 (9th Cir. 2002) to use the "established" rate in the Circuit. Thus, allowing for the PLRA's 150% rate cap, the court awarded \$135/hr.

The court also allowed fees (\$40/hr.) for the use of law students by Skinner's attorneys, because they were "indispensable and time saving." It further awarded attorney fees to ACLU attorneys who joined in the litigation, holding that public interest law firms are no less entitled to fees than private law firms. The court observed that a contrary policy would serve the undesirable effect of encouraging civil rights violations. The court also approved fees earned to collect fees ("fees-on-fees"), following other circuits. Finally, noting the many years of litigation before recovery of any fees, plaintiffs asked for a 1/3 multiplier to compensate for the self-financing of the litigation. Although the PLRA does not address this issue, the court agreed that few attorneys would work "on the come" for years at a \$135/hr. rate. Since the results here were "excellent," the court awarded a 25% enhancement. This is a legal first, court awarded attorney fees exceeding the PLRA limits. This is a final decision as the defendants elected not to appeal.

Plaintiffs were ably represented by Steven L. Pevar, ACLU Foundation, Hartford, Connecticut, and Shirley Kingston of Graves, Miller & Kingston, Cheyenne, Wyoming. See: *Skinner v. Uphoff*, 324 F.Supp.2d 1278 (D. WY 2004). ■

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# \$200,000 Failure-To-Medicate Award Granted to California Jail Detainee Who Lost Testicle

by John E. Dannenberg

On July 18, 2005, a Solano County, California jail pre-trial detainee, whose infected testicle was not promptly treated, won a \$200,000 damage award in Solano County Superior Court after suffering necrosis and subsequent amputation of the testicle.

Wayne Crowder, 46, had been under the care of Kaiser Hospital for an infected testicle, for which he had been given Cipro antibiotic. He was scheduled ten days later, on May 27, 2003, for a follow-up with a urologist, an appointment he never made because he was arrested on May 26 on drug charges and jailed in the Fairfield, California jail.

There, although he told the intake screening nurse of his condition, the prescription for Cipro was not filled for nine days. Another week later, he was seen by a urologist, who him sent immediately to the outside hospital where the testicle was amputated that day.

Crowder sued the County in state court under 42 U.S.C. § 1983, alleging deliberate indifference to his serious medical needs. Crowder argued that under the more relaxed Fourteenth Amendment standard accorded a pre-trial detainee, he was entitled to community-standard medical care, but the level he received even failed the tougher Eighth Amendment standard of deliberate indifference that attaches to convicted prisoners.

Crowder claimed that because he had lost his other testicle years before, he would now need lifelong hormone replacement therapy, which could cause prostate cancer later on. A lack of hormone replacement would cause weight

gain, breast enlargement, impotence and lethargy. His lifetime medication and urological monitoring was projected to cost \$78,732; a prosthesis would add \$6,000 and he claimed economic damages of \$115,394. With claims for future pain and suffering, the jury awarded a total of \$200,000. Crowder was represented by San Francisco attorney Thomas Paoli.

See: *Crowder v. Solano County*, Solano Superior Court No. FCS 023764. His claims against assorted medical contractors hired by the jail were dismissed, the only claims heard by the jury were against Solano County. ■

Source: *VerdictSearch California Reporter*.

## Louisiana's 2002 Exhaustion Requirement (Act 89) Not Retroactive

The Louisiana Supreme Court held that retroactive application of a 2002 law, requiring exhaustion of administrative remedies by prisoners before bringing a state tort action, would unconstitutionally deprive prisoners of a vested right. Therefore, the court held that the law has prospective application only when the prisoner was not required to comply with the unconstitutional procedure that existed before 2002.

In 1985, Louisiana enacted the Corrections Administrative Remedies Procedure ("CARP"), La.R.S. 15:1171--- 1179. Following CARP, the Louisiana Department of Public Safety and Corrections ("the Department") "adopted an administrative remedy procedure... La.R.S. 15:1171(B). As originally enacted, no state court could entertain an offender's grievance or complaint that fell under the purview of the administrative remedy procedure unless and until the offender had exhausted the remedies provided by the procedure. La.R.S. 15:1172(B)." Initially, "Section 1171 of the CARP provisions" made no reference to tort actions. "However, in 1989, the Legislature amended Section 1171 to expressly include personal injury in medical malpractice within the type of claims encompassed by CARP[.]"

In 1997, Louisiana enacted the Louisiana Prison Litigation Reform Act ("LPLRA"), which, operating in conjunction with CARP, sought to curtail "baseless or nuisance suits by prisoners." The LPLRA also provides that "[n]o prisoner's suit shall assert a claim under state law until such administrative remedies as are unavailable are exhausted." La.R.S. 15:1184A(2).

On June 29, 2001, the Louisiana Supreme Court held in *Pope v. State*, 792 So.2d 713 (La. 2001) "that the CARP legislation violated the [Louisiana] Constitution by allowing the Department to exercise original jurisdiction in tort actions and was 'an invalid attempt to alter the original jurisdiction of the District Court by legislative act.'"

Shortly after *Pope*, Louisiana prisoner Patrick Cheron filed a personal injury suit in state court against the Department and LCS Corrections Service, Inc. He alleged "that while incarcerated, he experienced severe symptoms of fever, blurred vision, vomiting, sore throat, in constant headaches. He contends that he contracted a potentially fatal kidney disease known as "F.S.G.S.," which was allegedly caused by inadequate cleanliness and improper food preparation utilized by the prison. He claimed that his repeated requests for medical attention were ignored, causing "severe physical pain and emotional damage and... subsequently reduc[ing] his life expectancy."

The Department filed untimely exceptions to Cheron's complaint "asserting that Cheron failed to exhaust administrative remedies as required by CARP and LPLRA." On April 15, 2002, the district court denied the exceptions, finding in part that *Pope* "eliminated the mandatory-exhaustion requirement of Louisiana Revised Statutes 15:1184."

Within days of the District Court decision, the Legislature enacted 2002 La. Act 89 ("Act 89"), amending CARP, "to cure the constitutional problem identified in the *Pope* decision."

The Department then appealed to the court of appeals but the appeal was denied

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as untimely on July 1, 2002. The Department then appealed to the supreme court, which "remanded the matter to [the court of appeals] 'to rule on the merits of the application.'" *Cheron v. LCS Corr. Servs.*, 828 So.2d 1117 (La. 11/8/02). On March 10, 2003, the court of appeals addressed the Department's arguments and again denied relief. However, the "supreme court later remanded... for 'briefing, argument and opinion.'" *Cheron v. LCS Corrections Services, Inc.*, 847 So. 2d 1246 (La. 6/20/03).

On remand, the appellate court noted that since the enactment of Act 89 it had "applied the *Pope* holding that an inmate was entitled to have a district court adjudicate his tort claim under its original jurisdiction without first exhausting administrative remedies available under CARP, without referencing Act 89 or determining whether it had retroactive effect." It found it necessary to address retroactivity and Cheron's case.

Ultimately, the court found that retroactive application "would result in the abandonment... and... dismissal of Cheron's claim[ ]" thereby affecting his "vested substantial rights." Therefore, the court concluded that "Act 89 has prospective application only with respect to" Cheron's case.

The court then found "that the *Pope* Court implicitly held that the administrative regulations to implemented [the] unconstitutional [pre-Act 89 CARP] legislation are invalid... Because the Department has not established available administrative remedies other than those established pursuant to CARP, the Department has not sustained its burden of establishing an available administrative remedy." Thus, the court concluded "Cheron was not required to exhaust any administrative remedies prior to filing his tort action[.]" See: *Cheron v. LCS Corrections Service, Inc.*, 872 So.2d 1094 (La. App. 1 Cir. 2004).

The Louisiana supreme court granted review and affirmed the court of appeals, noting that that the decision to not provide retroactivity to Act 89 affected many cases but that number was finite. In rejecting the DOC's argument that many prisoner cases would be affected by this ruling the court noted no evidence was provided as to the number of cases affected but more importantly, the legislature could require administrative exhaustion but could not apply such a requirement retroactively to deprive a party of a vested right. See: *Cheron v. LCS Correctional Services*, 891 So. 2d 1250 (LA 2005). ■

## PLN Sues The Geo Group for Public Records

On Dec. 2, 2005, Prison Legal News filed a civil suit against The Geo Group, Inc. (formerly Wackenhut Corrections) in the Circuit Court for Palm Beach, Florida, demanding access to public records held by the company.

The Geo Group is a for-profit company that operates privatized prisons, including two Florida prisons, and its contract-based fees are paid with public (taxpayer) funds. Pursuant to Florida's public records law, The Geo Group is required to produce requested public records pursuant to Public Records Law, F.S. 119.01(1).

*Prison Legal News's* editor, Paul Wright, submitted written public record requests to The Geo Group in April, 2005, requesting information related to lawsuits that resulted in settlements or verdicts against the company, as well as contract audits, violations and court-ordered injunctions. While The Geo Group provided a limited amount of information related to one category of the requested records, it ignored the other requests and never responded to a second record request submitted in September.

In its lawsuit, Prison Legal News alleges The Geo Group's failure to provide the requested public records is illegal, malicious and willful, and is designed to delay *Prison Legal News* from obtaining

the records because they are critical of The Geo Group's operation of privatized prisons. The requested records would likely reveal details related to sexual harassment claims, riots and other disturbances, staff on prisoner attacks, prisoner on prisoner attacks, inadequate medical care, contract sanctions and other penalties, and court orders and injunctions against the company. The Geo Group has a lengthy nationwide record of abuses and security incidents at its privately-operated facilities. Many reported here in the pages of *PLN*.

Prison Legal News further claims The Geo Group's contracts for the operation of state correctional facilities are extremely profitable for the company. However, without the requested records the public cannot accurately determine whether or not the state, and the taxpayers, are receiving their money's worth and a fair return based on the contractual requirements, or whether those funds are being appropriately allocated for the prison-related services needed and paid for by the state.

PLN is represented by Lake Worth, Florida attorney Frank Kreidler. Mr. Kreidler has successfully sued private prison companies for public records on prior occasions. See: *Prison Legal News v. The Geo Group*, Palm Beach County Circuit Court, Case No. 50 2005 CA 011195 AA. ■

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# Michigan Jail Settles Unreasonable Use of Force Case for \$130,000

by Amanda Hickman

On March 1, 2005, the Wayne County jail in Detroit, Michigan settled an excessive use of force case for \$130,000. Plaintiff, Victor Walker, alleged that on October 12, 2000, while being held in the Wayne County Jail in Detroit, Michigan, he was punched in his left eye by a guard, Alphonso Reese. At the time that Guard Reese struck Walker in the eye he was holding a set of jail keys in his fist. As a result of this punch, he suffered complete and permanent blindness in his left eye and an orbital fracture.

On October 12, 2000, after being strip searched as part of the intake process into the Wayne County Jail, Walker was told by jail staff to carry the bedroll of his brother, who was on crutches, to an assigned cell. While placing the bedroll into his brother's assigned jail cell, that cell door was closed by another guard and Walker was locked in the wrong cell. Walker notified the guards on duty of the mistake to avoid the appearance of an attempted escape, but was told to wait and a guard would let him out later. While waiting to be let out of the cell Walker fell asleep and was eventually awakened by the defendant, jail guard Reese, calling his name. Once he awoke, Walker was ordered out of the cell by Reese and told to strip. Walker questioned why he had to be strip searched again and in front of other prisoners. The questioning by Walker for the need of a strip search outraged Reese who then grabbed the jail keys off of his belt and while clutching them in his fist struck Walker in the left eye, resulting in blindness in that eye.

Walker filed a pro se complaint against Reese under § 1983 alleging a violation of the Fourth Amendment for the use of unreasonable force. Based upon the requirement of exhaustion of the jail grievance process as required by Prison Litigation Reform Act, the district court issued an order to show cause why the complaint should not be dismissed for failure to exhaust. While this show cause order was pending, the complaint was not served by the U.S. Marshal as required by the PLRA, and this delay resulted in the statute of limitations expiring prior to service of the summons and complaint.

The Wayne State University Law School Civil Rights Litigation Clinic was appointed to represent Walker while the show cause order was pending. Soon after

this appointment, Defendants filed a motion to dismiss the lawsuit based upon the statute of limitations expiring. In denying this motion, the district court found that any delay in the service of the complaint was due to the procedural requirements of the PLRA in the processing of the order to show. The court also found that plaintiff had exhausted what process was available

based upon defendants' failure to answer his grievance.

The Clinic engaged in discovery and the case was set for trial. On the eve of trial, the parties reached a settlement of \$130,000, inclusive of fees and costs, to compensate Mr. Walker for the loss of vision in his left eye. See: *Walker v. Reese*, USDC ED MI, Case No. 03-CV-73520. ■

## Ban on Separatist Religious Publication Reversed by Eighth Circuit

The Eighth Circuit Court of Appeals reversed a lower court's grant of summary judgment to prison officials related to the refusal to deliver a religious publication they deemed to be racially inflammatory.

Missouri Department of Corrections (MDOC) prisoner Michael Murphy was "a practicing member of the Christian Separatist Church Society (CSC), a religious group that holds as a central tenet the belief that its members must all be Caucasian because they are uniquely blessed by God and must separate themselves from all non-Caucasian persons."

Murphy sought "formal recognition and group worship accommodation for CSC within the" MDOC. Group worship was denied but "MDOC granted members of CSC solitary practitioner accommodation." This entitles a prisoner to practice his religion privately in his cell, to keep a sacred religious text, to receive their literature,... to have access to clergy visits, to adjust activities in order to observe holy days, and to wear a religious symbol,..."

Prison officials subsequently refused to deliver Issue 36 of *The Way*, a religious publication, finding "that the issue was so racially inflammatory as to be reasonably likely to cause violence."

Murphy brought suit seeking injunctive and monetary relief. He alleged that the censorship of *The Way* and the denial of group worship accommodation privileges afforded to other separatist groups violated his constitutional rights Religious Land Use and Institutionalized Persons Act (RLUIPA). The District Court granted summary judgment to defendants on all claims.

The Eighth circuit reversed the grant of summary judgment on Murphy's free-

speech claim related to the censorship of *The Way*. The court noted that it "previously held that a total ban on publications that espouse white supremacy is overly broad and does not closely conform to the purpose of upholding the security of the prison. *Murphy v. Missouri Dep't of Corr.*, 814 F.2d 1252, 1256 (8<sup>th</sup> Cir. 1987). Before the prison authorities censor materials, they must review the content of each particular item received." *Williams v. Brimeyer*, 116 F.3d 351, 354 (8<sup>th</sup> Cir. 1997).

The court then concluded, a step on its "independent review of the evidence, that a material issue of fact remains as to whether MDOC's choice to censor Issue 36 satisfies the four *Turner v. Safely*, 482 U.S. 78, 107 S.Ct. 2254 (1987)] factors." The court found that "Issue 36 does not appear to counsel violence, and MDOC's documented reasons for censoring the item is too conclusory to support a judgment in its favor on this issue."

Turning to Murphy's RLUIPA claim, the court observed that "Congress used the same strict scrutiny language from [the Religious Freedom Restoration Act of 1993] in the RLUIPA section that applies only to prisoners, 42 U.S.C. § 2000cc-1(a), but did not specifically codify the contextualized treatment that many courts had given the test in the prison context."

The court found that despite sparse legislative history, several factors led it "to conclude that Congress intended that the language all of [RLUIPA] is to be applied just as it was under RFRA." The court noted a joint statement of senators Orrin Hatch and Edward Kennedy, cosponsors of the bill, where they stated that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post hoc rationaliza-

tions will not suffice to meet [RLUIPA's] requirements." Thus, the court concluded "that the standard applied under RFRA should likewise be applied to cases arising under RLUIPA."

The court then explained that to prevail on his RLUIPA claim, Murphy must make the threshold showing "that there is a substantial burden on his ability to exercise his religion, 42 U.S.C. § 2000 cc - 2(b)." It then concluded "that the district court improperly concluded on summary judgment that Murphy's religion was not substantially burdened and that 'group discussion and study, cannot be said to be tenets or beliefs central to his religion.'"

To prevail on this claim, MDOC must establish "that its choice to give Murphy only solitary practitioner status was the least restrictive means to further a compelling interest." "We do not require evidence that racial violence has in fact occurred in the form of a riot, but we do require some evidence that MDOC's decision was the least restrictive means necessary to preserve its security interest." However, "it must do more than merely assert a security concern... [T]hey 'must do more than offer conclusory statements and post hoc rationalizations for their conduct.'" *Hamilton v. Schriro*, 74 F.3d 1545, 1554 (8<sup>th</sup> Cir.1996)."

The court found that a question of fact existed "as to whether there are means available to MDOC less restrictive than the total preclusion of group worship for CSC members. It is not clear that MDOC seriously considered any other alternatives, nor were any explored before the District Court." The court upheld the grant of summary judgment to prison officials on each of Murphy's remaining claims. See: *Murphy v. Missouri Department of Corrections*, 372 F.3d 979 (8<sup>th</sup> Cir. 2004). ■

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## California Youth Prison Superintendent Removed For Using Unreasonable Force

The Superintendent of a California youth prison was permanently removed from his position for using unreasonable force against a ward, and then not reporting it.

Steve Kruse, Superintendent at the N.A. Chaderjian Youth Correctional Facility in Stockton, was placed on administrative leave shortly after the May 27, 2005 incident and was terminated from the position effective August 10, 2005. In an August 4, 2005 report, the State Inspector General (IG) determined that Kruse had grabbed a handcuffed ward's hair and jaw as he was being escorted to another unit following a fight involving 44 youths at the prison. Kruse said he was using reasonable force because the ward was struggling with his escorts, but investigators found the youth was already under adequate control. The 19-year old ward's complaint that Kruse slammed his head against the wall was dismissed because there were no witnesses or visible injuries. The prison remains under an

"active and ongoing" investigation by the U.S. Department of Justice over repeated complaints that wards' civil rights are being violated there.

Kruse's failure to report the incident violated the department's use-of-force policy, a procedure intended to air all such incidents instead of covering them up with the department's vaunted "code of silence." IG Matthew Cate indicated that other employees who failed to report the incident will also be disciplined. Under civil service protection, Kruse remains an employee of the corrections department.

Kruse's swift removal followed a similar move against San Quentin State Prison's former Warden Jill Brown, whom the IG accused of fostering a "code of silence" by allegedly muzzling a healthcare manager being questioned by a court-appointed monitor on April 27, 2005. Both Kruse's and Brown's removals were made in anticipation of IG reports. ■

Source: *Sacramento Bee*.



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# Florida Awards Contracts Putting Sex Offenders on GPS Supervision; Other States to Follow

The Florida Department of Corrections (FDOC) has awarded three contracts for Global Positioning System (GPS) satellite monitoring of sex offenders. The contracts come on the heels of legislation that allocated \$3.9 million over a three-year period to put certain sex offenders on lifetime GPS supervision, even if their sentences or parole terms have expired.

Two of the contracts will keep constant watch over child sexual predators as part of the Jessica Lunsford Act, which was named for a 9-year-old girl who was kidnapped and killed by a registered sex offender in February 2005. The Lunsford Act was passed unanimously by the Florida legislature and signed into law by Gov. Jeb Bush on May 2, 2005. It requires a minimum 25-year sentence for offenders convicted of sexually assaulting a child 12 or younger plus lifetime electronic monitoring upon release, and expanded monitoring of sex offenders who commit crimes against older children. The act only applies prospectively; i.e., to crimes committed from the date of the legislation forward, but could apply to released sex offenders currently under state supervision.

The GPS monitoring contracts were initially awarded to Satellite Tracking of People (STOP) for northern Florida, and G4S Justice Services, a division of U.K.-based Group 4 Securicor, for southern Florida. However, on Sept. 6, 2005, after two weeks of field testing, STOP abruptly withdrew its bid. Previously, STOP had complained that the state's specifications for a two-piece monitoring device favored rival companies, since STOP used a one-piece device. After the company filed a protest in July, state officials

removed the challenged wording and STOP made the lowest bid. Neither the company nor the state commented on whether problems arose with STOP's GPS equipment during the trial testing period, or explained why the company quit.

Following STOP's withdrawal from the bidding process, iSECUREtrac Corp. was awarded the GPS monitoring contract for the northern half of Florida in November 2005. "This is a very significant win for us," said Tom Wharton, CEO of iSECUREtrac Corp. "We are proud to work with States like Florida that are so focused on public safety."

According to FDOC documents, about 1,200 offenders will be subject to GPS supervision by September 1, 2005, and as many as 10,000 offenders within three years. Under a third contract awarded to Advanced Public Safety, a division of Motorola, Inc., reported crimes will be matched with monitored offenders who are in the same area.

GPS technology can pinpoint an offender's location within 50 feet on a real-time display. It can also send alerts to parole or law enforcement authorities by e-mail, text message or faxes when offenders disable the transmitter or enter off-limit areas such as schools or day-care centers.

One company, Florida-based Pro Tech Monitoring, uses its CrimeTrax GPS technology to track around 5,000 people on court-ordered supervision such as parole, probation and house arrest in 38 states. Richard Nimer, Pro Tech's Vice President for Business Development, said inquiries about GPS tracking services increased almost nearly 400% after Jessica Lunsford's death.

The use of GPS tracking has had mixed results. On Nov. 17, 2005, California parolee Robert Dobucki was arrested after parole officials determined that he had visited an elementary school, a doll shop and a children's amusement park. Gov. Schwarzenegger is pushing legislation similar to Florida's that would increase penalties for child sex offences and require lifetime electronic monitoring.

However, a paroled child-sex offender in Idaho, William Lightner, removed a GPS bracelet and successfully absconded on July 23. And Kenneth Lamberton, a GPS-monitored defendant in Florida awaiting trial on a child-molestation

charge, allegedly tried to force one underage girl into a sex act and another girl to expose herself. Thus, while GPS monitoring can track offenders and alert authorities in some cases, they do not necessarily prevent criminal activity or escapes from supervision.

According to statistics compiled by the FDOC from fiscal year 2001-2002, which included data on over 1,000 released offenders under GPS monitoring, 44% of offenders on traditional supervision were taken back into custody while only 31% of offenders on GPS monitoring had their supervision revoked. Also, approximately 6% of the GPS-monitored offenders committed new crimes compared with 11% of offenders who were not subject to GPS monitoring.

Florida has approximately 30,000 registered sex offenders. According to a *Miami Herald* investigation of state records from January 2005, Florida's law-enforcement agencies had lost track of more than 1,800 sex offenders, indicating a serious need for better monitoring.

However, GPS supervision has some critics, including civil-rights experts, the ACLU and defense attorneys, who argue that the stringent requirements of electronic monitoring, the inconvenience of having to wear the tracking devices and the stigma attached to sex offenders are too onerous for people who have served their time, been released and may never re-offend again. Kansas City attorney Arthur Benson is challenging Missouri's sexual offender registry, which requires released offenders to register for life, and has similar problems with lifetime GPS monitoring. "While these laws are often couched in terms of protecting the public against repeat offenses, at heart they are vengeful, punishing acts," said Benson.

Three other states -- Missouri, Ohio and Oklahoma -- passed laws in 2005 requiring lifetime electronic monitoring for certain released sex offenders even if their original sentences or parole terms have expired. Similar bills have been proposed in Congress, as well as North Dakota and Alabama, while Pennsylvania, Oregon and New York are considering implementing statewide satellite tracking for sex offenders. ■

Sources: *Palm Beach Post*, *Fox News*, *Miami Times*, *St. Petersburg Times*.

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## Controversial Ex-Prison Official Lane McCotter Appointed Utah J.P.

Lane McCotter, once the director of the Utah Department of Corrections, has been appointed to a justice of the peace bench in Utah. The McCotter era remains a high-point of prison violence in Utah's history cumulating in the death of a prisoner who had spent 16 hours strapped naked to a restraining chair in 1997. Forced out of office two months after the restraining chair incident, McCotter became a prison consultant and an executive for Management Training Corporation, a Utah-based private prison company. Meanwhile, Utah ceased using restraint chairs in its prisons and settled the civil rights lawsuits against McCotter and the prison system for \$200,000.

McCotter started his first job as prison system director in the Texas prison system in 1985. By 1987, he was forced out of that position by allegations that he intentionally erased portions of a videotape showing the beating of a handcuffed, shackled prisoner. McCotter claimed the erasure was an accident. From there, McCotter went to work as director of the New Mexico prison system, where he stayed until 1991. In 1992, he took over as head of the Utah prison system.

McCotter was hired by the federal government in 2003. He and three other prison contractors were charged with the responsibility for rebuilding Iraq's prison system, including Abu Ghraib. McCotter personally directed the rebuilding of Abu Ghraib, along with Gary DeLand, another controversial former director of the Utah prison system. [PLN, Sept. 2004, p. 1]. They described Abu Ghraib as "the only place we agreed as a team was truly closest to an American prison." Those "reconstructed" Iraqi prisons became the scenes of inhumane, torturous treatment and rape of prisoners by U.S. military personnel and private "information extraction" contractors. [PLN, Nov. 2004, p. 36]. Perhaps they were very close to American prisons in more ways than just architecture.

On March 16, 2005, the Wasatch County Council appointed McCotter to the post of justice of the peace on the recommendation of County Manager Mike Davis. Jay F. Price, Chairman of the Council, noted that the Council was aware of "civil rights allegations" against

McCotter, but ignored them.

"I don't place much value in allegations," said Price.

Apparently allegations that form the basis for a civil rights lawsuit that the state settles are also not credible enough for Price.

McCotter assumed the bench for-

merly occupied by Michael Anthony Spanos on June 1, 2005, after completing a four-day justice of the peace qualifications course. One can only hope that he will be better at dispensing justice than he was at administering prisons. ■

Source: *Salt Lake Tribune*.

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# Politics Keeps Arizona Clemency Approvals Rare

by John E. Dannenberg

Only seven Arizona prisoners were granted clemency in 2004, four of whom were on their death beds. This gaunt statistic is the natural progression resulting from Arizona's abolishing parole a decade ago, replacing justice with politics in the form of the Board of Executive Clemency (BEC) and governor's veto.

Prior to 1994, Arizona prisoners with determinate sentences (i.e., a fixed number of years) were eligible to apply for parole after serving half of their term. Under the 1994 "Truth in Sentencing" guidelines, such parole was abolished, and prisoners must now do at least 85% of their time, at the discretion of the Department of Corrections (ADOC). In addition, the 1994 laws provide for a mid-term clemency review by the new BEC, subject to approval of any case by the governor. As a result, clemency applications have jumped from 28 in 1994 to 1,014 in 2004, with grant recommendations rising from 3 to 75, respectively.

Of those 75, 46 were unanimous. A unanimous vote portends automatic commutation, unless the governor intervenes. All other grants require affirmative gubernatorial approval to become effective. However, Governor Janet Napolitano did not permit any automatic grants to proceed, instead interceding in every case and permitting only seven releases. This meager result was only slightly bested by Governor Jane Hull, who in 2002 set the all-time Arizona record of twelve such commutations.

There has plainly been a politicization of the early release process. Arizona's governors are ever mindful of former Massachusetts Governor Michael Dukakis' failed U.S. Presidential run in 1988. Dukakis was politically ruined by the rape commit-

ted on a family visit pass by Massachusetts prisoner Willie Horton, whose image was festooned on his opponent's, first Al Gore in the Democratic primary and then George Bush I's, TV ads nationwide to show that Dukakis' "revolving door" weekend pass policy demonstrated a fatal "soft-on-crime" weakness. Arizona's governors have since been loathe to let anyone go home one day sooner than the maximum.

While pre-1994 parole releases were vested in the ADOC, the new scheme transferred all power of release to the governor. Although BEC perhaps performs a valuable screening function, it cannot actually effect any early releases. Of the 1,014 initial hearings in 2004, only 112 progressed to the more thorough "second phase" hearings, wherein the prisoner and interested parties are present. That GEC's illusory authority is by design as demonstrated by the fact that Arizona, which incarcerates more citizens per capita than any other western state, sees fit to pay each of its five full-time employee BEC members only \$44,995 per year. [By contrast, California, whose Adult Board of Parole Hearings (BPH) can unilaterally release non-murderer life-term prisoners, pays each of its twelve authorized members \$99,693 for the approximately 2,000 parole hearings it schedules annually.]

The "no-clemency" approach to longer punishment in Arizona is not limited to violent crimes. Arizona permits sentencing judges who support a clemency application to file a "603L" order declaring a sentence to be "clearly excessive." But upon 20 such court orders in 2004, which resulted in 16 BEC clemency recommendations, Governor Napolitano acceded only in one case. There, a prisoner doing ten years for drug possession had his term reduced to seven years, notwithstanding the court's 603L order recommending three years.

Tim Nelson, chief counsel for Napolitano, and his assistant Nicole Davis, who review clemency applications for the governor, are looking for a "few special cases" that might warrant the governor's intervention, cases "so compelling that the system we have set up should be disrupted in some way." (Cases where a doctor certifies that the prisoner is within weeks of death appear to qualify as "special" to Governor Napolitano.) Nelson

added, "I don't think it is the proper role of the executive branch to undermine the sentencing guidelines established by the legislative branch and administered by the judicial branch," when commenting on the miniscule commutation approval rate. Maricopa County district attorney chief Leonardo Ruiz agreed, noting that because prosecutors are elected, they are directly accountable to the people, and therefore not in need of extra oversight. "When somebody gets sentenced to a long prison term, typically it is because they deserve it," said Ruiz.

But the political agenda of the resulting 1994 clemency arrangement cannot be denied. Indeed, it is part of a recognized questionable national artifice. Addressing the American Bar Association (ABA) in 2003, U.S. Supreme Court Justice Anthony Kennedy said he believed that the process had "been drained of its moral force," suggesting that the ABA marshal recommendations for changes. Today, six states have boards that advise, but do not bind, the governor, while eight states mirror Arizona with commutation monarchies.

Phoenix defense attorney Mel McDonald, who has represented several clients before the BEC, complains that the process is "futile" with the governor involved. "Nobody is going to criticize you if you say no [other than the applicant or his family]. The process doesn't work...." Sensing this, three Republican state senators, Linda Gray, Robert Blendu and Thayer Verschoor, introduced bills asking voters to amend the state constitution to take the governor out of the loop and let the BEC's recommendations stand on their own. The bills died in committee. University of Arizona's college of law co-director Gabriel Chin opined, "It is understandable why a governor would hesitate to do it [clemency], but it leads to unnecessarily harsh sentences not being disturbed and inequitable sentences not being disturbed."

Under Arizona law, the governor need not give any reason to deny clemency. Nonetheless, Napolitano's counsel Nelson remained unabashedly candid about the impetus behind the current "no-clemency" policy, "[t]here is [sic], obviously, political consequences to the governor."

Source: *The Arizona Republic*.

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## Wrongfully Convicted Kentucky Man Wins \$590,000 Judgment Against Defense Attorney

On June 3, 2004, a Louisville, Kentucky, jury awarded \$590,000 to a wrongfully convicted man who spent two years in prison because his defense counsel was negligent.

Plaintiff Gary Puckett and his mother Peggy Puckett were at their home on October 23, 1993, when a fire broke out. Gary escaped but Peggy, who was obese and had a broken leg, died in the blaze.

Fire investigators determined that an accelerant had been used to start the fire, and accelerants were found on Gary's and Peggy's clothes. Gary was arrested on murder and arson charges.

Gary hired attorney David Kaplan to defend him, paying Kaplan \$3,000. Unfortunately for Gary, Kaplan didn't provide much of a defense.

When Gary's jury trial began in June 1994, Kaplan gave no opening statement. Later he referred to prosecutor Anne Haynie as "missy." Two jurors were so put off by Kaplan's courtroom antics that they complained to the judge.

To make matters worse, Kaplan did not conduct an investigation, read discovery, or test the accelerant--key proof in the trial. With the crucial accelerant evidence emphasized by prosecutors Haynie and Thomas Dyke--and unrebutted by the defense--Gary was convicted and sentenced to 25 years in prison.

Gary continued to profess his innocence. Then, in 1996, Commonwealth Attorney Nick King, suspecting prob-

lems with the Puckett trial, found that the investigator and prosecutors had withheld exculpatory evidence. The accelerant found on Gary's and Peggy's clothes was not the same kind as that used to start the fire. King moved for a new trial, which was granted, and Gary was released from prison. At the second trial, with all the evidence presented and Donald Heavrin representing him, Gary was acquitted.

Gary then sued Kaplan alleging negligent legal representation. The trial court granted Gary's motion for summary judgment, and Kaplan appealed.

The Court of Appeals affirmed the summary judgment but implicated that even though the prosecutors were immune the jury could still apportion fault to them as non-parties.

On Kaplan's motion for discretionary review, Kentucky Supreme Court affirmed as to prosecutorial immunity, but reversed as to the jury apportioning fault to the prosecutors as non-parties. See: *Jefferson County Comm. Atty. v. Kaplan*, 65 S.W.3d 916 (KY 2001).

Accordingly, the case proceeded to trial against Kaplan only on the negligence claim. With the aid of liability expert Donald Heavrin, Gary's evidence suggested that Kaplan's "defense" was the worst in the history of Jefferson County.

The jury found unanimously in Gary's favor and awarded him everything he claimed: \$50,000 for legal expenses, \$40,000 for lost wages, and \$500,000 for his two years in prison. Gary's total award was \$590,000.

Gary was represented by Bill V. Seiller and India N. Jewell of the Louisville firm Seiller & Handmaker. See: *Puckett v. Kaplan*, Jefferson County Circuit Court, Case No. 96-6279. ■

Source: *Kentucky Trial Court Review*

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## 85 Year-Old California Prison Doctor Wins \$20 Million For Age Discrimination

The chief physician and surgeon at California State Prison, Lancaster, still practicing medicine at age 85, successfully sued the California Department of Corrections (CDC) for age discrimination when CDC forced him to retire. On July 18, 2005, a Los Angeles superior court jury awarded the doctor \$20 million, including \$1.6 million in past and future lost earnings.

Dr. Robert Johnson refused to voluntarily retire in 2001 when he was 81. In response, his superiors complained to the state Medical Board that Johnson suffered from debilitating memory loss. But upon investigation, he was cleared of

that allegation. CDC then required him to take a fitness test. At the August 2001 CDC inquest, he was asked, "Dr. Johnson, you're over 80 years old, why are you still working?" It was even suggested that staff wanted to throw him a retirement party. Johnson's lawyer, Ralph Wegis, argued that CDC's conduct equated to hostile job action, amounting to age discrimination. Johnson refused to accept other job assignments.

Wegis told the jury that the malevolently instigated Medical Board investigation was itself a death knell on Johnson's career, because the record of the questions stained him as unemploy-

able and uninsurable elsewhere. The \$1.6 million wage loss award was predicated upon actuarial projections that he could continue to be able to work to age 96. Johnson's grandfather had lived to be 112. The rest of the award was for Johnson's emotional distress.

CDC spokesman Ted Slosek stated the award would be appealed as excessive. Johnson was represented by Bakersfield attorney Ralph Wegis and Los Angeles attorney Bruce MacLeod. See: *Johnson v. State of California*, Los Angeles County Superior Court, Case No. BC 288518. ■

Additional Source: *Los Angeles Times*.

## Fourth Circuit Holds Claims Value Relevant to Frivolous Determination

The Fourth Circuit Court of Appeals held that a district court may consider the value of the prisoner's claim when determining whether to dismiss it as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i), the in forma pauperis statute.

Federal prisoner Paul Nagy was confined at the Federal Medical Facility (FMC) in Butner, North Carolina. On April 3, 2002, Nagy delivered a bag of clothes to the FMC laundry for cleaning. The laundry's practice is to place a tamper proof security tie on laundry bags when they are turned in, and to remove the security tie when they are later picked up. When Nagy collected his laundry the day after dropping it off, however, the bag was open and his clothes could not be found. Apparently the security tie fell off during washing or drying. The FMC replaced Nagy's institutional clothing but not his private clothing, which was a sweat suit worth about twenty five dollars.

Pursuant to 28 U.S.C. § 2672 of the Federal Tort Claims Act (FTCA), "Nagy filed an administrative claim against the FMC on April 17, 2002, seeking twenty-five dollars in compensation for the lost sweat suit. The Regional Council for the Bureau of Prisoners denied his claim, explaining that the FTCA would compensate Nagy only for the loss of property resulting from the negligence, omission, or wrongful act of a Bureau of Prisons employee... the Regional Council also noted that, in the clothing exchange area, signs on each window worn that the FMC laundry service bears no responsibility for loss or damage clothing."

Nagy then brought an FTCA claim in federal court, seeking "compensation and punitive damages in the amount of \$4,000 due to the loss of his sweat suit and the alleged 'malicious' denial of his administrative claim." Initially, the district court granted Nagy's application to proceed in forma pauperis. However, one month later the court dismissed the complaint. The court held that punitive damages are not recoverable under the FTCA, 28 U.S.C. § 2674(2000), and dismissed Nagy's claim for actual damages as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i), citing the *de minimis* value of his suit for twenty-five dollars.

The appellate court held that the District Court did not abuse its discretion in dismissing Nagy's claim based, in part, on its *de minimis* value. The court explained about "[w]hether the suit alleges significant or *de minimus* damages is among the many factors in district court may take

into account in determining the frivolousness of a claim. Such consideration is 'consistent with the goals of the in forma pauperis legislation.'...Nothing in the in forma pauperis statute, and nothing in 28 U.S.C. § 1915(e)(2)(B)(i) in particular, suggest that the *de minimis* value of a claim cannot be taken into account... Given the purpose of 28 U.S.C. § 1915(e)(2), to ensure that indigent litigants do not bring suit solely because of the public subsidy available under § 1915(b), it would make little sense to mandate that trial courts invariably entertain claims without any regard to their monetary value."

The court explained that although "items of a small value may have large meaning, the unfortunate loss of such items cannot necessarily translate into the privilege to proceed in forma pauperis." The court also noted that "the request for almost \$4,000 in punitive damages for the loss of this twenty-five dollar item did nothing to strengthen the seriousness of Nagy's claim." The court was clear to indicate that it was not announcing a rigid rule to be followed in all cases, indicating that it was "simply address[ing] this case on its own terms[ ]" and finding that "[t]he district court, acting as a gatekeeper under 28 U.S.C. § 1915(e)(2), was within its discretion in adjudging Nagy's claim to be frivolous in these circumstances." When filing complaints litigants are wise to seek a realistic amount of damages if they wish to retain credibility with the courts. See: *Nagy v. FMC Butner*, 376 F.3d 252 (4<sup>th</sup> Cir. 2004). ■

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## Florida Violates Sex Offenders for Possessing Common Men's Magazines

The State of Florida, in a crackdown on sex offenders, is sending probationers to jail for probation violations because they possessed racy magazines or sex manuals. The crackdown comes from increased surveillance of sexual offenders after the March murder of Jessica Lunsford, a 9 year old Florida girl allegedly killed by a convicted sex offender on probation.

Probation officers and a local police searched the homes of sex offenders to make sure they are following the terms of their release. The Florida Department of Corrections (FDOC) contends it is enforcing existing court orders as part of its "zero tolerance" policy.

When Andrew Calderon's home was searched on May 18, 2005, officers found a sexy calendar, a racy poster, and a few copies of *Maxim* Magazine. Calderon, 23, was jailed for six days on probation violation for possessing "sexually stimulating" material. Calderon's probation stems from the sexual battery of a mentally disabled relative. He awaits a hearing to determine if the materials warrant return to prison.

"Anything that is sexually stimulating, we are going to violate them on and the judges are going to make those decisions," said Debbie Buchanan, FDOC Spokes-

woman. "If there's any question at all, we're going to violate them." Ironically, once in prison, sex offenders can order *Maxim* Magazine and sexy calendars, without fear of repercussions.

Florida sex offenders need also keep their eyes on the tropics. In June 2005, the FDOC announced that sex offenders will be banned from public shelters during hurricanes. Some Florida communities are attempting to segregate sex offenders by severely limiting where they can live.

Critics say that such restrictions, based on generalized fears, do not really make communities safer. What is needed, says Denise Hughes-Conlon, President of the Florida Association for the Treatment of Sexual Abusers, is information, readily unavailable to the public detailing just how much of a risk individual offenders may be.

Instead, the information available on the Florida Department of Law Enforcement Internet registry lumps sex offenders and predators (the designation is supposed to be given to those who've committed the most serious or multiple sex crimes) together and "doesn't take into account risk assessment." ☐

Sources: *Palm Beach Post*; *News - Journal Online*.

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## “Actual Innocence” Rule Inapplicable to Breach of Contract by Lawyer

The Seventh Circuit Court of Appeals reversed a district court’s dismissal of a diversity suit, holding that the “actual innocence” rule does not bar claims of breach of contract/fiduciary duty.

Hillary Winniczek was charged with federal crimes stemming from “a scheme to help people obtain commercial drivers’ licenses fraudulently. He hired a lawyer to represent him and was later approached by Sheldon Nagelberg, another lawyer, who told Winniczek and his wife that the lawyer he hired was inexperienced in criminal actions and they should fire him and hire Nagelberg; which they did.

“Nagelberg then told them that Winniczek had a good defense... but that it would cost... \$150,000 in fees, plus \$20,000 in expenses, to present the defense. They paid him the \$170,000 over the course of the year preceding the scheduled date of the criminal trial.”

“As soon as Nagelberg was fully paid, he told Winniczek’s that he wouldn’t take the case to trial because Winniczek had made statements to the authorities when he was represented by [the first lawyer] that scotched any defense he might have had, and as a result Winniczek had no choice but to plead guilty.” This ended Nagelberg’s involvement in the case.

Winniczek obtained the services of another attorney but ultimately pled guilty and was sentenced to 22 months in prison.

The Winniczek’s brought a diversity suit against Nagelberg, alleging breach of contract/fiduciary duty and legal malpractice in violation of Illinois law. The federal court has jurisdiction over a diversity action when the parties to the action reside in different states and the amount in controversy exceeds \$75,000. However, the district court dismissed the suit for failure to state a claim.

The Seventh Circuit affirmed a district court’s dismissal of the legal malpractice claim because “Winniczek does not claim to be innocent of the crimes for which he was convicted, and this dooms his claim for legal malpractice.” The court explained that “[u]nder Illinois law, as that of other states, a criminal defendant cannot bring a suit for malpractice against his attorney merely upon proof that the attorney failed to meet minimum standards of professional competence and that had he done so the defendant would have been acquit-

ted on some technicality; the defendant (that is, the malpractice plaintiff) must also prove that he was actually innocent of the crime.” See: *Kramer v. Dirksen*, 695 NE.2d 1288, 1290 (Ill. App. 1998); *Moore v. Owens*, 698 NE.2d 707, 709 (Ill. App. 1998); and *Levine v. Kling*, 123 F.3d 580, 581-82 (7<sup>th</sup> Cir. 1997).

The court reversed the dismissal of the breach of contract/fiduciary duty claim, finding that the “actual innocence” rule does not extend to such claims and “recovery of the overcharge is not barred by the actual – innocence rule.”

## Louisiana Prisoners Obscenity Conviction for Masturbation Vacated

The Louisiana Court of Appeals vacated a prisoner’s obscenity conviction and sentence for masturbating in a public shower, within view of a female guard.

Louisiana prisoner, “Bobby Holmes, was charged with two counts of obscenity in violation of La.R.S. 14:106. The first alleged act of obscenity occurred on August 14, 2001, when a female prison guard accused [Holmes] of ‘stroking his erect penis with his hand in a masturbating manner’ while in the prison shower... The second act occurred on April 22, 2002, when [Holmes] allegedly exposed his penis to another female guard and masturbated.”

At the time of the August 14, 2001 incident, La.R.S. 14:106(A)(1) provided that the act of obscenity must occur “in any public place or place open to the public view[.]” However, the statute was amended “on August 15, 2001, or five hours and fifty one minutes after [Holmes]’ conduct occurred.” The 2001 amendment provided that the obscenity could occur “in any public place or place open to the public view, or in any prison or jail[.]” The 2001 amendment was apparently applied to the August 14, 2001 incident

Holmes pled guilty to both counts and was sentenced to serve one year on each count, to be served consecutively. Holmes sought post-conviction relief, which was denied without a hearing, and Holmes appealed.

On appeal, Holmes challenged only the August 14, 2001 conviction and sentence. The appellate court noted that in *State v. Narcisse*, 853 So. 2d 1186 (La.

The court also rejected Nagelberg’s claim that the Winniczeks’ exclusive remedy was “to complain to the Illinois Attorney Registration and Disciplinary Commission that Nagelberg violated his ethical obligations to Winniczek.” See: *Winniczek v. Nagelberg*, 394 F.3d 505 (7<sup>th</sup> Cir. 2005).

In a separate opinion the court held that the plaintiffs were entitled to their costs, to include the appeal court’s \$250 docketing fee. The court awarded the plaintiffs \$482.20. See: *Winniczek v. Nagelberg*, 400 F.3d 503 (7<sup>th</sup> Cir. 2005). ■

App. 2 Cir. 2002), the court upheld a conviction under the pre-2001 version of La.R.S. 14:106(A)(1) where the defendant had been charged with exposing himself in a prison infirmary to a prison employee. The *Narcisse* court explained that: “[i]t is not necessary that a defendant expose himself to the general public in a completely public and open area in order to be convicted of obscenity... Any person who can see the act of obscenity being committed is a member of the public.”

The *Holmes* court, however, found that the fact that the incident occurred “in the prison shower distinguishes this case from *Narcisse*.” The court reasoned that “[i]t is common sense that a prison shower is a location afforded greater privacy than a prison infirmary. Obviously, there are no visitors in prison showers, and it cannot be reasonably held to be a ‘place open to the public view’ as the statute provides... a ‘prison shower’ heretofore has been regarded as one of the few places a prisoner is permitted to attend to his ‘private needs’ except for minimal security monitoring by authorized prison personnel.”

The court indicated that although it was not passing “judgment on the wisdom of the legislative amendment to La.R.S. 14:106(A)(1),” it found that “the conduct for which [Holmes] was charged did not amount to obscenity under the previous law.” See: *Louisiana v. Holmes*, 866 So. 2d 406 (La. App. 3 Cir. 2004). ■

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# California Tort Claim Dismissed For Failure to Fully Exhaust Administrative Remedies

by John E. Dannenberg

The California Court of Appeal held that a prisoner's tort claim must be dismissed without prejudice for failure to fully exhaust administrative remedies even though the response to his administrative appeal was allegedly overdue. Separately, the court held that as public entities, the state respondents were immune from state law liability from intentional infliction of emotional distress and negligence.

Prisoner Justin Wright sued the California Department of Corrections (CDC) in state court under 42 U.S.C. § 1983 alleging medical malpractice after the October 31, 2001 attempted repair of his two detached retinas resulted in extensive vision loss. Additionally, he complained that CDC failed to provide him medical care beginning on August 22, 2001, for which he filed a CDC Form 602 administrative appeal on March 24, 2002. On March 31, 2002, he filed a government tort claim with the State Board of Control, which was denied on May 10, 2002.

On December 13, 2002, Wright filed his first amended complaint in state superior court. The defendants demurred, arguing that because CDC had not yet answered his 602 at the third level, his complaint must be dismissed without prejudice for failure to exhaust available administrative remedies. Wright countered that he had "substantially complied" with the grievance process, claiming (only in general terms) that CDC was "long past" their own time constraints. Wright feared that if he did not file his complaint within the statutory six months of the denial of his Board of Control tort claim, he would be time barred from his suit. The trial court granted the demurrers and Wright appealed.

This case presents California prisoners pursuing state law tort claim actions against a public entity with an important resolution of the apparent tension between the procedural requirements of (1) exhaustion of administrative remedies, i.e., the requirement not to file a lawsuit before exhausting the CDC 602 grievance process and (2) Government Code (GC) § 945.6(a)(1)'s mandate to file a lawsuit before its six month statute of limitations expires.

The court of appeal thoroughly

reviewed the history of administrative exhaustion in California. It strictly construed precedent to hold that "substantial compliance" with such exhaustion in reality means full compliance, absent some condition that literally prevents it. In Wright's case, the court noted that while CDC regulations require third level responses within 60 days, they carve out an exception for a "reasonable period" for "complex issues," which the court deemed Wright's medical issues met. However, that open-ended delay would have forced Wright to wait past his six month Government Code § 945.6(a)(1) filing deadline.

In affirming the demurrers, the court resolved the dilemma with two holdings. First, it held that when a plaintiff is pending completion of exhaustion of requisite and available administrative remedies, the six month GC § 945.6(a)(1) statute of limitations period is tolled. Second, it held that a dismissal without prejudice to complete exhaustion not an un-timeliness bar is the proper remedy.

The procedural lesson here for CDC prisoner state tort plaintiffs is to (1) timely file both their Board of Control claim form and their 602 administrative appeal, but (2) await the actual finality of the 602 process before filing their lawsuit.

On the merits of Wright's two claims of intentional infliction of emotional distress and negligence, the court held that under state laws GC § 844.6(a)(2) ["a public entity is not liable for ... [a]n injury to any prisoner"] and GC § 845.6 [a public entity is not "liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner"], the state and CDC were immune from state law suit. These counts were accordingly dismissed with prejudice. Such claims should have been made under the

Eighth Amendment, if Wright could have met the arguably greater burden of proving deliberate indifference and a sadistic intent in causing the injuries. See: *Wright v. State of California*, 122 Cal. App. 4th 659; 19 Cal. Rptr. 3d 92 (2004). ■

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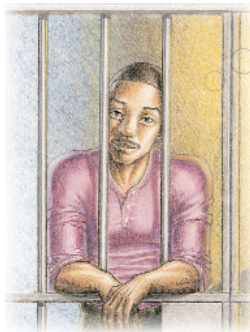
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# Georgia Prison Warden Proper Defendant In § 1983, ADA Suit

*by Michael Rigby*

The U.S. Eleventh Circuit Court of Appeals held that a Georgia prison warden was suable under the Eighth Amendment and Title II of the Americans with Disabilities Act (ADA).

Plaintiff Tracy Miller is a wheelchair-bound paraplegic at the Georgia State Prison (GSP). Miller suffers from a completely paralyzed right leg, a partially paralyzed left leg, and a neurogenic bladder causes urinary incontinence.

Since 1998, Miller has been in disciplinary isolation in GSP's maximum-security "K-Building" due to multiple disciplinary infractions. Miller is slated to remain there until at least 2012. Because the isolation cells are tiny, prison policy calls for beds to be removed daily to allow wheelchair-bound prisoners additional space in which to move around.

In his lawsuit, Miller alleged that the conditions he was subjected to in K-Building violated the Eighth Amendment's prohibition against cruel and unusual punishment and Title II of the ADA. Miller named as defendants the State of Georgia, the Georgia Department of Corrections (GDOC), GSP Warden Johnny Sikes in his official and individual capacities, Inmate Discipline Hearing Officer Ronald King, and GDOC Commissioner Wayne Garner. Miller sought monetary and injunctive relief.

Miller made multiple allegations in his complaint. First, Miller contended that because of the isolation cell's small size he could not maneuver in his wheelchair and was thus forced to remain immobile and restrained for extended periods. This problem was exacerbated, he claimed, by the prison staff's failure to remove his bed daily as policy required.

Miller further asserted that toilets and showers in K-Building are not wheelchair accessible and that he has not been afforded the opportunity to bathe regularly or to obtain basic hygiene. In addition, Miller claimed that GSP staff have not provided him with urine catheters or assistance in using portable toilets, which has caused him to urinate and defecate on himself.

Miller also complained that prison officials and staff have ignored his medical complaints; failed to provide him with necessary medical devices, such as leg braces, orthopedic shoes, and wheelchair

repairs; and have not provided him with required medical care, including physical and occupational therapy, which has resulted in bed sores, muscle atrophy, and spinal deterioration.

Finally, Miller contended that he has "been denied basic privileges provided to able-bodied inmates in isolation, including removal from isolation for one day after each thirty-day isolation period, and participation in 'yard call' and 'gym call' during each such removal day."

According to Miller, GSP staff and officials, including Warden Sikes personally, "were aware of his paraplegic condition, the inhumane conditions of his confinement and his serious medical needs, and were deliberately indifferent to those conditions and needs."

A magistrate judge ultimately denied Miller's motion for injunctive relief, granted summary judgment to Garner and Sikes, and granted partial summary judgment to the State, the GDOC, and King in his individual capacity holding that they were immune from liability. The recommendations were adopted by the U.S. District Court for the Southern District of Georgia. After a jury returned a verdict for King in his official capacity, Miller moved for a new trial and judgment as a matter of law. The motions were denied and Miller appealed.

The Appeals Court first examined Miller's Eighth Amendment claims and held that Warden Sikes was a proper defendant. While the Eleventh Amendment precludes a plaintiff from seeking injunctive relief against the State or the GDOC under 42 U.S.C. § 1983, the Court held, "the Eleventh Amendment does not prohibit a plaintiff from suing state officials in their official capacities for prospective injunctive relief." Likewise, the State, GDOC, and state officials in their official capacities are immune from monetary damages under § 1983, but not prison officials in their individual capacities (as long as they are not entitled to qualified immunity).

After concluding that Warden Sikes was suable under § 1983 for injunctive relief in his official capacity and for monetary damages in his individual capacity, the Court examined the sufficiency of these claims. The Court first noted that, "To show an Eighth-Amendment

violation, a prisoner must satisfy both an objective and subjective component." In Miller's case, he undoubtedly had serious medical needs and presented evidence that he was denied certain of those needs, thus satisfying the objective prong. As to the subjective inquiry, Miller's evidence suggested that Sikes knew of his medical needs and conditions of confinement and that prison staff were acting unlawfully, yet he did nothing in his capacity as warden to stop them or to correct the inadequacies. As such, Miller's claims raised genuine issues of fact regarding whether Sikes was deliberately indifferent to his serious medical needs.

Next, the Court addressed Miller's ADA claims. Under Title II of the ADA, public entities are prohibited from disability-based discrimination in the administration of programs, services, or activities (42 U.S.C. § 12132). This prohibition extends to disability-based discrimination against state prisoners. In the instant case, however, the Court concluded that Title II "does not validly abrogate the States' sovereign immunity and cannot be enforced against the State of Georgia or the GDOC in a suit for monetary damages," nor does Title II provide for suits against persons in their individual capacities. [This has since been overruled by the Supreme Court.] What is permissible under Title II, the court held, are suits for prospective relief against individuals in their official capacities. Therefore, Warden Sikes was suable under the ADA only in his official capacity for injunctive relief.

For Miller to prove his ADA claims against Sikes for injunctive relief, the Court held that he must establish: "(1) that he is a qualified individual with a disability; (2) that he was excluded from the participation in or denied the benefits of the services, programs, or activities of a public entity or otherwise subjected to discrimination by such entity; (3) by reason of such disability." Because the magistrate failed to address any of these issues, the Eleventh Circuit remanded for reconsideration all of Miller's ADA claims for injunctive relief against Sikes in his official capacity.

Accordingly, the Eleventh Circuit partially reversed and remanded Miller's Eighth Amendment and ADA claims



against Sikes while affirming as to all other defendants. See: *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004).

On remand the lower court held that

Miller should not have been granted In Forma Pauperis Status as he had previously had three lawsuits dismissed as frivolous under the Prison Litigation Reform Act,

28 U.S.C. § 1915(g). The court then denied Miller's motion to amend his complaint and seek injunctive relief as moot and dismissed the case without prejudice. The

## No Qualified Immunity from 57-Day Illegal Confinement

The Eighth Circuit Court of Appeals held that several prison officials were not entitled to qualified immunity for their roles in confining a prisoner 57 days beyond his ordered release.

In December, 1977, Daryl Davis was convicted of theft under Missouri law. He was then sentenced as a prior offender, to seven years in the custody of the Missouri Department of Corrections (MDOC).

In March, 1999, the Missouri Court of Appeals reversed Davis's conviction and granted a new trial. On remand, Davis entered an *Alford* plea and was sentenced to one year, with credit for time served. Since he had already served approximately 18 months, the court ordered his immediate release.

"Despite the judge's order that Davis was to be released immediately, county officials placed Davis back into county jail to await transport back to" the MDOC.

He was transferred four days later.

"After returning to [prison], Davis repeatedly protested his continued incarceration but was ignored, met by indifference, or admonished for refusing to accept responsibility for his crime." Prison officials failed to check records or asked that Davis produce his Judgment and Sentence Order. Rather, they "scolded that Davis for his 'criminal thinking' in continuing to demand release." He was dismissed from a treatment program, in part because of his insistence that he be released.

Davis brought suit against numerous County and MDOC employees, alleging that his right to substantive due process under the Fourteenth amendment was violated by the refusal to release him on time. He also alleged a state law false imprisonment claim. The District Court granted summary judgment to the county defendants but rejected the State defendants' request for qualified immunity.

See: *Davis v. Hall*, 259 F. Supp. 2d 906 (ED MO 2003).

The State defendants filed an interlocutory appeal of the district court's denial of qualified immunity. Davis also appealed the District Court's ruling that were adverse to him.

The appellate court affirmed the district court's decision to deny summary judgment to all but one state defendant, finding that Davis alleged depictions of a recognized constitutional right that was clearly established. The court concluded that "decisional law does not support the defendant's contention that there is never a duty to investigate a prisoner's claim that he is entitled to be released."

The court refused exercise jurisdiction over the other issues raised by the defendants on appeal, and remanded to the district court for further proceedings. See: *Davis v. Hall*, 375 F.3d 705 (8th Cir. 2004).

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## Court May Infer Deliberate Indifference from Obviousness of Risk

The Seventh Circuit Court of Appeals vacated a district court's grant of summary judgment to prison officials in a prisoner's claim that officials were deliberately indifferent to his safety when they had him strip insulation from a live 480-volt wire without protective gloves.

Indiana prisoner Christopher Hall worked as an electrician, even though he was not a journeyman electrician, at the Food Industry Plant of the Correctional Industrial Facility. He was supervised by electrician Foreman Allen Bennett and Plant Engineer Stan Russell.

"On July 29, 1997, Russell directed Bennett's team to locate an electrical circuit in the plant capable of handling the additional load of another machine." Russell refused to allow the team to perform the work after hours with the power off.

The "team obtained a circuit tracer, a voltage meter, and a lineman's pliers with protective insulation on the handles. Hall insists that he also asked Bennett for protective gloves but was refused."

"Hall says that his first task with respect to each potential circuit was to attach the circuit tracer by stripping the insulation from the line and attaching alligator clips to the exposed wire... Hall was using a lineman's pliers to strip the insulation from a live 480-volt line in order to attach the tracers alligator clips when current from the line injured his left middle finger and exited his left knee. He was knocked unconscious."

Hall brought suit against Russell and Bennett, alleging that they were deliberately indifferent to his safety by knowingly placing him in a dangerous situation. The district court granted defendant summary judgment, concluding "that at most Hall could establish that the defendants had acted negligently rather than with deliberate indifference. The district court reasoned that Hall lacked evidence that the defendants knew that requiring him to work without gloves would create a substantial risk to his safety.... [T]aking note of the circuit tracer, the voltage meter in the pliers, the court reasoned that the defendants had provided Hall with other 'safety equipment,' thus negating the inference of deliberate indifference arising from the failure to supply protective gloves."

The Seventh Circuit noted that defendant did "not dispute that working on a

live electrical line without adequate protective equipment presents an objectively serious risk to inmate safety." Rather, they argued that they were not deliberately indifferent to that risk.

Hall argued "that a jury may infer from the record that the defendants knew, given the obviousness of the risk, that he could be electrocuted as a consequence of working on a live circuit of elevated voltage without protective gloves." The court found that "defendants' failure to address this inference... undermines their argument. Rather than responding to Hall's contention that the risk was obvious the defendants continue to dispute Hall's version of events in complete disregard for the standards governing summary judgment."

The court then concluded that there was "sufficient evidence to establish that the defendants knew of the risk facing Hall... Hall denies representing himself to Russell as a journeyman electrician, so we

must assume that the defendants had no reason to believe that Hall was adequately trained or fully qualified as an electrician. Moreover, while the defendants offered no evidence that even a qualified electrician would have completed the task assigned to Hall without first donning protective gloves, Hall submitted uncontroverted evidence that a plant safety rule explicitly requires those performing electrical work to first turn off the power."

The court found that "regardless whether Hall was provided with other safety equipment,... his first assigned task required protective gloves." It then reversed the grant of summary judgment, finding "a jury could infer from the electrical safety code mandating the use of protective gloves when cutting into the insulation on live wires that the defendants knew pliers alone would not protect Hall from the risk of electrocution." See: *Hall v. Bennett*, 379 F.3d 462 (7<sup>th</sup> Cir. 2004). ■

## PLRA Exhaustion Requirement Has Procedural Default Component

The Third Circuit Court of Appeals held that the administrative exhaustion requirement of the Prison Litigation Reform Act (PLRA) includes a procedural default component. The court also held that "the determination whether a prisoner has 'properly' exhausted a claim (for procedural default purposes) is made by evaluating the prisoner's compliance with the prison's administrative regulations governing inmate grievances, and the waiver, if any, of such regulations by prison officials."

Pennsylvania Department of Corrections (DOC) prisoner Robert Spruill suffered "from a chronic and debilitating lower back disorder, spondylotic spinal stenosis with recurrent compression of L3 and/or L4 nerve root on right" which caused him excruciating pain and which caused him to fall and injure himself on two occasions.

Despite numerous requests to receive a physical examination and treatment, prison medical staff ignored the requests, accusing him of faking his injuries, and "playing games." Twelve days after Spruill's initial complaints in his filing of the separate grievances, "Dr. [Shawn] McGlaughlin had Spruill brought into the

medical examination room, where Dr. McGlaughlin deliberately bent and twisted Spruill's legs 'as if he was trying to shape a pretzel.'" He "did not examine Spruill's face or thumb for injuries sustained" from a fall ten days earlier.

Spruill's "grievances were consolidated and denied upon Initial Review and Spruill filed administrative appeals. The first appeal was denied, and Spruill filed a final appeal, which was also denied[.]" because Spruill was deemed to be receiving appropriate medical care.

Spruill then brought suit alleging deliberate indifference to his serious medical needs. "Because Spruill had failed to seek money damages in his grievances, the District Court concluded that he failed to meet the exhaustion requirement of [42 U.S.C.] § 1997(e)(a), and therefore dismissed Spruill's suit in its entirety. The District Court also held in the alternative that Spruill's failure to name [prison physician's assistant (PA) Brian] Brown in his grievances constituted a failure to exhaust his claims against Brown." Finally, the district court held, on the merits that Spruill failed to state a claim because he received adequate medical treatment.

## Washington S.Ct. Upholds Persistent Prison Misbehavior Statute

The Third Circuit noted on appeal “that there is an emerging split among the circuits on whether the PLRA includes a procedural default component[.]” with the Seventh and Tenth Circuits favoring it and the Sixth Circuit rejecting it. Compare *Pozo v. McCaughtry*, 286 F.3d 1022 (7<sup>th</sup> Cir.) cert. den 537 U.S. 949 (2002) and *Ross v. County of Bernalillo*, 365 F.3d 1181 (10<sup>th</sup> Cir. 2004) with *Thomas v. Woolum*, 337 F.3d 720 (6<sup>th</sup> Cir. 2003). The court then noted the value of a procedural default rule and concluded that Congress’s policy objectives are “served by a procedural default rule because such a rule prevents an end-run around the exhaustion requirement, and thereby creates an overwhelming incentive for a prisoner to pursue his claims to the fullest within the administrative grievance system.”

The court then followed the reasoning of the Seventh Circuit in *Strong v. David*, 297 F.3d 646 (7<sup>th</sup> Cir. 2002), concluding “that prison grievance procedure supply the yardstick for measuring procedural default... This result is more in harmony with Congressional policy than creating *ad hoc* federal common law, and it is also fairer to inmates.”

The court then examined the relevant prison grievance rules, noting that the rule detailed three categories of what “shall,” “should,” and “may” be included in grievances. “A request for money damages falls into the [“may”] category. Since an optional procedural provision cannot give rise to a procedural default, the court held Spruill was not precluded from seeking monetary relief, and reversed the district court’s dismissal for failure to exhaust.

The court also reversed the dismissal of Spruill’s claim against PA Brown, concluding “that the prison grievance officer’s recognition that Brown was involved in the event that Spruill complained of excused any procedural defects in Spruill’s initial grievance.”

Finally, turning to the merits, the court concluded that “Sпруill has connected his factual allegations to the alleged mental states of Dr. McGlaughlin and Brown. That he believes that their actions were not only deliberately indifferent, but malicious and sadistic, reinforces the sufficiency of his complaint.” Thus, the court reversed the dismissal of Spruill’s suit against McGlaughlin and Brown. See: *Sпруill v. Gills*, 372 F.3d 218 (3<sup>rd</sup> Cir. 2004). ■

In a 5–4 decision, the Washington State Supreme Court upheld a law that makes it a felony for a Washington prisoner to commit a serious prison infraction after losing all potential earned early release credits. The majority concluded that the statute was not void as an unconstitutional delegation of legislative authority and that it does not violate equal protection.

The Washington Legislature adopted RCW 9.95.070, creating the crime of persistent prison misbehavior. Under the law, it is a Class C felony for a Washington prisoner, serving a sentence for a crime committed on or after August 1, 1995, to knowingly commit a serious prison disciplinary infraction, after losing all potential earned early release time credit. The statute does not define “serious prison discipline infraction,” leaving that up to the Washington Department of Corrections (DOC).

In 1999, Division Three of the Washington Court of Appeals held that RCW 9.94.070 constitutes an unlawful delegation of authority to the DOC. See: *State v. Brown*, 95 Wn. App. 952, 977 P.2d 1242 (1999) (*Brown I*), aff’d on other grounds, *State v. Brown*, 142 Wn. 2d 57, 11 P.3d 818 (2000) (*Brown II*).

In 2000, Joseph Goodrich Simmons, Jr., was sentenced to the DOC, and racked up 46 separate disciplinary infractions during a 14 month period, thereby forfeiting all potential earned early release time credits. “On December 4, 2001, just one month before his release, Simmons committed another serious infraction.”

Simmons was charged under RCW 9.94.070, with persistent prison misbehavior. Relying on *Brown I*, Simmons moved to dismiss the charge. However, the court agreed with the state that RCW 9.94.70 is constitutional and “Division Three’s holding in *Brown I* was not controlling because that decision was not affirmed on the basis that RCW 9.94.070 as an unconstitutional delegation of authority.” Simmons was subsequently found guilty on stipulated facts, of persistent prison misbehavior.

As we previously reported, on appeal “Division Two [of the Washington Court of Appeals] affirmed the trial court and held that Division Three’s holding in *Brown I* did not control this case. See:

*State v. Simmons*, 117 Wn.App. 682, 73 P.3d 380 (2003).”

A slim majority of the Supreme Court affirmed the decision of the Court Of Appeals, holding “that RCW 9.94.070 provides adequate procedural safeguards against arbitrary administrative action and abuse of discretion and does not unconstitutionally delegate legislative authority to the DOC.” The dissent, disagreed however, finding that RCW 9.94.070 and RCW 72.09.130 “do not contain any procedural safeguards.”

The majority also rejected Simmons’ equal protection challenge, finding that “[a] party challenging the application of the law as violating equal protection principles has the burden of showing that the law is irrelevant to maintaining a state objective or that it creates an arbitrary classification. Simmons has not met this burden.” The dissent did not reach the equal protection argument, having found that RCW 9.94.070 violates the separation of powers doctrine.” See: *State v. Simmons*, 152 Wn.2d 450; 98 P.3d 789 (Wash. 2004). ■



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## Seventh Circuit Reverses Dismissal of Retaliation Claim

The Seventh Circuit Court of Appeals reversed a district court's dismissal of an Illinois prisoner's retaliation claim.

On January 17, 2003, Illinois prisoner Robert Hoskins worked in the Dixon Correctional Center (Dixon) cafeteria when Food Services Supervisor Connie Lenear "called him a racial epithet because he could not help relocate cartons of chocolate milk." Hoskins reported the incident and filed a grievance.

On January 20, 2003, Lenear approached Hoskins and he told her "that he was not speaking to her." Another prisoner later told "Hoskins that Lenear... said she intended to get Hoskins transferred out of Dixon." Shift Supervisor Captain Schott was also overheard telling Lenear to issue Hoskins a disciplinary ticket for "insolence." She did so, and "on Schott's instructions, Hoskins was placed on 'investigative status' and taken to segregation."

On January 21, 2003, Hoskins filed grievances against Lenear and Schott, alleging that they issued the falsified "insolence" disciplinary report in retaliation for his January 17, 2003 grievance.

On January 28, 2003, Hoskins was found guilty of insolence and sanctioned to loss of his job. Although he was not sanctioned to serve a segregation term, he remained there on investigative status.

On February 17, 2003, Schott saw Hoskins and "promised to 'make things go away' if Hoskins would do the same." Hoskins refused and Schott threatened to have Internal Affairs Officer Robert Bock "write up" a disciplinary case that would get Hoskins "sent out of the prison."

The next day "Hoskins received a disciplinary report, written by Bock and dated that same day, charging him with making 'possible verbal threats toward staff.'" Bock claimed that unnamed informants reported witnessing "Hoskins make 'an inference of physical harm' towards Lenear." There was no indication, however, of what Hoskins allegedly said.

On February 24, 2003, Hoskins was found guilty and sanctioned to loss of privileges, two months in segregation and a recommendation for transfer. This resulted in Hoskins' transfer to Lawrence Correctional Center.

Hoskins challenged the disciplinary order and the charge was reversed and remanded to the Dixon Warden on June

30, 2003. No further action was taken and, on September 10, 2003, the disciplinary conviction was expunged and "the reduction in status in two months in segregation" was reversed, but Hoskins was not returned to Dixon.

Hoskins brought suit against Lenear, Schott, Bock, members of the adjustment committee and the Dixon Warden. The district court construed Hoskins' claims as alleging a due process violation and dismissed the complaint prior to service, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), for failure to state a claim.

The Seventh Circuit agreed that

Hoskins failed to state a cognizable due process claim. The court disagreed, however, "with the district court's analysis of Hoskins' retaliation claim" explaining that "due process and retaliation claims are analyzed differently." The court then vacated the dismissal of the retaliation claims against Lenear, Schott and Bock but upheld the dismissal of the claims against members of the adjustment committee and the warden because "by Hoskins' account of events," they "did not participate in acts of retaliation." See: *Hoskins v. Lenear*, 395 F.3d 372 (7th Cir. 2005). ■

## Seventh Circuit Upholds \$56.5 Million Jail Murder Verdict

The Seventh Circuit Court of Appeals upheld a \$56.5 million jury verdict against former jail guards who murdered a pretrial detainee. This is the largest verdict for abuses against a single victim in an American jail/prison case that we are aware of.

On October 25, 1997, Christopher Moreland was arrested for driving under the influence of intoxicants in Indiana. At approximately 5:50 a.m., he was lodged in a drunk tank at the St. Joseph County Jail.

Moreland immediately provoked a confrontation by directing racial slurs at another detainee in the tank.

Guard Paul Moffa "grabbed Moreland by the neck or shoulders, threw him to the floor,... and sprayed Moreland's face from a distance of roughly 4 or 5 inches[ ]" with OC-10 pepper spray, which "causes involuntary closure of the eyes, respiratory inflammation, and a temporary loss of muscular strength and coordination." He slammed Moreland's head against the concrete so hard that it sounded like "a basketball bouncing off concrete" or "a melon popping, like dropping a watermelon."

Moreland was handcuffed behind the back and dragged to an elevator which took him to the fourth floor. While in the elevator, Moreland thrashed about and guards pinned him to the floor.

When the elevator doors opened on the fourth floor, guard Erich Dieter was told that Moreland caused Moffa to get sprayed with OC-10, signaling

that "Moreland had some 'payback' coming."

"Dieter ... held Moreland from behind and accelerated toward the shower until the two men smashed into the far wall, crushing Moreland between the wall and Dieter's ... body."

Someone "turned on the hot water, which exacerbates the pain of pepper spray." As Moreland cried for help, guard Michael Sawdon threw a five-gallon bucket of cold water over him. Guards "gathered outside the shower, watching and laughing as Moreland, still handcuffed, lay with his head in a shallow puddle of water, spit, and mucus, trying to wash the pepper spray off his face."

Moreland was then dragged to a "restraint chair" and strapped in while still handcuffed. Guards continued to beat Moreland and Sawdon discharged another OC-10 canister in his face while he was strapped in the chair.

A nurse saw Moreland "slouched back in the restraint chair, moaning and unresponsive[ ]" with "a cut above his left eyebrow that had bled profusely. Dieter and Sawdon told her... Moreland had slipped and fallen." She recommended that Moreland be taken to the hospital but "Moffa, Dieter and Sawdon [refused] because their shift was ending and transferring Moreland to the hospital would require them to remain at work."

Moreland remained handcuffed and strapped in the restraint chair until two day-shift guards found him shortly after 7 a.m. Although he was still unconscious

and they noticed the large lump on the back of his head, injuries to his face and bandaged cut over his left eye, Moreland received no medical attention. Rather, guards simply took him to the first floor, changed his clothes and returned him to the drunk tank.

The nurse "Saw Moreland in the tank around 9:40 a.m., coughing and unresponsive." By 11 a.m., he still hadn't moved. "The next time she checked, Moreland was blue, cold and lifeless." He was pronounced dead, from acute subdural hematoma, at 1:23 p.m."

An investigation and federal civil rights prosecution followed, but, of course, the guards allied and filed false reports to conceal their wrongdoing. They were acquitted of the criminal charges.

Moreland's estate and parents brought suit against "numerous parties, most of whom either settled or were voluntarily dismissed." The district court granted Sheriff Speybroeck's motion for summary judgment. "A trial was held on the claims against Moffa, Dieter, and Sawdon. The jury found Dieter and Sawdon liable, but could not reach agreement on Moffa and a mistrial was declared as to him." The jury awarded compensatory damages of \$29 million, \$15 million in punitive damages against Dieter and \$12.5 million in punitive damages against Sawdon. We reported on the trial and verdict. [PLN Feb. 2003, p. 21]. Dieter and Sawdon appealed the judgment against them and plaintiffs appealed the grant of Summary Judgment to Speybroeck.

Defendants challenged a number of the district court's evidentiary rulings but the Seventh Circuit rejected all those challenges.

Finding that "defendants' conduct... qualifies as truly reprehensible[.]" the court rejected defendants' argument that the punitive damages awards were unconstitutionally excessive. "The evidence supports a conclusion that defendants were utterly and callously indifferent to Moreland's rights, engaged and wanton physical violence, disregard of obvious medical needs, and subsequent deceit." Additionally, "[t]he ratio between the compensatory punitive damages... does not test the limits of constitutionality, although... both compensatory and punitive damages awards are very large."

Finally, the court rejected plaintiffs' argument that summary judgment for Speybroeck was improper, finding the

argument "underdeveloped" and "the evidence... insufficient to raise a jury question on the... claim against the sheriff." It remains to be seen how much, if any, of

the verdict will actually be collected from the individual defendants. See: *Estate of Christopher A. Moreland v. Dieter*, 395 F.3d 747 (7<sup>th</sup> Cir. 2005). ■

## Dismissal of §1983 Complaint Against Ohio CCA Prison Reversed

by Bob Williams

The United States Court of Appeals for the DC Circuit has reversed the dismissal of a 42 U.S.C. § 1983 prisoner complaint against the CCA facility at Youngstown, Ohio, finding the complaint did state a claim of municipal liability against the District of Columbia who contracted with the Ohio-based private prison.

Morris J. Warren was a District of Columbia (the District) prisoner incarcerated at the Corrections Corporation of America (CCA) prison in Youngstown, Ohio, pursuant to a contract between the CCA and the District. While there, Warren alleges he was subject to inhumane treatment including being forced to lie on a "cold floor naked between 15 to 20 hours" every day; denied "cell running water or toilet water [for] over 72 hours, weeks at a time;" tear gas sprayed in cells and pods daily; deprived of medication for a month; forced to endure a blood draw with others in his pod using common needles; and destruction of property. As a result, Warren claims he caught pneumonia, suffered a stroke, and was infected by "yellow jaundice."

Warren claimed the District "knew or should have known" about his treatment and did nothing to stop it. In support of this, Warren described his complaints to the District's mayor and the Department of Corrections director; the calls Warren's wife made on his behalf; newspaper articles and even the action of a

contract monitor appointed pursuant to a class action settlement against CCA at Youngstown [See *PLN*, Mar. 2000 cover story for more on this prison].

The district court dismissed the complaint on the District's motion for dismissal under F.R.Civ.P. 12(b)(6) for failure to state a claim.

To extend liability to a municipality (i.e. the District) a § 1983 complaint must not only allege a violation of a constitutional right or federal law, it must also allege that a policy or custom of the municipality caused the violation. This is because municipalities are liable for their agents' torts only if the agents acted pursuant to municipal policy or custom. See: *Monell v. Department of Social Services*, 98 S.Ct. 2018 (1978).

On appeal, the Court liberally construed Warren's complaint and accepted Warren's facts as true, the proper standard for *pro se* complaint facing dismissal pursuant to Rule 12(b)(6). The Court found that if Warren "can prove the violations, and prove as well that the District had actual or constructive knowledge of them, he will have established the District's liability." Since Warren alleged sufficient actual and/or constructive knowledge on the District's part, the complaint should not have been dismissed for failure to state a claim. See: *Warren v. District of Columbia*, 353 F.3d 36 (D.C. Cir. 2004). ■

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## News in Brief:

**Arkansas:** In 2001 prison guards used force 12 times to remove prisoners from their cells. By 2005 they did it at least 40 times. Prison officials attribute this to more hardened prisoners and not more brutal guards.

**Arkansas:** On December 1, 2005, an unidentified prison guard at the Varner Unit super max prison, resigned after confessing to engaging in oral sex with an unidentified 33 year old male prisoner at the facility. The guard claimed the sex was consensual, even though Arkansas outlaws sex between prisoners and staff. The prison claims he was raped and the assaults occurred on more than one occasion. The prisoner reported the assault by calling a special sexual assault hotline installed by the DOC to comply with the Prison Rape Elimination Act.

**Brazil:** On December 17, 2005, Henrique Fernandes da Silva, 35, security chief of the Bangu 3 prison complex in Rio de Janeiro, one of the largest in Brazil, was shot and killed in his home in front of his wife and children. Da Silva had received threats after searching the prison to confiscate cell phones, drugs and weapons. He is the fifth official from the prison to be murdered in the past five years. Prison gangs are suspected of the crime.

**Brazil:** On December 28, 2005, rioting prisoners at the Urso Branco Prison in Porto Velho, a city in the Amazon, released 207 visitors they had taken hostage four days earlier. The rebellion ended and the hostages were released when prison officials agreed to their demand to return one of their leaders, Paula de Souza, from another prison. Authorities did not budge on the demand that they fire the prosecutor who ordered de Souza's transfer. No one was injured in the uprising. The overcrowded prison has been the scene of numerous bloody riots and incidents.

**California:** On December 13, 2005, Orange County superior court judge Ronald Kline, 65, pleaded guilty to four federal felony charges of possessing child pornography depicting small boys engaged in sex. Klein remains free on bond until he is sentenced in March, 2006.

**California:** On December 19, 2005, Erika Cerna, 28, a custody assistant at the West Valley Detention Center in Rancho Cucamonga, was charged with bringing drugs to at least three jail prisoners and also having sex with one of them. Cerna was arrested after a prisoner informant

told police of her alleged activities. Cerna was also charged with participating in a criminal street gang as the prisoners she is accused of supplying drugs to are alleged to be members of a street gang.

**California:** On December 20, 2005, Rosalinda Duran, 29, allegedly beat and strangled her cellmate at the Valley State Prison for Women in Chowchilla, Michelle Yglesias, 30, to death. It is believed to be the first murder in a California women's prison in history. The murder occurred in the prison's Secure Housing Unit. California is one of the few state's to double cell prisoners with behavior or mental health problems in segregation units.

**Canada:** On December 29, 2005, Shawn Bird, 28, a prisoner at the Saskatchewan Penitentiary in Prince Albert was stabbed to death by another prisoner. On December 13, 2005, Michael Merrill, 52, another prisoner at the facility, was found dead with string around his neck, prison officials said it was a suicide. In June, 2005, David Pasqua was killed hours after arriving at the prison which holds less than 500 prisoners.

**China:** On October 1, 2005, the Beijing Prison Administration opened a TV station for prisoners, the first in the country's history. It is available to all 17,000 prisoners in the 13 jails under the BPA's administration. The news anchors are prison guards and administrators. The station broadcasts a variety of news, sports and rehabilitation programs aimed at helping prisoners reform themselves.

**Colorado:** In December, 2005, the Colorado Department of Corrections retreated from a proposal to limit servings of beef to state prisoners after ranchers protested. The DOC had planned to reduce beef servings from 5-7 times per week to 2-4 and use turkey instead. The DOC claimed this was necessary to reduce its \$11.6 million food budget and slim down prisoners. State senator Ken Kester, R-Las Animas, said "I had a lot of cattle producers who were hot as all get out over this, but they are very happy about how this is turning out." Members of the 2,000 members Colorado Cattleman's Association have asked to meet with DOC executive director Joe Ortiz. Kester said he will monitor prison menus to see if turkey begins to appear more often.

**Florida:** On December 1, 2005, Keith Carter, 35, Marty Finney and Edward

Roberson escaped from the Indian River County jail by pulling a shower head out of the wall of their cell block and climbing through the hole, into a maintenance room, out a door and over three 12 foot fences topped with razor wire. Jail officials discovered the escape a few hours later when Carter was stopped on I-95 for reckless driving. Finney and Roberson were captured in Denver on December 14 after police tracked their e mails to a hotel computer.

**Florida:** On December 15, 2005, Willie Lee Powell, 45, a former guard at the Levy County jail was arrested and charged with having sex with female prisoners at the jail. Powell resigned from the jail that summer after several women prisoners accused Powell of coercing them to have sex with him. Powell was hired by the jail in 2001 after working in the state Department of Corrections. He was suspended without pay by the jail in 2001 after an informant recorded a conversation where Powell directed the informant to purchase illegal drugs. The district attorney did not prosecute the case citing a lack of evidence.

**Florida:** On December 5, 2005, Blas Duran, 34, Angel Rodriguez, 39; William Ortiz-Ponce, 36 and Antone Jones, 39, prisoners at the Glades Correctional Institution were charged with smuggling a loaded gun and cell phones into the prison. Prosecutors allege the prisoners were going to turn the gun in to prison officials to curry favor with them; the cell phones were used to get the gun into the prison. The plot unraveled in June when an unidentified informant alerted officials to scheme and presumably carried all the favor for himself. The loaded automatic pistol was recovered buried under a sidewalk in the prison.

**France:** On December 10, 2005, a helicopter landed in the prison yard at Alton and took off with three prisoners. The helicopter had been hijacked by two armed men who had rented it for a skiing trip in the Alps. The escapees were pretrial detainees awaiting trial on drug and theft charges. The helicopter landed nearby and the men escaped leaving the pilot unharmed.

**Hawaii:** On December 20, 2005, four prisoners, two of their relatives and a guard, Akoni Sandoval Kapihe, at the federal detention center in Honolulu were indicted on charges they conspired to



bring marijuana and methamphetamine to prisoners in the jail.

**Illinois:** On December 27, 2005, Sangamon county jail guard Charles Ealey, 36, was charged with official misconduct and battery stemming from an alleged assault of prisoner Brian Fifer on September 23. Based on Ealey's false testimony, Fifer had been charged with aggravated battery. When he protested at a preliminary hearing, jail officials examined a video tape of the incident and determined Ealey had battered Fifer, who was telling the truth about the incident. In April, 2005, Ealey had been honored at the sheriff's Correctional Officer of the Year.

**Indiana:** In December, 2005, the Porter County Attorney, Gwenn Rinkenberger, sent a demand letter to Schenkel Shultz, the firm that designed the county jail, asking that they pay the county \$355,000 to repair the jail's ceiling after two prisoners escaped through it on September 6, 2005. The county claims the steel in the ceiling was not thick enough and the light fixtures were improperly designed which allowed the prisoners to escape and this was a design flaw on the architect's part. The design firm said the county's claim had no merit.

**Indiana:** On December 21, 2005, Tip-ton county prosecutors charged Ashleigh Brown with one count of drug trafficking. Prosecutors claim Brown brought Xanax, Oxycontin, marijuana and tobacco into the jail for her boyfriend, Joshua Maine, 21. Maine died of drug intoxication in the jail on November 2, 2005. Prosecutors also charged jail guard Thomas Owens with giving Maine Oxycontin after he admitted it to police. Brown says she only gave Brown tobacco products.

**Kentucky:** On December 13, 2005, Norman Norris, a lieutenant at the Louisville Metro jail was charged with two counts of first degree sodomy, two counts of incest and one count of sexual abuse stemming from his alleged rape of an 8 year old girl. During his 8 ½ years of employment by the jail Norris was commended three times and promoted and also disciplined three times for using excessive force on prisoners.

**Mexico:** On December 25, 2005, Jose Molina Lopez, 42, a prisoner in the jail in El Porvenir in Chihuahua State who had confessed to killing his wife, was found dead in his cell. Cause of death was a bullet through his mouth. Police were investigating how he acquired the .38 caliber pistol in jail.

**New Jersey:** On December 16, 2005, state prisoner Thomas Stiles, 38, was sentenced to 17 years in prison after being convicted of trying to hire fellow prisoner Carlos Davila for \$5,000 to murder his ex wife Diana. Davila promptly reported the offer to police, along with a hand drawn map Stiles had provided showing him how to get to his ex wife's house. Stiles was already serving an 8 year sentence for attempting to have sex with a "12 year old girl" he met on the internet. The "girl" turned out to be an undercover cop.

**New York:** In December, 2005, Eastern Correctional Facility prisoner Injah Tafari, 41, was charged with assaulting two prison guards on September 17 during a control unit visit when he began throwing composite chairs through the unit windows. One guard suffered a cornea abrasion, the other a two inch cut to his forehead. Three windows in the isolation unit were also damaged. State police were summoned to the prison to assist in controlling Tafari.

**Ohio:** On December 30, 2005, over 3,000 crime victims were called and falsely told that prisoners convicted of assaulting or killing them or family members were being released from prison. The prison system says the calls were mistakes caused by a computer glitch. No one called the crime victims to tell them the initial calls were in error.

**Oklahoma:** In December, 2005, Darrin Brewer, 38, a prisoner at the Geo run prison in Lawton, and his wife LaShanda Brewer, 31, were charged in state court with smuggling drugs into the prison where Darrin sold them to other prisoners.

**Virginia:** In December, 2005, US senators Charles Schumer (D-NY) and Charles Grassley (R-IA) wrote Bureau of Prisons (BOP) director Harley Lappin to ask for the transfer of BOP guard Hikmat "Joe" Mansour, a case manager at the U.S. Penitentiary in Lee County for death threats he has purportedly received from his fellow BOP employees and also some prisoners because he translates Arabic language letters sent to prisoners into English for the political police. Mansour has complained publicly about a lack of Arabic language translators to read prisoners' mail. In 2003 he was assaulted by a co-worker and has received hate e mails at work. He has since been demoted from unit manager to an occupational health and safety specialist.

**Washington:** On January 1, 2006, a

new Pierce county jail rule goes into effect where the county will not pay the cost of all prisoner medical bills but will instead pass the bill to the city that imprisoned the prisoner. The county believes this will save millions it now spends on medical care for prisoners with chronic health conditions or serious injuries. Some cities, such as Orting, are not renewing their jail contracts with Pierce County until the issue is negotiated. Attorney General Rob McKenna issued an opinion in June that if a prisoner cannot afford medical care and there is no agreement with the jail then the agency that made the arrest must bear the cost of care. Some cities are responding by budgeting money for anticipated medical costs. ■

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## **Former California Warden Allegedly Assaults News Reporter**

The former warden of Salinas Valley State Prison (SVSP), Anthony Lamarque, allegedly swung a cane at *Sacramento News and Review* reporter Stephen James and then pinned him against a wall, when Lamarque apparently objected to being photographed at a civil lawsuit deposition being taken in the Embassy Suites Hotel in Seaside, California on July 11, 2005. Lamarque is being sued for alleged retaliation against SVSP prison guard Donald Vodicka, who exposed SVSP's "Green Wall" [code of silence] guard's gang in testimony to the California State Senate. (See: *PLN*, Sep. 2004, p.17.) In his deposition, Lamarque dismissed the Green Wall as only a fraternal or "social group," whereas Vodicka had testified that they assaulted prisoners, intimidated other SVSP guards, and enforced a code of silence among them.

Lamarque's counsel, Deputy Attorney General Mary Cain Simon, said she deemed the deposition private, and when

James persisted, threatened to have him ejected from the hotel, a response media lawyer Terry Francke called an overreaction. Cain-Smith accused Vodicka's lawyer of malevolently arranging for the photographer, whereupon she terminated the deposition and left the room. When James then entered the room with his camera, Lamarque allegedly beset upon him with the cane. Vodicka, who was also present, confirmed the assault. Lamarque ran off and hid in a bathroom until the hotel manager escorted him off the premises.

Court reporter Linda Kincade, who recorded the testimony, declined comment, saying she could not even discuss the matter with the police. Videographer Gene Frye, who taped the proceedings, was interviewed by the Seaside police. They referred the incident to the Monterey County district attorney, who requested further police interviews. ■

Source: *Monterey Herald*.

## **Other Resources**

### **ACLU National Prison Project**

Contact about state and federal conditions of confinement affecting large numbers of prisoners, and sexual assaults against prisoners. Write: ACLU National Prison Project, 733 15th St. NW Ste 620, Washington, DC 20005.

### **Amnesty International**

Compile information about prisoner torture, beatings, rape, etc., to include in reports about U.S. prisons distributed worldwide. Write: Amnesty International, 322 8th Ave., New York, NY 10001.

### **Children of Incarcerated Parents**

Works to stop intergenerational crime. Good info in three areas: education, family reunification, and services for parents and children. Write: Center for Children of Incarcerated Parents, PO Box 41-286, Eagle Rock, CA 90041.

### **CorrectHELP**

Provide information related to HIV. Contact if you can't access programs or are not receiving proper medication. Write: CorrectHELP, PO Box 46276; West Hollywood, CA 90046. HIV Hotline 323-822-3838 (Collect OK from prisoners).

### **FAMM-gram**

Quarterly magazine of FAMM, that includes info about injustices resulting from mandatory sentencing laws. *FAMM-gram*, \$10 yr prisoners. Write: FAMM, 1612 K Street NW #1400, Washington DC 20006.

### **Florida Prison Legal Perspectives**

Bi-monthly newsletter that includes court rulings, administrative developments and news

about the Florida DOC. \$9 yr prisoners; \$15 yr individuals, \$30 yr professionals. Write: FPLP, PO Box 660-387, Chuluota Florida 32766.

### **Justice Denied**

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### **November Coalition**

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### **Stop Prisoner Rape**

Seeks to end sexual violence against prisoners. Counseling resource guides for imprisoned and released rape survivors & activists available for almost every state. Specify state with request: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010. Donations welcome.

### **Western Prison Project**

Justice Matters is 4-times a year magazine reporting on prisoner issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr. prisoners; \$15 all others. Write: WPP, PO Box 40085, Portland, OR 97240. Write for info about reports related to imprisonment.

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**Represent Yourself in Court: How to Prepare & Try a Winning Case**, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$34.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

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**Legal Research: How to Find and Understand the Law**, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

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**Lockdown America: Police and Prisons in the Age of Crisis**, by Christian Parenti, Verso, 290 pages. \$17.00. Documented and has first hand reporting on law enforcement's war on the poor. Covers paramilitary policing and SWAT teams, the INS and prisons. 1002

**The Perpetual Prisoner Machine: How America Profits from Crime**, by Joel Dyer, 318 pages. \$19.00. Exposes how private prisons, banks, investors and small companies profit from the prison industrial complex, and prison growth adds to revenue & profits. 1025

**Crime and Punishment In America**, by Elliott Currie, 230 pages. \$12.95. Refutes arguments in favor of prison building as a crime solution. Demonstrates crime is driven by poverty and discusses proven, effective means of crime prevention. 1019

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**BOP Occupational Training Programs Directory**, 124 pgs. \$10.00. Directory listing vocational and education programs available to prisoners in every federal prison. Includes contact info for BOP national, regional and CCM offices, and BOP facilities. Invaluable if considering a training or education transfer. 1053

**Criminal Injustice: Confronting the Prison Crisis**, by Elihu Rosenblatt; South End Press, 374 pages. \$18.00. A radical critique of the prison industrial complex. 1009

**Marijuana Law: A Comprehensive Legal Manual**, by Richard Boire, Ronin, 271pages. \$17.95. Examines how to reduce the probability of arrest and successful prosecution for people accused of the use, sale or possession of marijuana. Invaluable information on legal defenses, search and seizures, surveillance, asset forfeiture and drug testing. 1008

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